CHAPTER-V

CONCLUSION AND SUGGESTIONS

All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would loose all significance and meaning and the life itself would not be worth living. That is why ‘liberty’ is called the very quintessence of a civilized existence.

Origin of ‘liberty’ can be traced in the ancient Greek civilization. The Greek distinguished between the liberty of the group and the liberty of the individual. In 431 BC, an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the State was a means to fulfill certain fundamental personality in association of fellow citizens so it was natural and necessary to man. Plato found his ‘republic’ as the best source for the achievement of the self-realization of the people.

Chambers’ Twentieth Century Dictionary defines ‘liberty’ as: ‘Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility.’
Eminent former Justice H.R. Khanna of the Supreme Court of India, observed that¹ ‘liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body’.

Life and personal liberty have been given prime importance in the United Kingdom. It was in 1215 that the people of England revolted against King John and enforced their rights, first time the King had acknowledged that there were certain rights of the subject which could be called Magna Carta 1215. In 1628 petition of rights was presented to King Charles-I which was the 1st step in the transfer of Sovereignty from the King to Parliament. It was passed as the Bill of Rights 1689.

In the Magna Carta, it is stated 'no free man shall be taken or imprisoned or outlawed or banished or any ways destroyed nor will the King pass upon him or commit him to prison unless by the judgment of his peers or the law of the land'.

The importance of personal liberty is reflected in the Fifth Amendment to the Constitution of U.S.A. (1791) which declares as under:

‘No person shall be deprived of his life, liberty or property, without due process of law.’

The ‘due process’ clause was adopted in section 1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by ‘the principles of fundamental justice.’

The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the ‘due process clauses’. Under the above clauses the American judiciary claims to declare a law as bad, if it is not in accordance with ‘due process’, even though

¹ 2 ILI Journal 18 (1978), 133
the legislation may be within the competence of the Legislature concerned. Due process as conveniently understood means procedural regularity and fairness.

Article 2(2) of the West German Constitution (1948) declares:

Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order.

Though the freedom of life and liberty guaranteed by the above Article may be restricted, such restriction will be valid only if it is in conformity with the ‘legal order’ or ‘pursuant to a law. Being a basic right, the freedom guaranteed by Article 2(2) is binding on the legislative, administrative and judicial organs of the State [Article 1(3)]. This gives the individual the right to challenge the validity of a law or an executive act violative of the freedom of the person by a constitutional complaint to the Federal Constitutional Court under Article 93. Procedural guarantee is given by Articles 103(1) and 104. Article 104(1)-2(2) provide:

‘(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein...

(2) Only the judge shall decide on the admissibility and continued deprivation of liberty.’

These provisions correspond to Article 21 of our Constitution and the Court is empowered to set a man to liberty if it appears that he has been imprisoned without the authority of a formal law or in contravention of the procedure prescribed therein.

Article XXXI of the Japanese Constitution of 1946 says:

‘No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law.’
This Article is similar to Article 21 of our Constitution save that it includes other criminal penalties, such as fine or forfeiture within its ambit.

Section 1(1) of the Canadian Bill of Rights Act, 1960, adopted the ‘Due Process’ clause from the American Constitution. But the difference in the Canadian set-up was due to the fact that this Act was not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian status, which, again, could be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian Parliament itself. The result was obvious: The Canadian Supreme Court in *R. v. Curr*\(^2\), held that the Canadian Court would not import ‘substantive reasonableness’ into section 1(a) because of the insularity experience of substantive due process in the U.S.A. and that as to ‘procedural reasonableness’, section 1(a) of the Bill of Rights Act only referred to ‘the legal process recognized by Parliament and the Courts in Canada’. The result was that in Canada, the ‘due process clause’ lost its utility as an instrument of judicial review of legislation and it came to mean practically the same thing as whatever the Legislature prescribes much the same as ‘procedure established by law’ in Article 21 of the Constitution of India, as interpreted in *A.K. Gopalan v. State of Madras*\(^3\).

