CHAPTER 4
LEGAL POSITIVISM IN 21ST CENTURY: AN OVERVIEW

4.1. Introduction

The state is the most universal and powerful institution of all social institutions. It provides atmosphere to individual for the self-realization and self-progress. Infact, human life would have become bedlam without it. There have been many theories on its origin, nature and functions but the essential function of state residue same in each theory. One of them is Government that is a instrument through which the sovereign will of the state finds concentrate their words. For the manifesto of these expression, government functions divided in to three proportions i.e. - law making (legislation), law implementing (executive) and law adjudication (judiciary). These functions of the government performed by the organs of the government in their specialization areas with control and harmonization. The co-ordination and control among these three organs are the result of the constitutional history of the state.

A welfare state is a concept of government where the state plays a important role in the protection and promotion of the economic and social well-being of its citizens. It is based on the doctrine of equality of opportunity, equitable distribution of wealth, and public accountability for those who are unable to avail themselves of the minimum requirements for a good life. The general term of well-beings may cover multiplicity of forms of economic and social organization.\(^1\)

As it is observed by R. C. Gupta, -“A Welfare state is one which takes all those steps considered necessary “to remove poverty, mass unemployment and insecurity and protect the rights of the workers and of the poor classes with a view to safeguarding them against any type of encroachment in society.”\(^2\)

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There are two main characteristics of the idea of welfare state:

1. Welfare state is a model in which the state assumes primary responsibility of its i.e. the welfare of its citizens. Thus responsibility in this theory ought to be comprehensive, because all the aspects of welfare are considered and universally applied to all citizens as a ‘Right’.

2. Welfare state also means the creation of a ‘Social Safety Net’ of minimum standards of varying from the welfare. In short the welfare state is a government that provides for the welfare or well-being of its citizens completely. Such welfare government is involved in citizen’s lives at every level. The purpose of welfare state is to create economic equality or to assure equitable standards of living for all. The welfare state provides education, housing, sustenance, healthcare, pensions, sick leave and equal wages through price and wage controls.³

The concept of welfare state pleads for a positive role of the state in every sphere of human life and activities such as: education, health control over communications, transport, libraries, insurance, banking and other social services etc. The concept puts emphasizes upon the tendency to provide assistance, and an excessive care for the needs of all, who are unable to self-realization. A welfare state makes the citizens more able to provide for themselves.”⁴

A state is defined in International law as, “an independent political entity occupying a defined territory, the members of which are united together for the purpose of resisting external force and preservation of the internal order.” This statement lays stress on what may be called ‘Police Functions’ of the state, viz, preservation of law and order and defence of the country from external aggression. It needs to be emphasized however that no modern state today rests content with such a limited range of functions. A modern state does not rest content with being merely a ‘police’ or ‘law and order state’. It becomes necessary for any state to establish certain basic organs or agents or instrumentalities which act on its behalf and through which state can function and operate because all the people in a state cannot combine and operate all together all the time to achieve the desired goals. Thus, certain fundamental organs

become necessary. This creates the needs for Constitutional law\(^5\). Because of state can not govern itself on the adhoc basis without their being some norms to regulate its basic institutions. There must be a predictable body of norms and rules from which the governmental organs must draw their powers and function. The purpose of Constitution is to have a framework of government which is likely to endure through the vicissitudes of nation.\(^6\)

The great figure of the tradition of legal positivism are usually considered to include Bentham (1748-1832), Austin (1790-1859), Herbert Hart (1907-1992) and Kelson. However the true, philosophical origins of legal positivism probably reside in the great seventeenth century philosopher, Thomas Hobbes. For Hobbes the law was an exercise in the expression of sovereign will. As Hobbes commented, ‘the civil laws are the commands of him who hath chief authority for direction of the future actions of the citizen.’ On the view of the law, the laws are essentially rules laid down and upheld by the sovereign and the sovereign is the person or person’s with effective authority in the society. Jurist Hobbes represented the law as ‘the sovereign’s will’. Thus, Jurist Hobbesin gave conception of law as ‘the command theory’ which was later developed by the great positivist thinker of 19\(^{th}\) century, Jeremy Bentham and John Austin. The command theory of Jeremy Bentham and John Austin was effectively replaced by the Jurist Hart’s by given a concept of ‘rule of recognition’. Both ‘command theory’ and the Hartian ‘rule of recognition’ are example of jurist Jospeh Raz’s ‘the Concept of Legal System’ that is that the law of a society is to be identified by social facts alone.\(^7\)

The nineteenth century legal theories over and these theories fails to satisfy the aspiration of the people because of their refusal to accept morality and reasons as elements of law. It was realized that exaggerated importance to historical approach

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\(^5\) Constitutional law is the body of law that evolves from a Constitution, setting out the fundamental principles according to which a state is governed and defining the relationship between the various branches of government within the state. Available at: http://www.dictionary.com/browse/constitutional-law (visited on March 13, 2018)

\(^6\) M.P. Jain, Indian Constitutional Law, 1-7(LexisNexis Publication, 2014).

\(^7\) Indeed Prof. Raz has denied the heart of legal positivism is by denying necessary connection between law and morality.

\(^8\) David Brooke, Q & A Jurisprudence 2013-2014, ed. 6(2013) available at: https://books.google.co.in/books?id=WclVIBjwIeC&pg=PA58&dq=jurisprudence+%22legal+positivism%22&hl=en&sa=X&ved=0ahUKEwiRtOmFv7DMAhWELaYKhXdUAmQ4ChDoAQgAMQ#v=onepage&q=jurisprudence%20%22legal%20positivism%22&f=false (visited on March 29, 2016).
giving undue significance to cultural and social characters of legal system had given rise to fascism in Italy and Nazism in Germany. The impact of materialism on the society and the changed socio-political conditions compelled the 20th century legal thinkers to look for some value oriented ideology which could prevent general moral degradation of the people. The end of 19th century time shattered the significance of western legal system and jurists of this time were search for value conscious legal system. All these factors cumulatively led to revival of natural law theory in its modified form and it is different from the earlier one theory of natural law. The new approach has concerned with the practical problems of the society and not with the abstract ideas. The end of later 19th century and 20th century once again witnesses, the seeds of the natural law sown in legal systems and natural law concepts reflecting in the legal thought. A number of factors contributed in revival of natural law in 20th century. As example: Too much emphasis on positivism devoid of moral values led to injustice in many cases and such condition no longer suited the expectations of individual. The new values that there must exist certain objective moral values and these values should be given a positive coloring i.e. converted into law. Secondly, social reformers and socialists attacked the social and economic inequalities and authority worship of positive. The solution to more and more problem demanded the need for law higher than positive law.9

4.2 Theories of Revived Natural Law:

There have been different doctrines of natural law at varying periods of time but are certain fundamental principles of natural law remained constant which are as follow:10

1. Ideals.
2. Conformity to ought.
3. Discovery of Perfect Law.
4. Perfect law deducible by reasons.
5. Conditions sine qua non for existence of law.

Hence, Natural law theory, in its original formulation, believes in the existence of objective moral principles which depend on the essential nature of universe and which

can be discovered by natural reason. Ordinary human laws are only true law in so far as it is conformity to these principles. These above said principles of justice and morality constitute the natural law, which is valid as the rules for human conduct are logically connected with the truth concerning human nature.\textsuperscript{11}

There is no unanimity about the definitions and exact meaning of natural law. In jurisprudence, the term ‘natural law’ means those rules and principles which are supposed to have originated from some supreme source other than any political or worldly authority. It is a basically priori method\textsuperscript{12}, different from empirical method\textsuperscript{13}, it symbolizes physical law of nature based on moral ideas which has often been used either to defend a change or to maintain status quo according to the needs and requirement of the time. For example the concept ‘Rule of Law’ in England and India and ‘Due Process’ in USA are essentially based on natural law. Natural law is external and unalterable, as having existed from the commencement of the world, uncreated and immutable. Natural law is not made by man, but it is only discovered by man. Natural law is not promulgated by legislation; it is an outcome of preaching of philosophers, prophets, saints etc. and thus in sense it is higher from of law. Natural law has no formal written code. Natural law is also termed as Divine Law, Law of Nature, and Law of God etc. Divine law means the command of God imposed upon men. Natural law is also ‘law of the reason also as being addressed to and perceived by the rational of nature of man. The natural law denies the possibility of any rigid separation is unnecessarily causing confusing in the field of law. The supporters of natural law argue that notion of justice, ‘right and reason’ have been drawn from the nature of man and therefore, this aspect cannot be completely eliminated from the purview of law. It has generally been considered as an ideal source of law with in various contents.\textsuperscript{14}

Morality which is the principles of law aims at increasing social harmony by diminishing the incidence of excessive selfishness noxious towards others in social

\textsuperscript{11}N.K. Jayakumar,\emph{ Lectures in Jurisprudence}, 114(LexisNexis Publication, 2015).
\textsuperscript{12}A priori method accepts things or conclusions in relation to subject as they are without any enquiry and observation. Available at: \url{https://www.slideshare.net/kitime2015/natural-law-60595251} (visited on March 13, 2018).
\textsuperscript{13}Empirical method or a posteriori approach tries to find out the causes and reasons in relation to subject matter. Available at: \url{https://www.slideshare.net/kitime2015/natural-law-60595251} (visited on March 13, 2018).
\textsuperscript{14}‘Revival of Natural Law’ available at \url{www.legalserviceindia.com/article} (visited on 20December 2016).
life. The classical distinction was first made by Kant who characterized law as concerned with external conduct and morality as concerned with internal conduct. It was strengthened by the support of jurists like Stammler. Morality appeals to the conscience of man, his intentions, sense of ethics duty, and the concern for good for its own sake. Law is heteronymous i.e. imposed on man from outside, while the morality is autonomous, i.e. coming from within the man’s inner self.  

