INTRODUCTION

1. Statement of the Problem:

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

2. Significance and objectives of the Study:

Introduction:

The Constitution has given the powers to three organs –

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

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

Independence of Judiciary –

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

Judicial Review –

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

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

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

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

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

**Judicial Activism** –

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

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

**Objectives of the study**-

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

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

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

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


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

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


   The author has discussed following topics in detail.

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

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

   Object of Art. 21, the meaning of person, the meaning of life and how human rights and civil liberty are interlinked is focussed.
Life of an unborn child, the concept of free legal aid, right of speedy trial in America and India is discussed.

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

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

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

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


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

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

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

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

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

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

Right to livelihood, Life Insurance, right to know, right to shelter, welfare legislation, right to pollution free environment, public hanging, rights of
women, use of Bar fetters, Use of hand cuffs, solitary confinement, right to speedy trial is discussed in detail.

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


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

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

According to author the power of judicial review is limited.


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

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

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

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

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

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

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

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

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

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


The author has discussed the concept of basic structure doctrine, judicial activism and the concept of PIL. There are critics as well as supporters of the
judicial role. The author has discussed the topics such as ecology, secularism, judicial reforms, the role of central executive etc.

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

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

Type II-
Chief Justice Marshall evolved it in America and it is typical to American Federal Constitution.

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

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

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

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

Phase I (1950-1955) -
In this phase the court raised the issues of the philosophy of the Constitution and empowerment of the people.

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

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

**Phase III (1972-1975)**

The court expanded the doctrine of the basic structure.

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

The phase of judicial activism and PIL.

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

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

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

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

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

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

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

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

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

Primary Source – Statutory Materials, Government Documents and Reports

Evaluation and Interpretation of Data:

The State

\[ \downarrow \]

Constitution

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

Decentralisation of Powers

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

Bureaucracy

Village Administration

1. Zilla Parishad
2. Panchayat Samiti
3. Gram Panchayat
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<td>Constitution</td>
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<td>Lok Sabha</td>
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<td>Rajya Sabha</td>
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<td>President</td>
<td>Secretariats</td>
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<td>Vice President</td>
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<td>Legislative Assembly</td>
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<td>Legislative Council</td>
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<td>Governor</td>
<td>Secretariats</td>
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No Control of L and E on Judiciary
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<th>Judicial Review</th>
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<td>Constitution</td>
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<td>L - Lok Sabha</td>
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<td>Rajya Sabha</td>
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<td>E - President</td>
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<td>Vice President</td>
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<td>L - Legislative Assembly</td>
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<td>Legislative Council</td>
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<td>E - Governor</td>
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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

Constitution

L - Lok Sabha
Rajya Sabha

E - President
Vice President

Legislative Assembly
Legislative Council

Central Bureaucracy
Secretariats
State Bureaucracy
Secretariats

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

Since 1950 the Supreme Court has gone through various phases. After emergency period the Supreme Court started evolving new doctrines. The Court started enlarging the ambit of Art.12, Art.21 and of other Fundamental Rights. The period of judicial activism and of PIL contributed towards the development of Art.21. The Court started bringing various rights within the ambit of Art.21. I was interested in the study of the effect of these judgements of the Supreme Court on the society. Through critical analysis of experts on the judgements of Supreme Court in their various books I perceived that there are various problems which are discussed by critics in the matter of implementation of the judgements of the Supreme Court.

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

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

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

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

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

Art.21 is studied under following heads –

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

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

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<th>Abbreviation</th>
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<td>AIR</td>
<td>All India Reports</td>
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<td>All E.R.</td>
<td>All England Law Reports</td>
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<td>Bom L.R.</td>
<td>Bombay Law Reports</td>
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<tr>
<td>C.J.I.</td>
<td>Chief Justice of India</td>
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<tr>
<td>Govt.</td>
<td>Government</td>
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<td>HC</td>
<td>High Court</td>
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<td>ILR</td>
<td>Indian Law Report</td>
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<td>JT</td>
<td>Judgement Today (Journal on SC cases)</td>
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<td>SC</td>
<td>Supreme Court</td>
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<td>SCA</td>
<td>Supreme Court Appeals</td>
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<td>SCR</td>
<td>Supreme Court Reports</td>
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<td>SCW</td>
<td>Supreme Court Weekly</td>
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<td>Union Territory</td>
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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 Proceeding.

Order - It can come from any authority.
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