Article 32 of the Constitution of Bangladesh, 1972 reads as under :-

‘No person shall be deprived of life or personal liberty save in accordance with law.’

This provision is similar to Article 21 of the Indian Constitution. Consequently, unless controlled by some other provisions, it should be interpreted as in India.

\(^2\)(1972) S.C.R. 889
\(^3\)AIR 1950 SC 27
Article 9 of the Constitution of Pakistan - Right to life and Liberty -

‘Security of person : No person shall be deprived of life and liberty save in accordance with law.’

In the 1962 - Constitution of Nepal, there is Article 11(1) which deals with right to life and liberty which is identical with Article 21 of the Indian Constitution.

Universal Declaration, 1948 - Article 3 of the Universal Declaration says:

Everyone has the right to life, liberty and security of person.

Article 9 provides :

‘No one shall be subjected to arbitrary arrest, detention or exile.’

Clause 10 says :

‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’

Covenant on Civil and Political Rights - Article 9(1) of the U.N. 1966, 1966 says :

‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’

European Convention on Human Rights, 1950 contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion.

In every civilized democratic country, liberty is considered to be the most precious human right of every person. The Law Commission of India in
its 177th Report under the heading ‘Introduction to the doctrine of arrest' has described as follows:

Liberty is the most precious of all the human rights. It has been the founding faith of the human race for more than 200 years. Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The Universal Declaration of Human Rights adopted by the General Assembly on United Nations on December 10, 1948 contains several articles designed to protect and promote the liberty of individual. So does the International Covenant on Civil and Political Rights, 1996. Above all, Article 21 of the Constitution of India proclaims that no one shall be deprived of his right to personal liberty except in accordance with the procedure prescribed by law. Even Article 20(1) & (2) and Article 22 are born out of a concern for human liberty. As it is often said, 'one realizes the value of liberty only when he is deprived of it.' Liberty, along with equality is the most fundamental of human rights and the fundamental freedoms guaranteed by the Constitution. Of equal importance is the maintenance of peace, law and order in the society. Unless there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in the scientific and technological spheres.

Prior to the emergence of modern constitutionalism, the concept of separation of powers in the idea of State was first heard from Aristotle. Maitland\(^4\) traced this idea in the UK Constitution in the reign of Edward I

(1272-1307). Locke\(^5\) in his *Treaties on Civil Government* also mentioned about it and insisted on the supremacy of legislative power. However, the modern idea of separation of powers owed its origin to Montesquieu, a French aristocrat and a judge who, during his tour of England from 1729 to 1731, was highly impressed by the British idea of liberty. Montesquieu advocated this idea to ensure three things- (a) good governance (b) preservation of liberty and (c) prevention of tyranny.

However, the commentators on Montesquieu, like Ivor Jennings opined that he did not advocate strict separation. According to Jennings\(^6\), Montesquieu visualized that the genius of the British Constitution lays in combining separation with supervision.

The doctrine of Montesquieu was also criticized by Munro on the grounds of Montesquieu’s credulity, inconsistency and lack of judgment.\(^7\) About separation of powers, Professor De Smith thought no writer of repute would claim that separation of powers is a central feature in the modern British Constitution\(^8\) and also characterized the doctrine as a tiresome talking point and an irrelevant distraction for the English law student and teachers\(^9\). Professor O. Hood Phillips denounced the doctrine as a constitutional myth.\(^10\)

George Marshall in *Constitutional Theory* believed that the phrase ‘separation of powers’ may be counted little more than a jumbled portmanteau of arguments for policies.\(^11\)

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Scholars on constitutional law like Bradley and Ewing\textsuperscript{12} argued that a strict separation of powers is possible neither in theory nor in practice. Barnett\textsuperscript{13} another well-known author recognized that a complete separation would be unworkable and may result in a constitutional deadlock. Laurence Tribe\textsuperscript{14}, an author of \textit{American Constitutional Law}, argued that the historical evidence suggests that framers’ idea of separation of power was un-form and tentative and they had few institutional arrangements in mind beyond the basic principle that there should be a separation. Prof. Gerhard Casper\textsuperscript{15} called it an uncertain doctrine.