Historically, we find that no clear distinction was drawn between law and morality in ancient times. In Greece, juries who administered justice in popular courts did not perceive any clear distinction between what was legally prohibited and what was morally wrong. The Roman’s defined the laws in the language of morality. In India, the all pervasive concept of Dharma was the basis of both law and morality. Thus Roscoe Pound identifies the four stages in the law-morality relationship. The first is the stage of undifferentiated ethical customs, customs of popular actions and law’s. This may be called the pre-legal stage. The second stage is that of strict law, codified or crystallized, which is outstripped by morality. The third stage of revival of natural law is that infusion of morality into law, and reshaping of law by morals. Ideas of equity and natural law play an important role in growth of law. The final stage is that of conscious, constructive law making in which morals or morality are for the law maker to consider. Law attains maturity and judges have to decide according to law. Several jurists believe that there is a distinction between law and morality, although there are some features common to both. According to Vinogradoff, “the object of law is the submission of the individual to the will of organised society, while the tendency of morality is to subject the individual to the dictates of his conscience.”

Therefore, Natural law theory that some laws are basic and fundamental to human nature and are discoverable by human reasons without reference to specific legislative enactments or judicial decisions. Natural law is opposed to positive law, which is human made, conditioned by history and subject to continuous changes. Natural law idea became particularly important in roman legal theory which eventually became to recognise a common codes of regulating conduct of all people and alongwith individual codes of specific places and time. Christian philosophers such as St. Thomas Aquinas perpetuated this idea, asserting that natural law was common to the

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15 supra note 11 at 114.
16 Ibid.
people. Christian and non-Christians in modern times, the theory of natural law became the chief basis for the development of international law theory of Hugo Grotius. In the 18th century, Rousseau especially as interpreted during the French Revolution, made natural law a basis for democratic and egalitarian principles. The influence natural law theory declined in the 19th century, under the impact of positivism, empiricism and materialism. But in the 20th century, thinkers saw natural law is necessary intellectual opposition to totalitarian theories.17

Before revival of natural law theory, the foundation of law is accessed through reasons and through these laws human laws gain force. The natural law can be discovered only by natural law and man made laws is valid up to extent it conforms to the natural law principles. These principles of justice of morality constitute the natural law which is valid of necessity because the rules for human conduct are logically connected with truth concerning human nature.18

According to Dr. Allen, “the new natural law is value loaded, value oriented and value conscious and is relativist, changing and varying and everlasting in character and is not absolute like old natural law.19”

The revival of natural law in the late nineteenth and early twentieth centuries reflected itself in several modern theories. The skepticism of modern thinkers against an absolute idea of justice, their relativist view of world and above all their unflinching belief in the progress of mankind resulted in the rejection of the older notions of natural law as a law which is immutable, eternal and universal. In its modern incarnation natural law became 'an evolutionary ideal, and thus as a directive force in the development of positive law'. As a consequence, modern natural theories could be seen as part of the never ending search for ideas of justice.20

Towards the end of 19th century the ‘natural law’ theories revived due to many reasons, some of which are:

1. As a reaction against the 19th-century legal theories which exaggerated the importance of positive law (law as it is) which caused the need for its revival.

2. The analytical school is undemocratic as it presupposed a hierarchical social system.

3. It makes a difference between inferior and superior and such assumes that who commands is not bound by law. This does not hold a good in a state (democratic) where the legislature or law making body is also bound by law.

4. The scientists themselves have accepted that scientific study is based on certain pre-supposed notions and in contrast to the concept of time and space the changes in the scientific investigation also became possible.

5. It was realized that abstract or vague thinking was not completely futile, as they became guidelines or a code of conduct.

6. With the pace of new emerging and increasing problems, positivists realized its helplessness.

7. The result of materialism on the society and altered socio-political conditions compelled the 20th-century legal thinkers to look for some value-oriented ideology which could help to prevent moral degradation of people in general. Both the world wars had created havoc in the world and morals, and principles had no place in the world. And it was realized that it is the need of the hour to formulate such laws which should be based on natural law principles. In regard to the revival of the natural law theory, the main contribution has been made by John M Finnis and Lon Fuller.²¹

Further, According to Salmond, the natural law school became unpopular in the 18th century; because the 18th century witnessed dramatic achievements in physical science. The beginning of the 19th century however, saw the revival of natural law theories. The main reasons according to Salmond for this revival of the natural law are²²:

1) The desire to re-establish closer relation between law and morality

2) Dissatisfaction with the command theory of law (as given by Austin) which has banished morality from its fold.

3) The need for a jurists basis for a progressive interpretation of positive law in these cases in which law could not be strictly applied. This has been particularly important in America.

4) The development of sociological theories and sciences.

5) The development of the idea of relativity in modern jurisprudence which means that laws are universal and vary in their content with time in place. Apart from these reasons, the decline in social and economic stability in the present century with the resulting expansion in governmental activities coupled with revising doubts as to the method of the empirical sciences affording the sole avenue to truth have led to some reaction in favour of natural law thinking.

4.3 Revival of Natural Law:

The impact of materialism and industrialist on the society changed socio-political conditions. Due to above mentioned reasons legal thinkers to look for some value-oriented ideology which could prevent general moral degradation of the people. The world war-I further shattered the Western society and there was a search for a value conscious legal system. All these factors led to revival of natural law theory in its modified form different form the earlier one. Dr.Allen rightly pointed out, "the revival of natural law is value loaded value-oriented and value conscious and is relativistic and not absolute, changing and varying and not permanent and everlasting in character. It represents a revolt against the determination of historical school on the one hand and artificial finality of the analytical school on the other hand".23

However, the new ‘natural law’ theories have taken stock of the various approaches to law during the past and the present centuries (analytical, historical, sociological). The modern jurists have given their theories of ‘natural law’ in this background. Now ‘natural law’ is relative and not abstract and unchangeable. The new approach is concerned with practical problems and not with abstract ideas. It attempts to

23 Supra note 19 at 22
harmonise the ‘natural law’ with the variability human ideas and the variability human ideals and takes into account the new legal theories putting emphasis on society. Among the philosophers who have given their theories in the present century, stammler and J. Kohles hold importance place:-

4.3.1. Views of Rudolf Stammler (1856-1938):

Stammler was an exponent of ‘natural law with a variable content.’ He distinguished between the concept of law and the idea of law or justice. He approached the concept of law in this manner. Order is appreciable through perception or will. Community or society is “the formal unity of all conceivable individual purpose and by this means the individual may realize his ultimate best interest. Law is necessary a priori because it is inevitably implied in the idea of co-operation.” It just aims at harmonizing individual purposes with that of society. He defined a law as “a species of will, other regarding, self-authoritative and inviolable.” Law is a species of will because it is concerned with orderings of conduct. It is other regarding because it concerned with a man’s relations with other men. It is self-authoritative because it claims general obedience. It is inviolable on account of its claim to permanence. The idea of law is the application of the concept of law in the realization of justice. Every rule is a means to an end. One must seek a universal method of making just law’s. A just law is the highest expression of man’s social activity. Its aim is the preservation of the freedom of the individual with the equal freedom of other individuals. He say’s that all positive law is an attempt at just law and that is justice law or justice is a harmony of wills or purpose within the framework of the social life. The harmony of wills or purposes varies according to time and place. For the knowledge of wills and purpose. One must come in actual contact of the living social world. This will enable one to judge as to what purposes deserve legal recognition. He carried the legal philosophy of German Jurist Kant. The purpose of Stammler’s idea of a “just law” is to help in building up a fundamental conception of life. According to him, in order to achieve social justice, a legislature has to bear in mind two principles i.e. respect and participation. In the last concluding chapter of his book “Theory of Justice” he gives

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the following elements as the characteristic of “Just Law”. They are divided in to two aspects\(^\text{26}\)