In our Constitution also, under Article 53 executive power vests in the President, but the Indian President acts on the aid and advice of the Ministers who, being responsible to the House of People, wield the real executive authority. In so far as the legislature and judiciary are concerned there is no such investiture of power as in the American Constitution. Both the legislature and the judiciary are creatures of the Constitution. The powers of the legislature are expressly limited by the text of the Constitution vide Article 13 and Article 245, apart from by the judicially-evolved doctrine of ‘due process’ and ‘basic structure’. The executive power in our Constitution is co-extensive with the legislative power vide Articles 73 and 162. But so far as judicial power is concerned, there is no such limitation either express or implied. The power has been conferred in very wide terms on the Courts by Articles 32, 141, 142, 144, 226, 227 of the Constitution. Of these, Article 32 is itself a fundamental right and not a part of the articles dealing with the Supreme Court. Article 32 was held by the framers as the ‘heart and soul of the Constitution’. The judiciary

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has been given primacy over legislative power at least in the scheme of Articles 13 and 19, by conferring advisory jurisdiction on the Supreme Court under Article 143 many matters of far-reaching constitutional importance were referred to the judiciary by the President and most of them, excepting one were answered by the judiciary. This advisory jurisdiction to some extent corresponds to Section 4 of the Privy Council Act, 1833 and Section 60 of the Canadian Constitution. Conferment of advisory jurisdiction on the highest Court Tribe\textsuperscript{16} maintained militates against the concept of strict separation of power. Article 50 of our Constitution is a Directive Principle and aims at only ensuring judicial independence by directing the State to separate judiciary from the executive in public service of the State.

Structurally there is no separation of power in our Constitution and it has been repeatedly held by the Supreme Court that there is no strict separation. It was so pronounced by Bijan Kumar Mukherjea, Chief Justice in \textit{Ram Jawaya Kapur}.\textsuperscript{17} The attempt to give separation primacy over judicial review stems from the fallacious premise that Parliament is supreme in our Constitution. Repelling such an argument and after comparing the features of the British Constitution with the federal structure of our Constitution, Gajendragadkar, Chief Justice in \textit{Special Reference No. J of 1964, In re}\textsuperscript{18} clarified that Parliament may have plenary legislative powers but they are subject to the Constitution in view of the provisions of Articles 13 and 245. The Chief Justice pointed out that the Constitution is supreme and it is sole duty of the Court to protect it and interpret it.

We must remember that both the High Courts and the Supreme Court have been recognized by the Constitution vide Articles 215 and 129 as superior


\textsuperscript{17} \textit{Ram Jawaya Kapur v. State of Punjab}, AIR 1955 SC 549, para 12.

\textsuperscript{18} AIR 1965 SC 745.
Courts of records with plenary jurisdiction as interpreted in *M.V. Elisabeth*\(^{19}\) following the principles of *N.S. Mirajkar*\(^{20}\) that nothing is beyond the jurisdiction of the superior Courts unless it is expressly barred by law, as echoed in Section 9 Code of Civil Procedure.

In exercise of this jurisdiction, the Supreme Court has long come out of the shackles of the black letter of law in *Gopalan*.\(^{21}\) *Gopalan’s*\(^{22}\) ratio was overruled twice by the Supreme Court once in *R. C. Cooper*\(^{23}\) and then again in *Maneka Gandhi*.\(^{24}\) Today the Supreme Court cannot accept death penalty execution by boiling the cook in oil as was done with Bishop’s cook in medieval England and endorsed in *Gopalan*.\(^{25}\) The same jurisprudence of black letter of the law guided the majority in *ADM, Jabalpur*\(^{26}\) to hold that if a person is detained by mistake and in malafide exercise of power even then he has no right to life and liberty during emergency as his rights have been suspended and he is treated with motherly care. If we uphold this jurisprudence, which, Venkatachaliah, the then Chief Justice said and rightly so that it should be consigned to the ‘dustbin of history’\(^{27}\), then we may say that the glowing dissent of Khanna, J. in *ADM, Jabalpur*\(^{28}\) is an overreach as it did not follow strictly the doctrine of separation. But the dissent of Khanna, J. has been constitutionally affirmed in the 44th Constitutional Amendment.\(^{29}\) If we follow separation strictly, judges will be the mute spectators if Parliament by a requisite majority today curbs the fundamental rights to equality or the freedom of speech and expression.

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28 (1976) 2 SCC 521.
29 Article 359 (1-A) of the Constitution.
If a challenge to such an amendment is made before the Court, the Court will have to fold its hands as the doctrine of separation of powers will prevent the Court from examining this challenge. If this logic is followed, then we would not have got the epoch-making in *Kesavananda Bharti*\(^\text{30}\)

Justice Ruma Pal in her lecture delivered in Pennsylvania University\(^\text{31}\) rightly described this doctrine as ‘parallelism of power’. Separation can only run parallel but never counter to principle of judicial review.

The basic fact is that the Constitution of India itself empowers judicial review, so that when the Courts express their view as to the reasonableness of restrictions imposed on the fundamental rights, they do so pursuant to powers vested in them by the Constitution which is not the supremacy of the Courts but the supremacy of the Constitution.\(^\text{32}\)

The 21\(^{\text{st}}\) century is witnessing huge shifts in the global balance of power. As the dominance of the West wanes, the world focus shifts to the emerging powers of the new world order, China and India.\(^\text{33}\)

As India takes its place on the international stage, it is only natural that legal systems the world over will turn their attention to its highest Court and want to draw on the development of constitutional jurisprudence by the Supreme Court of India over the last sixty four years that trend has already begun.

Justice Michael Kirby of the Australian High Court describes the US Supreme Court as being in danger of becoming something of ‘a legal backwater’. He asserts that High Court will draw from the legal systems of


\(^{32}\) Setalvad, *Common Law in India*, p. 197.

younger democracies such as the Supreme Court of India, the Court of Appeal of New Zealand and the Constitutional Court of South Africa.  

The tide of judicial activism, facilitated by the power of judicial review shows no signs of ebbing. On the contrary, it continues to surge, notwithstanding frequent and often shrill confrontations between the executive and the judiciary.

‘Judicial review’ refers to the Court’s inherent power to review the action of other branches or levels of Government and in particular, the Court’s power to invalidate legislative and executive action as being unconstitutional. Judicial review is concerned only with the question as to whether the act or order under attack should be allowed to stand or not.

The juristic basis of judicial review is the doctrine of *ultra vires* and to adjudicate that the power has been exercised reasonably and proportionately to its object.

Judicial review of legislation has been acknowledged as a product of American Constitutional Law. In *Marbury v. Madison*, this power was said to be implied in a written Constitution. In defence of such a power it was said:

> Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

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35 At a conference of Chief Ministers and Chief Justices of the High Courts in New Delhi held on 8-2-2007, Prime Minister Manmohan Singh warned that “the dividing line between judicial activism and judicial overreach is a thin one.” He stated that “Compelling action by authorities of the States through the power of mandamus is an inherent power vested in the judiciary. However, substituting mandamus with a takeover the functions of another organ may, at times, become a case of overreach,” *Indian Express*, New Delhi, 9-2-2007.
36 *Black’s Law Dictionary*, 7th Edn.
40 2L Ed 60 : 5 US (1 Cr) 137 (1803).
They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.41

Article 21 reads as under:

Protection of life and personal liberty.-No person shall be deprived of his life or personal liberty except according to procedure established by law.