1. Principles of respect and

2. Principles of Participation

3. Principle of Respect: No ones volition must be subject to the arbitrary desire of another.

4. Any legal demand must be of such a natural that the addressee can been his own neighbour.

5. Maxims of participation

6. No member of a legal community must be arbitrarily excluded from the community

7. A legal power may be exclusive only in so far as the excluded person can still be his own neighbour.

4.3.2. Views of Dabin:

According to him, “the law of nature of man as it reveals itself in the basic inclinations of that nature under control of reason. One of the precepts of natural law is concerned with the goodness of society which is the aim of state and law. The state provides order and law’s are means to that end. Laws may be expressed in various forms of statutes, customs and precedents, but they are general regulations of conduct, not of conscience. Ordinarily, they are obeyed and when they are violated, compulsion under the authority of the state has to be employed. Laws are directed to conduct and not conscience. There is a moral duty of every one to obey these positive laws which confirms to the natural law principles of promoting the common weal. If a law fails to conform to that principle, it is not morally binding because everybody admits that civil laws contrary to natural law are bad laws and even that they do not answer to the concept If law. Thus, in order to fulfill the common good, law’s have to be adapted to the needs and ethos of the particular community. This shows that an

attempt to harmonize the restoration of natural law with the variability of human society and to follow new emphasize on society.\textsuperscript{27}

\textbf{4.3.3. Views of Joseph Kohler:}

Kohler is a neo-Hegalian. He defines law as the standard of conduct which is consequences of the inner impulse that urges men towards a reasonable from a life emanates from the whole, and is forced upon the individual. He gives a new interpretation to the law. According to him, legal interpretation should not be materialistic. The society, in the course of evolution advances morally and culturally. So taking into account the moral and culture requirements, the law can serve its purpose better. He says there is no eternal law. He observes that formation of the jural postulates of the time and place is one of the most important achievements of recent legal science.\textsuperscript{28}

\textbf{4.3.4. Professor Rawls} (1921)

\textbf{Views of John Rawl:} According to persons who in their mutual relations recognise as binding certain conduct specifying a system of co-operation. Principles of social justice are necessary for making a rational choice between various available alternate systems. The basic principles of social justice are generalized means of securing generalized wants, primary social goods which include basic liberties opportunity, power and a minimum of wealth. The first principle of social justice is, “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Thus the concept of basic liberty include equal liberty of thought and expression, equal participation in political decision making and rule of law which safeguards the person and his self respect.

The second principle is “social and economic inequalities are to be arranged in such a way that they are both”\textsuperscript{29}:

1. To the greatest benefit of the least advantaged, complied with the just saving principles and

\textsuperscript{27} Supra note 25 at 617-618.
\textsuperscript{28} Supra note 24 at 101-102.
\textsuperscript{29} Supra note 25 at 620-621.
2. Attached to offices and positions open to all under conditions of fair equality of opportunity. With the help of these principles, Prof. Rawl’s tries to establish a just basic structure. There has to be a constitutional convention to settle a constitution and procedures that are most likely to lead a just and effective order. After that come legislation and its application to particular cases. Thus, Prof Rawl’s claims that in this way, the basic principles will yield a just arrangement of social and economic institutions.

He made significant contribution to the revival of natural law in the 20 Century. He propounded two basic principles of justice based on natural justice; namely:

- Equality of right to securing generalized wants including basic liberties, opportunities, power and minimum means of subsistence; and

- Social and economic inequalities should be arranged in such a way so as to ensure maxim benefit of the community as a whole.

Thus, the first principle of justice is: “each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.” The second principle is generalized means as “each generation must not only preserve the gains of culture and civilization, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation.”

4.3.5. Views of Del Vecchio: he asserted that natural law is the principle of legal evolution which guides mankind and law towards greater autonomy of the individual.

4.3.6. Views of Francois Geny (1861-1944): he was greatly impressed by the Stammlers’s natural law with changeable content and he devoted himself to the revised natural law. He was opposed to the historical and analytical schools(legal positivism). He believed that law has to be relativistic and not static or immutable like the 19th century natural law. He gave the importance to judicial decisions in moulding a legal system. He developed his natural law theory within the frame work of the positive law.

30 Lloyd Denis, Introduction to Jurisprudence, 87(Stevens and Sons Ltd.:1959).
31 Singhal’s, Lectures on Jurisprudence, 142(Shree Ram Law House, Chandigarh).
33 Supra note 23.
4.3.7. Views of Gustav Radbruch (1878-1949): he was initially a positivist and treated “law as law”, but the mass-massacre during the Nazi regime turned him to a moralist and he rejected the theory of separation of morals from law. He asserted that the right of the citizens to disobey such positive laws if they are opposite to ultimate rules of justice.

4.3.8. Views of Hart (Modren Legal Positivist): He is a leader of contemporary positivism himself attempted to restate natural law positions from a semi-sociological point of view. According to him that there are certain rules which are essential if human beings are to live continuously together in close proximity. These simple facts constitute a core of indisputable truth in the doctrine of natural law. Hart puts primary emphasis on an assumption of “survival” as a chief human goal. He is thus concerned with social arrangements. He is of the view that extra legal moral standards may be appropriate in the statutory or constitutional interpretation. He says there are certain natural facts and aims of “being constituted as men are...in which certain content of natural law is a necessary” and there are.

a) Human vulnerability,

b) Approximate equality,

c) Limited sources

d) Limited human understanding, and

e) Desire for social life

4.3.9. Views of Finnis:

He is important jurist of the present century. He has given a new definition and status to the natural law. According to Finnis, “natural law is the set of principles of practical reasonableness in ordering to human life and community.” According to him there are certain basic goods for human beings. The fundamental principles of natural law are pre-moral. Finnis gave a list of seven basic principles as following:

1. Life: the first basic principle is the value of life, corresponding to the drive for self-preservation.

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36 Supra note 24 at 96.
2. Knowledge: it refers to a preference for true over false belief.

3. Play: this basic principle concern with each one of us can see the point of engaging in performances which have no point beyond the performance itself.


5. Sociability or friendship: acting for one’s friend well-being.

6. Practicability reasonableness: “the basic good of being able to bring one’s own intelligence to bear effectively: on the problems of choosing one’s actions and life style and shaping one’s own character.”

7. Religion: “questions of the origins of cosmic order and of human freedom and reason.”

4.3.10. Views of Fuller:

Lon L. Fuller is a post-positivist lawyer. He gives an advanced theory of procedural naturalism.\textsuperscript{37} According to Fuller natural law as essentially a way of thinking.” He does not contend that the rules, the rules of a legal system must conform to any substantive requirements of morality or any other external standard. He maintains the need for rules of law to comply with “internal morality of law. Initially, he draws a distinction between morality of duty and morality of aspiration. The former corresponds to an external corresponds to an external morality of law. It consists in those fundamental rules without which society can not exist. He gives eight typical ideals on which a legal system should strive, viz, generality, absence of retrospective legislation and certainty not abuse retrospective legislation, promulgation, no contradiction rules, consistency between rules as announced and their actual administration, rules, avoidance of frequent changes and absence of laws requiring the impossible. These principles of legality are basic condition which every system fulfils. The greater its success, the more fully legal such a system is.\textsuperscript{38} According to L.L.Fuller, there are eight rules for failure of any legal system. These rules are following:\textsuperscript{39}\textsuperscript{-}

\textsuperscript{37} Lon. L. Fuller, \textit{The Morality of Law}, (Yale University Press, New Haven, 1969)
\textsuperscript{38} Supra note 34 at 136.
\textsuperscript{39} \textit{id.} 37 at 32-36.
1. The lack of rules or law, which leads to adhoc and inconsistent adjudication.
2. Difference between the adjudication and legislations.
3. Daily revisions of law’s.
4. Failure to publicize or make known the rules of law.
5. Ambiguous/ unclear legislation that is not possible to understand.
8. Demands that are beyond the power of subject and ruled.

### 4.3.11. Views of Clarence Morris:

According to Prof. Morris, “justice is realized only through good law.” He used the term law in wider sense. According to him, “the word law means more than statues and ordinance; it includes both adjudicated decisions of cases and social recognition of those legal obligations which exist without governmental promptings”. According to him law is divided into three principles. Justice is one of important principles justification of law and other two are rationality and acculturation. The theory of Morris is concerned with the method of realizing justice and is not a theory of just content. Law makers should serve the public by advancing its genuine aspirations which are “deep seated, reasonable and non-exploitative.” Thus without support of public the legislators cannot succeed. The second justification of law is concerned with the reasoning process of law, both judicial and legislative. Reason behind the decision is major ingredient of justice. The third justification of law is ‘acculturation’ which is conformity with culture. The purport of a statue is more easily achieved when one is in tune with the cultural environment of the legislator. Further acculturation is included a plea for an awareness in law-making man’s responsibility towards his /her environment. Thus, Morris does not particularly say that just quality is necessary condition for continuity of law but that seems to be implicit.\(^{40}\)

### 4.4 Draw backs of Positivism-

1. Legal positivism has been criticized by the naturalists on the ground that it is inadequate because it fails to take moral consideration into account.