The original draft of the Article used the words ‘due process of law’. Our constitutional advisory B.N. Rau had discussions with Justice Felix Frankfurter, the United States Supreme Court Judge42 The draft Constitution was deliberately changed to a narrower concept contained in the words ‘procedure established by law’.

Gopalan43 was based on the twin premises that each fundamental right was to be interpreted independently of the others and if a procedure which was laid down was followed that itself was a sufficient guarantee for the right to life. Article 21 was given a narrow and literal meaning.

This narrow view of fundamental rights haunted judicial decisions during the period of internal emergency from 1975 to 1977. The Supreme Court in ADM, Jabalpur44 accorded virtual immunity to any executive action affecting the life and liberty of a citizen during the emergency. This conduct of the Supreme Court was regarded as being extremely deferential to the Government. After the emergency, the Supreme Court consciously tried to redress the balance and it adopted an approach asserting the primacy of social and economic rights of citizens.

42 Granville Austin, The Indian Constitution : Cornerstone of a Nation (P. Clarendon, 1966) 103.
In 1978, in *Maneka Gandhi’s case*\(^{45}\), the Court was concerned with the issuance of a passport. It reiterated, the earlier view that the right to travel was included in Article 21. The reasoning of the judgment in effect rejected the twin premises of *Gopalan*\(^{46}\) and held that the law could be tested on the whole range of fundamental rights and further that the procedure itself must be ‘reasonable, fair and just’. This decision became the springboard for radical transformation of the law\(^{47}\) and the subsequent decisions held it to include both procedural and substantive due process.\(^{48}\) The Court extended the right to life to include the right to live with human dignity and all that goes along with it. Being mindful that in a developing country such rights may remain theoretical the Court alerted that the magnitude of this right would depend upon the extent of the economic development of the country, but that it must, in any view of the matter include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Thus the Supreme Court by its interpretation has completely transformed Article 21 from its original intendment.

Article 14 reads as under:

> Equality before law-The State shall not deny any person equality before the law or the equal protection of the laws within the territory of India.

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As originally understood, this Article related to discrimination. In the event two persons were shown to be treated unequally, the State had to show that there was a rational classification in according differential treatment.

*Royappa*\(^{49}\), introduced the new concept that since arbitrariness is anathema to equality, any arbitrary action would also fall foul of Article 14. This radical approach was extended in a case dealing with the allotment of an airport stall at Bombay to an ineligible candidate in *Ramana Shetty*.\(^{50}\) The Court held thus:

> It is indeed unthinkable that in a democracy governed by the rule of law, the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege\(^{51}\) (*per* Bhagwati, J.).

This approach now provides a whole new armoury for challenging State action on the ground of arbitrariness. What is arbitrary however depends wholly upon what a Court considers arbitrary in given circumstances. This gives a very flexible and a subjective basis to a Court. In a larger sense the subjective values of a judge have a role to play in the ultimate determination of all cases. But there is always some guidance of laws and precedents to control or guard this subjectivity. But the concept of arbitrariness confers very sweeping powers, which go far beyond what is termed as *Wednesbury*\(^{52}\).

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50 Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489.
51 Ibid., 504, para 10.
52 Associated provincial Picture Houses Ltd. v. Wednesbury Corp., (1948) 1KB 223: (1947) 2 ALL ER 680 (CA).
unreasonableness. Thus, the Courts have tested fixation of criteria for employment, terms of Government contract, prescription of a regulation and even giving of holidays on the basis that the action is arbitrary. In some cases this principle has been extended even to declare statutory law as ultra vires. Thus, the Supreme Court has extended the scrutiny under Article 14 from the original concept of rational classification to a further test of being non-arbitrary.

The paramountency of the right to ‘life’ and ‘personal liberty’ was highlighted by the constitutional Bench in *Kehar Singh versus Union of India*.

The Court certainly has power to decide constitutional issues. However, as pointed out by Justice Frankfurter in *West Virginia State Board of Education v. Barnette*, since this great power can prevent the full play of the democratic process, it is vital that it should be exercised with rigorous self restraint.

In *Asif Hameed v The State of J&K*, the Indian Supreme Court observed thus:

The legislature, executive, and judiciary have to function within their own spheres demarcated in the Constitution.

As observed by Justice Frankfurter in *Trop v. Dulles* (1958):

All power is, in Madison’s phrase, of an encroaching nature. Judicial power is not immune against this human weakness. It must be on guard on going beyond its proper bounds, not the less so since the only restraint upon it is self restraint.

As observed by the Supreme Court in *State of Bihar v. Kameshwar Singh*,

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53 (1989) 1 SCC 204  
54 319 U. S. 624 (1943)  
55 AIR 1989 S.C. 1899  
56 AIR 1952 S.C. 252(274)
The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence.

In Divisional Manager, Arawali Golf Course v. Chander Haas\textsuperscript{57} the Supreme Court observed:

Judges must know their limits and not try to run the Government. They must have modesty and humility and not behave like Emperors.

A similar view was taken in Government of Andhra Pradesh v. Laxmi Devi\textsuperscript{58}.

The experience of Indian democracy has shown that transient majorities will have no qualms about sacrificing more fundamental values for quick and immediate political gains. Bartering away forever, parks and open spaces in the city of Mumbai in the name of slum rehabilitation, really a thinly disguised bonanza for builders is one such instance.\textsuperscript{59} Hacking down mangroves which protect the coastline of Mumbai to make way for high rises is another such example of sacrificing fundamental values and intergenerational equities for myopic political gains.

The Courts in India have adopted the British approach in broadening the horizons of judicial review by a marked shift from mere unreasonableness to the test of proportionality.\textsuperscript{60}

\begin{itemize}
  \item \textsuperscript{57} (2006)
  \item \textsuperscript{58} Civil appeal No.8270 of 2011 decided on 25-02-2008 by the Supreme Court of India
  \item \textsuperscript{59} Maharashtra’s Slum Rehabilitation Act, 1971 read with the Development Control Regulation, 1991.
\end{itemize}
The right under Article 32 to move the Supreme Court for violation of any fundamental right, is itself a fundamental right \textit{K.K. Kochunni v. State of Madras} \textsuperscript{61} and under Article 32(2) the Supreme Court has power to issue anyone or more of the prerogative writs, for ‘enforcement’ of any fundamental right besides which it can also resort to the law of contempt, when necessary (Article 129).

The best example of beneficent exercise of judicial review is overturning of \textit{S.P. Gupta v. Union of India} \textsuperscript{62} by the larger Bench judgment of the Supreme Court in \textit{Supreme Court Advocates-on-Record Association. v. Union of India} \textsuperscript{63}.

The learned Judge in \textit{Shivakant Shukla} \textsuperscript{64} rejected the contention that Article 21 is the sole repository of the right to life and personal liberty. Rule of law postulates the Government under law and not under the will of the ruler. In the evolution of the society from tooth and claw to civilized existence right to life and liberty represents a facet of human values cherished by mankind and it is not a gift of any Constitution.

Cases in torts and equity provide good examples of pure judicial law-making. Cases such as \textit{Vishaka v. State of Rajasthan} \textsuperscript{65} where guidelines are made by the Supreme Court for protection of working women against sexual harassment at work places and ultimately a law for prevention of sexual abuse at work place has been passed by the Parliament; \textit{Union Carbide Corporation. v. Union of India} \textsuperscript{66} where the principle laid down is that the ‘polluter pays’ in