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\(^{40}\) Series on Lectures on Jurisprudence, (Shree Ram Law House, Chandigarh.)
2. There is another criticism on the ground that theory conflicts with liable on ordinary usages by denying the name ‘law’ to rules which are generally classified as legal. Example rule of customary law, International law, Constitutional law etc. the above name rules originate from sovereign command. Customary law springs from habitual behaviour. Like international law is system of customary rules originating from state practices.\textsuperscript{41}

3. The revival of natural law in early of 20\textsuperscript{th} century was in reality dissatisfaction with 19\textsuperscript{th} century legal positivism because legal positivism neglects the social bases of law.\textsuperscript{42}

4. The revival of natural law after word war-II was cleared by the prompted by the fact that evident of violation of human dignity during 19\textsuperscript{th} century and did not prevented by legal positivism, so it was felt necessary to avoid that form of violation not happening again.


All laws were originally customary law, and there was no statutory law in ancient India, for the simple reason that there was no parliament or legislature in those times. Customary rules could of course tell us that when a man dies his property should go to his son. But what could happen if there is no son. This could not be answered by custom. Hence, textbooks were required to deal with this subject and this requirement was fulfilled by the ancient India, just as it was done in ancient home. The study of ancient India jurisprudence really belongs to the school of jurisprudence called historical jurisprudence. Whose father is regarded as the German jurist, Savigny. According to Savigny, law is not a consciously created phenomenon but was the gradual distillation at the volksgeist (the spirit of the people). Law was found, not made. Thus Savigny was a strong advocate of customary law and was opposed to the legislation.\textsuperscript{43}

\textsuperscript{41} Supra note 18 at 25- 28.
\textsuperscript{42} ‘Natural Law Theories of 20th Century’, Available at: \url{https://www.academia.edu/10326359/Natural_Law_Theories_in_the_20th_Century} (visited on December 12, 2017).
\textsuperscript{43} Justice Markandey Katju, ‘Ancient Indian Jurisprudence Vis-à-vis Modern Jurisprudence’ (2010), 1 SCC P-915-18
This school is entirely unsuited to the scientific era. In the age of rapid technical growth people are not prepared to wait for the slow growth of custom. Legislation is the dominant source of law today, as it enables rapid change in the law and this rapid change is necessary in the modern industrial society which is fast changing in view of new scientific discoveries and inventions.\textsuperscript{44}

The first attempt to create a scientific theory in jurisprudence was the positivist theory of the English Jurists Bentham and Austin. Science studies objective phenomena as it is and not how we would like it to be. This was precisely the approach adopted by the positivist jurists in law. There are two kinds of sciences: (1) Natural Science and (2) Social Science. Natural Science study inanimate matters (e.g. physics, chemistry etc.) or living organism like plants and animals (botany and zoology) and also the physical body of human beings chemical science on the other hand, study the social behaviour of human being e.g. economics, political science sociology etc. jurisprudence is also one of the social sciences.

The French thinker Auguste Comte is known as the father of positivism. He was introduced the method of natural science into social sciences. This method was careful observations, logical analysis, experimentation, logical inference etc. The British jurists Bentham and Austin utilized the positivist approach of Auguste Comte to the subject of Jurisprudence. They insisted that jurisprudence is the study the law, including the legal concepts etc. as it is, and no as it ought to be. This was the scientific approach because in science also we study objective phenomena as it is and not how we like to be. This was in sharp contrast to the proceeding theory in jurisprudence which was called the natural law theory. The natural law theory postulated that along with the positive man-made law, the higher law inmates from God or reason or morality or some other sources. Natural law was of the view that law is what ought to be and a bad law was not law at all.\textsuperscript{45}

Positivism, therefore, replaced natural law as the predominant theory in jurisprudence. Positivism lays great emphasis on statutory law i.e. the law made by the legislature or its delegates, and it is ideally suited to the industrial era (unlike historical jurisprudence which was the jurisprudence of feudal and pre feudal era). Thus,

\textsuperscript{44} Ibid.  
\textsuperscript{45} Supra note 43.
positivist jurisprudence regards law as a set of rules (or norms) enforced by the State. As long as law is made by the competent authority after following the prescribed procedure it will be regarded as law, and positivists are not concerned with its goodness or badness.\textsuperscript{46}

Austin regards law as the command of the sovereign, and since in modern society the most common form in which such command occurs is a statute or statutory law, and especially codification, were given the highest place in positivist jurisprudence.

While positivism was a great advance over natural law and was suited to modern industrial society, it had a great defect and that was this: it rigorously excluded a study of the social, economic and historical background of the law.

Positivism only studied the form, structure, concepts etc. in a legal system, it was of the view that study of the social and economic conditions and the historical background which gave rise to the law was outside the scope of jurisprudence and belonged to the field of sociology.

However, unless we see the historical background and social and economic circumstances which give rise to a law it is not possible to correctly understand it. Every law has certain historical background and it is clearly conditioned by the social and economic system prevailing in the country. The great defect in positivism therefore was that it reduced jurisprudence to a merely descriptive science of a low theoretical order. There was no attempt by the positivist jurists, like in sociological jurisprudence, to study the historical and socio-economic factors which gave rise to the law.

Positivism reduced the jurisprudence to a very narrow and dry subject which was cut-off from the historical realities. Thus it deprived the subject of jurisprudence of flesh and blood.

This defect in positivism was sought to be overcome by sociological jurisprudence, which became an important trend in the 20\textsuperscript{th} century. Sociological jurisprudence studies the legal system not in isolation but as part of the social reality. This was definitely a great advance over positivism since, as already mentioned above; the law

\textsuperscript{46} ibid
can not be properly understood without knowing its historical and social background. Thus, sociological jurisprudence considerably broadened the scope of jurisprudence.

Sociological jurisprudence, however, pointed out that there were great gaps in the statutory law which had to be filled in by the judges, and even the statutory law had to be interpreted by the judges in a manner as to fulfill the needs of the society. Sociological jurisprudence, thus, shifted the centre of gravity of the legal system from statutory law to judge-made law. Whereas under positivism a judge is only a passive agent and it is sociological jurisprudence arms a judge (that is the task of the legislature), sociological jurisprudence arms a judge with tremendous powers to play an active role and even make law.

However, as pointed out by the sociological jurists, there were often gaps in the statutory law, and also the statutory law did not always keep pace with the pace of social development due to advancement in technology. This required judge-made law to fill in these gaps, in certain circumstances. Hence, we can say that modern industrial jurisprudence while mainly positivist, in that it relies mainly on legislation, also uses the idea of sociological jurisprudence by supplementing the legislation whenever there is a legal vacuum or when compelling social need arises. Also, it sometime uses some concepts from natural law e.g. the rules of natural justice (when there is no statutory rule).

Thus, while ancient Indian jurisprudence can be said to belong to the historical school of jurisprudence, modern jurisprudence is a combination of positivism, sociological jurisprudence and natural law.

The Constitution of Indian establishes a Parliamentary form of Govt. both at Centre and States. In this respect, the makers of the constitution have followed the British model in to. The reason for this is that we were accustomed to this govt. The essence of Parliament form of govt. is its responsibilities to the legislature. The president is the constitutional head of Centre. Governor is the constitutional head of the States. The real executive power is vested in the council of Ministers whose head is the Prime Minister in the centre, while Chief Minister at the States. Because of the distribution of power between centre and the state, the role of judiciary becomes more important and independent and impartial judiciary is the very much important lecture of the Constitution. Mere enumeration of a number of provisions in a Constitution
without any provision for their support will not serve any useful purpose. Indeed, the
every existence of a right depends upon the remedy for its enforcement. For this
purpose on independent and impartial judiciary with a power of judicial review has
been established under the constitution of India. It is the custodian of the rights of
citizens. Besides, in a federal Constitution, It plays no other input and significant role
of determining limits of power of the Centre and States. An independent judiciary
having the power of judicial review is prominent feature of our Constitution. The
importance of Judiciary possessing unimpeachable independence has to be
particularly emphasized for the state like India in which it has constitutionally enacted
bill of rights. In such states, a supreme tribunal interpreting the Constitution between
the state and executive and the citizen or individual assumes a greater importance.
Thus, having postulate impartial and independent judiciary on an indispensable
requirement of a bare society, government by the rule of law.

Researcher would examine briefly how our Constitution has taken measures towards
the creation of such judiciary. However, the true nature and function of the courts has
since along been a matter of debate in all countries governed by written Constitution.