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\textsuperscript{61} AIR 1959 SC 725. \\
\textsuperscript{62} 1981 (Supp) SCC 87. \\
\textsuperscript{63} (1993) 4 SCC 441. \\
\textsuperscript{64} (1976) 2 SCC 521. \\
\textsuperscript{65} (1977) 6 SCC 241 : 1997 SCC (Cri) 932 \\
\textsuperscript{66} (1991) 4 SCC 584.
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the case of liability arising from gas leakage; *M.C. Mehta v. Union of India*[^67] where the Supreme Court laid down standards tolerable for automobile emission; *Satish Chander Shukla (Dr.) v. State of U.P.*[^68] where principles were laid down for reducing atmospheric pollution; *Workmen of Birla Textiles v. K.K. Birla*[^69] wherein directions are given by the Court for shifting and closure of hazardous industries; etc., are good examples of judicial law-making in the filed of social and environmental awareness.

The Supreme Court has been able to mitigate large-scale violations of human rights in leading cases like those of bonded labour, Bhagalpur blindings and oppressive under trial detention.[^70]

The study made in this thesis reveals that the Supreme Court of India has played a vital role in interpreting the scope of Article 21 of the Constitution. The interpretation given by the Court is very wide and many postulates relating to right to life and liberty have been included within the meaning and scope of Article 21. The term 'life' has been expanded to include within its scope a human and decent life and not animal life. The right to life is not limited only to protection of limb but it also embraces the bare necessities of life. Right to live with human dignity has been given an expanded interpretation an environment free from exploitation. Right to means of livelihood and right to carry on any trade or business have also been included in the ambit of Article 21. It clubs life with liberty, dignity of a person with means of livelihood without which the glorious content of dignity of a person would be reduced to animal existence. The right to livelihood cannot

[^68]: 1992 Supp (2) SCC 94.
hang on to the fancies of individuals in authority. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. The context of word 'liberty' has also been called the very quintessence of a civilized existence. Life bereft of liberty would be without honour and dignity. There is no separate water tight compartment in which the right to life can be best fitted or the right to liberty would be more suitable, rather both are inter-woven. Article 21 of the Constitution also gives protection against police atrocities, torture, mental, physical and economic pain. Torture was being used as a weapon to subdue, suppress and stifle the human rights of living in freedom. It was realized that if torture is used as an instrument to suppress human rights, the scourge and menace to international peace will continue to exist. The Supreme Court of India was conscious to the situation and observed that a person behind bars is not a person without human dignity. Convicts are not by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. The prisoners have also right against handcuffing. Handcuffing of under-trial or convicted prisoners by the police authorities has been observed to be inhuman. The inmates of jail have rights against custodial deaths. Most cases of custodial violence relate to property offences because the police think violence helps it in obtaining confession and recovering property. The presence of torture in criminal justice system is a slur on the fair name of democracy. It is unconstitutional and unethical and violative of human dignity. Maintaining the right to privacy, validity of domiciliary visits and surveillance was considered by the Supreme Court and it was observed that domiciliary visit but not surveillance was repugnant to personal liberty. Freedom from domiciliary visits was also included in right to life and liberty under Article 21. Rights of under-trials are protected under Article 21. They have a right of speedy trial at
all the stages namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. The period of remand and pre-conviction detention should be as short as possible. The thousands of poor persons languish in jails awaiting trial for their offences. This long pre-trial confinement adversely affects the rights of the under-trials. The Supreme Court has declared that this procedure can not possibly be regarded as reasonable, just and fair so as to be in conformity with Article 21.

In catena of cases, the Supreme Court has held that accused can be released on his own personal bond without sureties and without any monetary obligations. The right to free legal aid is another innovation of the Courts in the context of Article 21. It has been held that the State Governments cannot avoid their Constitutional obligation to provide free legal service to the poor accused by pleading financial or administrative inability. Furthermore the Supreme Court has accorded the status of a fundamental right to free legal assistance at the cost of the State.