Austianian jurisprudence gives narrow opinion of the judicial function. According to
Austin law as a command of sovereign and his sovereignty concept is indivisible and
absolute in hand of political sovereign, so only the legislature could make law. The
function of the courts was merely to declare the law or to interpret the statutory law.
On the other side, realist movements in United States, which concentrates on
decisions of law courts regards and contend that law is. For realist jurists, judges are
the law makers. The entire common law is the creation of the English Courts but is
posited on the myth that the judges merely found the law. Thus, the English judges
not only made the law but also changed it to suit entirely new conditions created by
the industrial revolution.\textsuperscript{47} Thus, the legal system of a country at a given time is not
the creation of one man or a single day; it represents the cumulative fruit of the
endeavour experience, thoughtful planning and patent labour of a large number of
people through generations. Therefore, India has known history of over 5000 years,
and there were the Hindu and the Muslim periods before the British period, each of in
ancient periods has a its own legal system. There is no historical evidence of judicial

\textsuperscript{47} K.S. Rathore, Historical Overview of Judicial Activism in India, Vol.34(2)2012 Indian Bar Review, 175
system of Pre-Vedic India. At that time, Dharma was the law. Morality was the power, ground and reason of law (Dharma). 48

Though the concept of citizen’s welfare is considered as an English invention by some scholars, Britain is called mother of all welfare states, yet it cannot be said that ancient India was also a welfare state. The concept of “Ram Rajya” and Arthashastra of Kantilya clear reflects the seeds of welfare states in ancient India. In-spite of both these philosophies, India has its own independent history of the development of citizen’s welfare which can be traced from ancient times. Certain values, tradition and the concepts in respect of the welfare of citizens had their genesis in India and on the basis of such genesis the edifice of the modern welfare concept in India has been erected. From the very beginning, it is on old notion in India that the state exists for the preservation and promotion of the welfare of the subjects. Even in the very ancient period the human being was left frees and provided rights as a mean to his development. In Rigveda, there are civil rights (nowdays called fundamental rights) that of Tana (body), and Skirdhi (dwelling peace) and Jibni (Life), Mahabharta is also tells about the importance of the freedom of individual’s civil liberties vaicika mantra, “May the members of our society have similar goals. May our heart be full of love for each other and may we be limited in one thought. May the individual efforts be put together to achieve our common goal”. 49

Therefore, Law of Dharma is deemed to be the highest ideal of human beings life. It deals with the virtuous conduct of man, his duties and relationship with religion. In India, it is very closest to the natural law and finds its ultimate law and finds its ultimate object is the welfare of society. It includes everything that is right, just and moral. It originates from the Vedas and it is a time immemorial concept. 50

According to Edmund Burke, “A Constitution is an over growing thing and is perpetually continuous as it embodies the spirit of the nation. It is enriched at present the past influence and it makes the future richer than present.” 51

48 Ibid.
49 Vaicika Mantras, Rigveda Mantra 10, Hymn Mantra-4
As per Justice Holmes in *Abrams v. United States*. A constitution is not an end in itself, rather a means for ordering the life of nation. The generation of yesterday is not to paralyze today, it seems best to permit each generation to take care of itself.

In the case of *D.S. Nakara v. Union of India* it was held by the apex court that the principle object of socialist or welfare state is to eliminate inequality in income, status and standards of life.

The founding fathers of the constitution of India incorporated many fundamental rights in the part-III of the constitution because they knew that the rights and liberties of the individuals are pre-requisites of their welfare. These areas necessarily to be protected by the state because these rights are not merely vital for the development and for his personality but also for ensuring dignity of the individuals. They were not unaware to the legal history of welfare state that the rights and liberties which are the essential conditions of welfare of the individuals can be protected through laws. Thus, in order to protect the rights of the citizens they introduce the principles of various checks and balances with the desideratum that no organ of the state may get absolute powers by making an amendment in the provisions in the constitution. They divided the functions and powers into three organ of State: First one, The legislature to make the laws in the interest of the people, second one organ of the state is Executive to the implement the laws made by the legislature and third one is judiciary to enforce these laws by interpreting provisions of these laws. All the three organs of the state constituted and envisaged by our National Charter are obliged to perform within their respective defined and earmarked areas, ambit or zones. The judiciary has been given the place of pride in our constitution because the constitution as a paramount law of the land costs a sacred to protect the fundamental rights has been provided to them through part III of the constitution. The whale pyramid of the judiciary has been established under the constitution. In order to protect the rights of the citizens the philosophy of ‘rule of law’ has also been given a place in the constitution. Article 14 deals with the provision that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India and provides protection against discrimination on grounds of religion, race, caste, sex or place of

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52 250 US 66
53 Dr. Ambedkar, ‘Constituent Assembly Debates, India vol. x at 296-297.
54 AIR 1983 SC 130
birth”. The reason behind this philosophy is that the equality and liberty are the
important pillars of the welfare state. Rule of law is a basic feature of the India
Constitution. The transition from feudal era to the industrial era and the declaration by
the government of the ‘welfare state’ as its goal, keeping in view the Directive
Principle of State Policy as embodied in the Constitution, made it necessary to
introduce various reforms. Therefore, the Constitution of India is amended several
times to meets the requirements of the growing nation and its changing needs, during
the past sixty eights years.\(^{55}\)

In the case of *Keshav Singh*\(^{56}\) held that all democratic country governed by a written
constitution, and the constitution is supreme and sovereign in that countries.
Legislators, Ministers, and Judges all take oath of allegiance to the constitution, for it
is its relevant provisions that they derive their authority and jurisdiction and it is so to
these provisions of the constitution that they owe allegiance. We can say they all are
subordinate to the Constitution. Therefore, there can be no doubt that the sovereignty
which can be claimed by the parliament in England cannot be claimed by any
legislature in India in literal absolute sense. The apex court further advised that if
parliament or state legislature made any law prescribing its powers, privileges and
immunities, they would be subjected to Art. 13 of the constitution of India, which
mandates that any law made in contravention of the fundamental rights shall, to the
extent of such contravention, be void. Further when there is a conflict between powers
of the legislature and Fundamental rights, the latter would prevail.\(^{57}\)

In the case of *Bhanwarla v. Rajasthan State Road Transport Corporation*\(^{58}\), Justice
Lodha observed that “the ‘Durante bene placito’ ruled the world with waves of 'laissez
faire' up to 19th century, Political as well as Industrial revolutions brought new tides
of workers emancipation from exploitation resulting in new concepts of 'status',
'security of service', 'releases from bonded labour'. Not to talk of Karl Marx or Lenin,
even Abraham Lincoln and Roosevelt pleaded for 'Dignity of Labour', 'Equality', Due
process of law, and that resulted in New Deal Legislations, Inspired by Mahatma

\(^{55}\) Supra note 51 at 362.
\(^{56}\) AIR 1965 All. 349
\(^{57}\) A. Lakshminath & K. Sita Manikyam, “Legislative Privileges and Judicial Power: Constitutional
Perspective”, at 49, Journal of Constitutional and Parliamentary Studies, vol. 43 Nos. 1-2, January-
June (2009)
\(^{58}\) (1985) 1 LLN 391(Raj. HC) also available at: Docid # IndiaLawLib/1079481 (visited on July 20, 2017).
Gandhi, the Founding fathers of the great Indian constitution brought the dream of 'Ravi' true when preamble of the 'Socialist Republic of India' embodied 'Equality' of status' and 'opportunity'. Justice, 'social, economic and political' targets 'followed' by Directives and fundamental rights of equality in Article 14 and equal opportunity in services in Article 16. Destruction of law and Justice bring about the destruction of society. The protection of law and justice has a protective influence. Therefore, law and justice should not be destroyed.

In same case Chief Justice Mukharji, has described law in a very interesting manner. He says,

"In the garden or forest of jurisprudence, there are many fruits. Law is divine. Law is natural. Law is custom. Law is contract. Law is command of the human sovereign. Law is a social fact. Law is a union of primary and secondary rules. Law is prediction. Law is experience. Law is an unrealizable ideal. Law is a practical and realizable compromise. Law is a balance of social individual interests. Law is morality. Law is what the Judges say from : the Bench. Law is tradition. "The law is different from 'Laws' Confusing as all this may appear, and which confusion led someone to say that 'Law is an Ass", there is perhaps a strain of fusion in the midst of all this confusion. If the law is like the beast of burden, it is because law has to bear many burdens, of human life inaction, old and new predictable and unpredictable. There are two extreme propositions which define the concept of law: while the one pleads its coercive character, the other lays stress on the social acceptance of law. The coercive character of law imports two ideas (i) the source of authority and the various kinds of sanctions. Austin & Kelsen emphasize the role of coercion in Laws. Austin defines law as (he command of the highest legislative power called the sovereign. Kelsen says a theory of law must deal with law as it is and not as it ought to be. The theory of law must be free from ethics, sociology, history or political philosophy. In other words, it must be pure. Thus both the jurists exclude the element of morality from the definition of law. Prof. Hart emphatically rejects the command theory of law. He observes that such a command cannot be given by a man with a loaded gun and law surely is not the gunman situation. The other extreme view draws our attention to the theories of Savigny and Enrich. They emphasis on the actual observance by the society and the growth of customs as the conclusive elements of law. According to them, the law may receive authority from the sovereign but it is not created by him.

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The Hindu concept of law does not conform to the Austinian view. According to Austins' philosophy most of the rules of Hindu law could be terms as nothing more than positive morality and not the command of the sovereign. The great Rishis who attained the spiritual heights delivered the Hindu law. The code of Manu Yagnavalkya and Narad were obeyed by the people like the command of the sovereign. The main philosophy behind the observance of the rules of Hindu Law was to attain ultimate object i.e., salvation. It is this moral aspect which prevailed all through the rule of law in India. In the early period, the theory was that Kings did not make laws but they merely enforced them. Even when any King made law, it was supposed to be in consonance with the divine principles as laid down in scriptures. Prayschitta or penance as a mode of expiation was fully recognised, which shows the heavily loaded moral perspective of the concept of law.”

Finally the court held that the discretion of the Government is exercised bonafidely and upon taking into account the relevant and material considerations without leaving any vital material out of consideration, the discretion of the Government is not amenable to judicial review. But, a mala fide action or action passed on extraneous consideration can always be challenged. It is, therefore, very obvious that the scope of judicial review in cases of refusal to make a reference is very limited and this Court cannot compel the Government to make a reference simply because the Industrial Dispute has been raised and refused. Again, this Court cannot substitute its only discretion in the place of the Government to decide whether it is expedient or inexpedient to refer an industrial dispute.

it was held in case of State of Rajasthan v. Mst. Vidhyawati and Another\textsuperscript{59}, that under the Constitution of India we have established a Welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortuous acts of its employees committed in the course of their employment as such.

\textsuperscript{59} AIR 1962 SC 933
In *Smt. Nilabati Behera aieas Lalita Behera v. State of Orissa and others*\(^60\), it was held that the concept of sovereign immunity is not applicable to the cases of violation of fundamental rights. It was held: “A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy”.

It was held in case of *Anokhi Devi v. Union of India*\(^61\) that with the advance of industrialization the laissez faire theory was gradually replaced by the theory of the welfare State, and in legal parlance there was a corresponding shift from positivism to sociological jurisprudence.

In case of *Government of Kerala v. Jollysaimon and Others*,\(^62\) It was held that with the advance of industrialization the Laissez-Faire Theory was gradually replaced by the theory of the Welfare State, and in the legal parlance there was a corresponding shift from positivism to sociological jurisprudence. It was realized that there are certain activities in industrial society which though lawful are so fraught with possibility of harm to others that the law has to treat them as allowable only on the term of insuring the public against injury irrespective of who was at fault. The principle of strict liability (also called no-fault liability) was thus evolved, which was an exception to the general principle in the law of torts that there is no liability without fault.

### 4.6 Place of Natural Law in English, American & Indian Legal Systems:

The principles of natural law have been incorporated in most of the legal systems of the world. Notably in England, America and India, the natural law philosophy

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\(^{60}\) AIR 1993 SC 1960

\(^{61}\) (2012) AIR(Raj) 46, Union of India v. Prabhakaran Vijaya Kumar and ors. (2008) AIR(SCW) 4165,

\(^{62}\) (2013) AIR(Kerala) 152.
occupies a dominant place in the justice delivery system. A brief account of the natural law as embodied in the legal systems of England, America and India is given below.

1. **Natural Law in England:** In England, natural law never flourished in the form of theory but its principles found in the form of body of law. The judicial control over administrative tribunals, recognition of foreign judgements, quasi contract are based on natural law principles. Justice, Equity and Good Conscience principles which have exercised a great formative influence on the English law is founded on ‘natural law’ ideas.

2. **Natural Law in America:** In America the natural law theories have great influence on legal theory. In America, the power of legislation is limited by the principles of natural justice and the Supreme Court has the power of judicial review of the legislation. The jurists Locke and Rousseau ideas have great influence on “the Declaration of Independence”. According to Locke and Rousseau, “the right to life, liberty and the pursuit of happiness are inalienable rights of men”.

3. **Natural Law in India:** The most of the legal principles and concepts are borrowed from England and many of them are based on ‘natural law principles’. Like Quasi contract, reasonableness in tort, Justice, Equity and Good Conscience. Therefore, Natural law theory argues of natural rights which is inherent in every human being by virtue of his personality and is inalienable and imperceptible. Natural law there has been a gradual transition to natural rights. The idea of natural rights has its origin in the natural law and natural justice speaks of natural rights. In the 20th century that doctrine of natural rights had been recognised and had been inserted into the sphere of Constitutional law in the forms of Bill of Rights. In England, where there is unwritten Constitution, the natural rights are called by different nomenclature as ‘civil rights’, civil liberties freedom or individual liberties. When natural rights are guaranteed and entrenched by a written Constitution, they become fundamental rights because they are guaranteed by a fundamental law. In the Indian Constitution part III is devoted to fundamental rights and hence accounts for the natural law elements in the Constitution. It is also noted their, that is not a part III alone but also the Doctrine of

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63 Supra note 24 at 97.
64 Id.
Basic Structure which is the light bearer of natural law in the Indian Constitution. Philosophers and jurists do not log behind the ologians, in their endeavour to search for a law which is higher than positive law, and they developed the theory of natural law. Natural law theory led to the natural rights, a theory most closely associated with the modern human rights. Locke and Rousseau who with the help of the concept of ‘social Contract’ developed philosophy that right to life, liberty and property were inherent rights of human beings.\(^{65}\)

The term ‘natural justice’ was until 18\(^{th}\) century often used interchangeably with the expression on ‘natural law’ and other synonymous phrase, but has in recent years acquired a restricted meaning and has come to be used as compendious phrase to describe certain rules of judicial procedure. The natural justice which are in modern times usually expressed in following form- (a) no man shall be judge in his own cause, and (b) both sides shall be heard or audi alteram partem. Thus when we see the relation between natural justice and natural law: - “Natural Justice i.e. the natural sense of what is right and wrong. From the investigation authorities it is clear that the practice of confining the expression ‘natural justice’ to the two procedural principles mentioned above is the comparatively recent origin. The expression was in the past used interchangeably with the expressions, “natural law”, ‘natural equity’, the law of God the other similar expressions. Thus in one case, \emph{R. v. Chancellor of Cambridge},

the expression of ‘natural justice’ was used in the pleadings and expression of ‘law of nature’ in the note judgement, in relation to the same principles. It is still occasionally used as a synonym for ‘natural law’. Therefore, it is describe to examine the relationship of natural justice with natural law by whatever name it has from time to time been called. Jus Naturale or natural law was originally the Stoic philosophical conception of universal ideal of good conduct upon which all law should be founded and which as some asserted ought not to be overridden by other law however made. The classical jurists were indistinct in their conception about the matter but many of them frequently refer to jus Naturale in the sense of law based on natural reason. Sir Henry Maine says, “the law of nation so far as it is founded on the principles of natural law is equally binding in every age and upon all mankind.” The medieval civil

and canon lawyers also relied on a conception of natural law and when confronted with a case for which there was no precedents or upon which their law was silent, purported to resort to the law of nature which they deemed to be fundamental to all law. The words ‘natural justice’ were here clearly not used in their restricted modern sense but were synonymous with natural law, in the same word ‘equity’ did not refer to technical equity. In other words natural justice and equity here meant the same thing i.e. natural law.66

In a democracy the people are supreme. The government in a democracy is handled by the elected majority, who are dignified agents of the sovereign people and they have necessarily to conform to the sole will of the sovereign people. They perform dual functions constituent as well as legislative. While the discharging constituent functions the representatives of the people to move with great skill, broad-mindedness & moral force to frame a Constitution, having capacity the perennial harmony and ever growing good to all shades of the people. The amending process of the Constitution requires rather more alertness and conscious deliberation to avoid the vices of discrimination and unbalanced decisions, it must not violative of the will of the sovereign of people. Guidance by reason and avoidness of political mood and sentiments should be their normal course of action. The Constitution original or amended must have dynamism, adaptiveness, and moral force. A good Constitution must possess some fundamental limitations and restrictions on the powers to govern and legislate. The limitations are direct or indirect, express or implied. A good Constitution must also provide for the power of judicial review over the Constitutional amendments and Legislative Acts. The power of judicial review must vest in the court which is the only competent, effective, impartial and authoritative organ to check the violation of the Constitution rights affecting the Union, the States and the peoples. Through judicial review, the court expresses the voice of the nation and brings about the atmosphere of Constitutional morality and harmony. In a democracy where the popular sovereignty prevails the Constitutional law is the supreme law and all the legislative laws are to be enacted in conformity with the Constitutional law. The practical purpose is that the court would refuse to enforce the law which is repugnant to the Constitution and it has also power to declare such law null and void. In the process of Constitutional interpretation, the court expounds the

social and economic philosophy of the country and in this way, court maintains the
equality, liberty, and freedom of the people. The court functions as a nation-builder
and also a balance wheel of the entire Constitutional system. The fundamental object
of judicial review is that the law should be the generator of peace, happiness and
harmony. The ruler has no authority to inflict pain and torture on the ruled and the
legislature has no right to usurp the basic right of freedom and liberty of the people.
Thus, judicial review protects the fundamental rights and liberties of the people and
helps in the mitigation and avoidance of infringement of such rights.\(^\text{67}\)