Right of fair trial has also been upheld as an integral part of the right to life and personal liberty as envisaged in Article 21. In a number of cases, the Supreme Court has given the gloss of Human Rights Jurisprudence while interpreting Article 21 and has upheld that even convicts have right to life with dignity and their torture cannot be tolerated. Prison reforms have also been addressed by the Supreme Court while interpreting the Prison Regulations imposing restrictions and it has been held that they must be just, fair and reasonable. The Courts have interpreted by evolving the issues of capital punishment vis-a-vis right to life under Article 21 and have evolved the law regarding it considerably to the extent that inordinate delay in disposing mercy petitions would be a ground for commuting capital punishment into life imprisonment. The Supreme Court has moulded the sentencing policy in the
light of the circumstances in which the offender came to commit the offence in view of facts collected on his personality, the social situations and by adducing reasons for its choice of punishment keeping in view the need for prevention of crime-the primordial principle of punishment.

It has been held that the right to die is not inherent in right to life and have declared mercy killing as illegal. The Supreme Court while taking serious objection over issues regarding crime against children and women has opened the horizon of Right to Life under Article 21 in a new light. Sexual harassment at work places was recognized by the Supreme Court and specific instructions were issued by the Supreme Court which have culminated into appropriate law in this regard. The Supreme Court has evolved the case law pertaining to rape and sexual assault. The observations made in the light of Article 21 of the Constitution has served the cause of law in general and rule of law in particular. The Supreme Court has considered rape as a crime against humanity and has directed the Courts to deal with such cases with utmost sensitivity and sternly. The Supreme Court has strengthened the right to life and personal liberty in context of children also and have taken strong view of sexual abuse of children and child delinquency and related issues. The Supreme Court has further laid down guidelines regarding adoption law and surrogacy to save the interest of all stake holders. Right to pollution free environment is another example of judicial innovation by which the Right to life as envisaged in the Indian Constitution has been lifted to higher pedestal and lots of other rights e.g. Right to clean water, issues pertaining to forest conservation, steps to regulate water pollution in Indian rivers. The Supreme Court down the years has opened the scope of public interest litigation while expounding Article 21 relating to all the aspects of environmental issues. Polluter pays principle has been given a new dimension by the Supreme Court in multitude of cases which has immensely
strengthened the regime of environmental rights emanated from Article 21 Right to life. The Supreme Court has articulated that right to health as part and parcel of right to life, by evoking public health doctrine, a collective dimension and inter relationship of it with protection against hazardous working conditions, education about disease prevention and social measures in respect of disability, unemployment, sickness and women's re-productive health and health-care of children have been catered to by the Supreme Court in many cases. Right to privacy is another important facet which has been expostulated by the Supreme Court in context of right to life. It has been held by the Supreme Court recently that even intrusion of mental privacy by use of narco-analysis tests etc. in the garb of interrogation have been frowned upon by the Supreme Court being amounting to mental torture and thereby a new dimension of human dignity has been emanated by the Supreme Court. The Supreme Court has heralded into a new era of the law of compensation for violation of right to life and personal liberty. In a number of cases including cases of police atrocities, fake encounters etc., the Supreme Court has granted exemplary damages and even more the remedy of reconciling individual damages has been made mandatory duty of the Courts to the effect that it would consider the question of award of compensation to victim of crime.

Right to education is another milestone carved out by the Supreme Court while interpreting Article 21. Now by the constitutional amendment in Article 21, a new Article 21-A has been inserted by the law-makers and a substantive law known as the 'Right to Education' has been made by the Parliament.

The aforesaid judicial trends clearly indicate that scope of Article 21 has not only been extended to a great extent but it is also under further expansion by the judiciary. This humanistic expansion by the judiciary is in the larger
interest of human life because life, liberty and security are the most prized possessions of an individual. Respectful life, liberty and property is not nearly a norm or policy of the State but an essential requirement of any civilized society. However apart from liberty of an individual, the society's interest of peace, law and order cannot be ignored or in other words there can be no liberty without social restraint. The essence of civil liberty and security is to keep alive the freedom of the individual subject to the limitation of social control in the light of dynamic social evolution.