Dr. Allen pointed that, in the 20\(^{th}\) century natural law is value loaded, value oriented
and value conscious and is relativistic and not absolute changing and varying and not
permanent everlasting in character. It represents revolt against the determinism of
historical school on the one hand, and imperative/ analytical school on the other hand.
In the 20th century the revival of natural rights has been recognised and inserted into
the sphere of Constitutional law in the form of Bill of Rights.\(^\text{68}\) The concept of natural
law has been taken in several forms. The idea began with the ancient ‘Greeks’
conception of a universe governed in every particular by an eternal, immutable law
and in their distinction between what is just by nature and just by convention. The
Stoic argued that the universe is governed by reason, or rational principles. Christian
philosophers readily adapted Stoic natural law theory, identifying natural law with the
law of God. With the secularization of society resulting from the renaissance and
reformation, natural law theory found a new basis in human reason. During 19\(^{th}\)
century, natural law lost influence because utilitarianism Benthamism and positivism
and historical school of jurisprudence became dominant. In the 20\(^{th}\) century, natural
law theory has received new attention, partly in reaction to the rise of totalitarianism
and increased the interest in human rights throughout the world.\(^\text{69}\)

In modern Indian Legal Theory the principles of new natural law were implanted
from great Britain along with its positivistic law imposed on this country especially
during the end of 19\(^{th}\) century. The Introduction of the English doctrine of equity,
justice and good conscience, the concept of rule of law, and the principles of

\(^{67}\) Justice Dr. Arijit Pasayat, Justice C.K. Thakker and Dr. Chakradhar, Tha’s Judicial Review of
Legislative Acts, 1 & 36(LexisNexis Butterworths Wadhwa, Nagpur, 2009).

\(^{68}\) Supra note 19 at 22.

\(^{69}\) Rahul Deo, Contribution of Natural Law to Legal Thought, available at:
processual justice from the main plank of new western natural law in India. Independence for Indian equity, justice and good conscience meant not merely English common law but English statutory law as well. In the post-independence era India has rejected the English Statutory law a relic of colonial Jurisprudence base on English conscience but the English processual system has become an integral part of the Indian Jurisprudence. India has now evolved its own natural law conditional by its indigenous need and ethos. As justice Krishan Iyer observed, “Free India has to find its conscience in our rugged realities and no more in alien legal thoughts. Thus, the constitution of India enshrines a broad spectrum of natural law philosophy reflecting the spirit of the ancient and modern procedural and substantive natural law.  

In the Constitution of India, nowhere the expression of natural justice is used. However, golden thread of natural justice sagaciously passed through the body of Indian Constitution. Preamble of the Indian Constitution includes the words, ‘Justice Social, Economic and Political’ ‘Liberty of thought, belief, worship and equality of status and of opportunity which not only ensure fairness in social and economical activities of the people but also acts as shield to individuals liberty against the arbitrary action which is basis for principles of natural justice. Constitution of India’s provisions relating to the ‘principles of natural justice are under Articles 14, 19, 21, 22, 32, 226.

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71 Article-14 Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. ( Bare Act of the Constitution of India).
72 Article19. Protection of certain rights regarding freedom of speech etc
(1) All citizens shall have the right
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
© to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) omitted
(g) to practise any profession, or to carry on any occupation, trade or business
(2) Nothing in sub clause (a) of clause ( 1 ) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence
(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause
(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause.

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

(Bare Act of the Constitution of India)

73 Article 21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law. (Bare Act of the Constitution of India)

74 Article 22. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention;

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4).

Right against Exploitation. (Bare Act of the Constitution of India)

75 Art. 32. Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
1. Article 14 manifests in the form of the following propositions:

1. A law conferring unguided and unrestricted power on an authority is bad for being arbitrary and discriminatory.

2. Article 14 illegalizes discrimination in the actual exercise of any discriminatory power. In the case of *Ram Krishan Dalmia v. Justice Tendolkar*, it was held that class legislation classification is prohibited under Article 14, only the reasonable classification is permitted under Article 14.

3. Article 14 strikes at arbitrariness in administrative action and ensures fairness and equality of treatment. Example of few judgments relevant to this Article such as: *in Delhi Transport Corp. v. DTC Mazdoor Union. Maneka Gandhi v. Union of India. Central Inland Water Transport Corporation Ltd. v. Brojo Nath etc.* In welfare state like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace and with rapid expansion of state liability and civic needs of the people, conferment of administrative discretion became need of an hour. With the expansion

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(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution. (Bare Act of the Constitution of India)

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(76) Art. 226. Power of High Courts to issue certain writs

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32. (Bare Act of the Constitution of India)

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77 AIR 1958 SC 538
in scope of discretionary power of administrative authority the regulatory measures are to be equipped with sufficient power to prevent abuse of discretion.

In this regard Constitutional rules of law country like India, component of natural law, i.e., fair play in action must be found and re-proclaimed by judiciary to keep intact the supremacy of rule of law in India. In maintaining the rule of law, “the rules of natural justice can operate only in areas not covered by law validly made”, such old judicial decisions of apex court and other high courts must be reconsidered and correct view would be declaring principles of natural justice necessary corollary of law, they must operate in presence of and even in contravention to the established law where the interest of justice demands.\(^78\)

2. The principle of natural justice is incorporated under Article 39(A) in order to provide protection to the indigent person and provide equal justice and free aid.

3. Special protection given to the backward classes under Article 15(4) for their upliftment.

4. The principle of natural justice have been incorporated under Article 31. According to Article 31, no civil servant can be dismissed without giving reasonable opportunity to show cause against he action proposed to be taken against him.

5. Doctrine of Basic Structure Theory signifies the principle of natural justice.

6. Rule of Law, Right to Equality, Right to Freedom, Right to Constitutional Remedies also signifies the principle of natural law.

7. Workers participation in management of industries under Article of 43(A).

In *E.P. Royappa v. State of Tamil Nadu*,\(^79\) the Supreme Court declared that equality is dynamic concept and is against arbitrariness.

### 4.7 Rise of Welfare State: Role of Judiciary

A welfare state intends to provide essential conditions for good living, for this the welfare concept emphasizes upon the right of the state to intervene in all such activities as might contribute in bringing about well-being of the citizens. The state provides for legislation for social and economic security, government participation in business and commerce in a way that the common man is benefited. The states exercise its organised power to ensure and to promote the common good of all the

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\(^79\) AIR 1974 SC535
citizens. “A welfare state is one where government assumes responsibility for minimum standards of living for every person.” It is the primary function of the state to protect and to promote the basic necessities (Roti, Kapra or Makan) and living standard of the individual so that he may enjoy his life in a respectful manner. The welfare state acts, first to relieve the needy by palliative action, second to seek causes and producer cares so that the nearly once rescued may be able to stand on their own feet and third, to prevent need from arising.\textsuperscript{10} i.e. a welfare state not only relieves and cares the needy and weaker sections but also tries to strike at the very roots of the problem. In such a way it checks the need from arising again and again. To remove the problem welfare measures are taken for weaker sections of the society such as physical, handicapped, economically, socially backward classes and to uplift the living standard of these classes.\textsuperscript{80}

In modern age nature of law and its functions can not be confined to one particular concept, idea or philosophy or view point. Law is mixture of ideas evolved to resolve social conflicts in the society on the matrix of set standards of values, ideals and goals as evolved from time to time by philosophers, thinkers and jurists. Law has to be seen as an integral part of the entire fields of society and its sciences. It is not to be seen in fashion with blind adherence to the letter of the law in technical and procedural sense. Law is to be applied purposefully so that discrepancy between the law in the books and the law is action is altogether removed law is the applied forum of justice and justice can not act in vacuum. Without proper knowledge and handling social, economical and political problems of the community, both the law and justice are handicapped and do not serve the purpose. To see law fulfilling its socio-economic pertaining to fundamental human freedoms in USA decades before the US supreme court was persuaded that if attack was made on the constitutionality of a statute (as being an unreasonable interference with life, liberty, equality etc.) then the advocate concern should be permitted to introduce evidence from social science. Due to that reason the role of judiciary in India has been expounding the philosophy as enshrined in Directive Principles of state policy and fulfilling the cause of justice through the weapon of public interest litigation.

The most important function of the state in order to promote the citizens welfare is to provide social justice. The state has to create the conditions which assure social justice by removing social inequalities, social justice means material, culture, spiritual and all basic requirements of man must be fulfilled. The state should provide equal opportunities to the citizens. There should be no discrimination on the basis of external grounds. The concept of social justice has been interpreted by justice Krishna Ayyar as follows:- “Social justice is a generous concept which assures every citizen to a fair deal. Any remedial injury, injustice, inadequacy or disability suffered by a member, for which he is not directly responsible falls within the liberal connotation of social injustice.”

It is the duty of the state to provide all basic services to the citizens without making any discrimination among them. As it has G. Austin observes that “the real satisfaction of the fundamental needs of the common man is the part of social justice.” The state should assure social justice to the citizens, it can provide social justice through enactment of compensatory laws, insurance laws, maternity laws, industrial laws, security laws.

The function relating to social justice and social security prove a high degree of protection of the citizen’s life. To achieve these objectives the constitution of India attempted to contain various principles in consonance to the principles of welfare state. The same position is in India, the Indian constitution provides in Art. 38 that “The state shall strive to promote the welfare of the people by securing and protecting justice in social, economic and political…. ” Article 14 of the Indian Constitution recognizes the Right to Equality. Articles 15, 16, 17, 18 prohibits discrimination and untouchability, Article 19 provides essential freedom to all the citizens with reasonable restricting to maintain the citizen’s welfare, Articles 21 provides for right to life and personal liberty which can be denied only by procedure established by law, the procedure must be reasonable, fair and it is not to be arbitrary. Under the same article, a creative role has been played by the judiciary as it has extended the scope of Article 21 to include right to speedy trial, free legal services, bail to travel abroad, to have clean environment, to medical assistance and the horizons of this extension seem

limitless. In this way, social justice has become an important aspect of promotion of citizen’s welfare.

“It is one of the important function of the state to ensure that all should equally enjoy their rights and to ensure the conditions without which man can not develop his powers inherent in him. A state should recognise only those rights which are relative to common good. Laski observes that “rights are the conditions of social life without which no man can seek to be himself at his best.”

In this context that we are to assess the meaning and functions of the three organs namely judiciary, executive and legislature. In our country, conventionally legislature has been assigned the function of legislating or making of laws. The executive provides the machinery to implement those legislations, judiciary acts as watchdog to oversee the implementations. It corrects the misdeeds of both legislature and executive.

Being an organ of society, a state has to provide an atmosphere in which everyone gets an opportunity for the development of his facilities so that he may develop his personality according to his own ability.

It is the function of the state to ensure order and justice in the society by checking disorder. The state takes step towards the well-being and up-liftment of the citizens. The word “order” here does not mean only to establish peace and order, but the modern interpretation of the maintenance of order is to protect the weak against the strong. It is an essential function of the state, the government should make its policies in a form in which all the citizens may have equal opportunities to grow. The state should provide basic facilities in the field of health and decent living.

While Parliament often tried to assent the supremacy of the state and directive principles over fundamental rights, Supreme Court upheld the right of the individual as enshrined in the Constitution by given appropriate judgements.

Justice Mathew observed that “By adopting in 20th century revivalist approach to the natural law theory, the Supreme court held that the fundamental rights are not absolute but they are relative in nature and variable in order to build a social order”.

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85 Available in Civil Service Chornicile Special, (Vol. May 2017), 105

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Justice Nariman expressly overruled the notorious judgment of the Supreme Court in *ADM Jabalpur v. Shivakant Shukla*. Recall that in ADM Jabalpur, the Court had upheld the suspension of *habeas corpus* during a proclamation of Emergency, on the basis that the source of rights was confined to the four corners of the Constitution itself and given that the Constitution itself authorized their suspension in an Emergency, there was no basis on which detainees could move Court and claim any rights.  

In *Puttaswamy case*, a majority overruled ADM Jabalpur on this specific point, and held that there were certain rights that could be called “natural rights”, inhering in people simply by virtue of their being human. The Constitution did not *create* such rights, but only *recognised* them. Justice Chandrachud writing for the plurality, observed that “privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights.” In Puttaswamy case the two important theoretical propositions made about constitutional law. The first was the doctrine of living constitutionalism, and the second was the endorsement of natural rights.  

4.7.1. Judicial Activism: Role in Welfare State  

1.1 Legitimacy of Judicial Activism:

By admitting all above aspects, judicial activism is welcomed not only by the single individual but also by the social activists, civil servants, National Human Right Commission, governments. In 19th century John Austin defined law as a command of sovereign backed by sanction. According to Austin, it is threat behind law that differentiate the law from other species like fashion, custom or habits. He did not make any difference between good and bad law. According to him even bad law is

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86 Popularly known as Fundamental Right Case, AIR 1973 SC 1461.
88 Ibid.
law if it followed three characteristic i.e. (1) it was command. (2) command issued by sovereign (3) was backed by sanction. But Hart criticized Austin’s legal positivism on the ground that if the peon of the bank was asking by the gunman to hand over their cash, is it law. Is a gunman a sovereign? Because the order of gunman is also backed by threats i.e. fear of death. Austin defines the sovereign as a authority who is not subordinate to any other person and required order passed by sovereign is obeyed by everyone. At a particular time the gunman orders to peon to hand over the cash, he is obeyed by everyone who is under a threat but he is not required to obey. The gunmen have a power but no authority. However, there is difference between the gunman and political sovereign, the gunman is not considered as a lawful authority. Gunman command is obeyed because of fear of death. According to Hart there is difference between having an obligation to obey and being obliged to obey. Further Hart says that sovereign is lawful authority. One obey the order of lawful authority not only because he obliged to obey but person feels under an obligation to do so. It is the ‘having an obligation to act’ that arise only from the lawful orders of the sovereign. A sovereign appointed and elected by the people is a legitimate authority. For example, the President of India has to act on the aid and advice of the Council of Minister.

The same opinion was given by the Nehru. The court interpreted Nehru’s words ‘could point out to us if we go wrong here and there, but in matter of policy making the parliament was the supreme. Further, it was stated that if the court had power to interpret the law, the parliament had power to change it. Professor Lino Graglia: “By judicial activism mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit.”

In other words, the Court is engaging in judicial activism when it reaches beyond the clear mandates of the Constitution to restrict the handwork of the other government branches. The idea of judicial activism has been around far longer than the term. Before the twentieth century, legal scholars squared off over the concept of judicial legislation, that is, judges making positive law. “Where Blackstone favored judicial legislation as the strongest characteristic of the common law, Bentham regarded this as a usurpation of the legislative function and a charade or ‘miserable sophistry.’” Bentham, in turn, taught John Austin, who rejected Bentham’s view and defended a form of judicial legislation in his famous lectures on jurisprudence. judicial Activism
is not a result of general development of judicial procedure. It is an essential aspect of the dynamics, derivatives and independent findings of the courts. It is a specific judicial interest about the issues. Judicial Activism does not mean governance by the judiciary. Judicial Activism must also function within the limits of judicial process. Within those limits it performs the function of stigmatizing, as well as legitimizing, the actions of the other bodies of the Government- more often legitimizing. The judiciary is having certain limitation according to statutes which are framed by the legislature. It becomes strong only when people repose faith in it. Such faith constitutes the legitimacy of the Court and of judicial activism. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. Such inarticulate and diffused consensus about the impartiality and integrity of the Judiciary is the source of the Court’s legitimacy. It is an essential aspect of the dynamics of a constitutional court.

Hence, the debate on the judicial activism has been around since the days of Blackstone and Bentham. The traditional role of the judge has always been considered as that of an impartial arbitrator who hears the argument of both parties and renders justice without interfering in the debate of the matter. The changing attitude of the Supreme Court of India in its journey from Supreme Court of India to Supreme Court for Indians which shed their character as upholders of the established system legitimized the expending role of judiciary from mere arbitrator to a catalyst of social change and full fill the vacuum created due to passiveness of other organs of the government. The landscape of recent verdicts of Supreme Court clearly evident that it not only makes law in the sense of the realist jurisprudence but actually has started legislating exactly as the legislature legislates. In this background the paper intended to insights into the metamorphosis of judicial activism in India. The realist school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judge made the law. The chief exponent this school were Jerome Frank, Justice Holmes, Cardozo and Llewellyn asserted that the judges made law, though interstitially. The examples of making law in the sense of realistic school of jurisprudence are the expending the meaning of the word personal

liberty, procedure established by law under Article 21\textsuperscript{91}, freedom of speech under Article 19 of the Constitution and the basic structure doctrine etc. But whatever the Supreme Court is doing by issuing directions to the government on policy matters and creating positive rights is not judicial law making in the realistic sense of jurisprudence.\textsuperscript{92}

Thus it is the duty of the state to create a healthy atmosphere where the citizen have opportunities to develop their personality and inner faculties in other words their over all well being. A welfare state is committed to the attainment of a substantial degree of social, economic and political equalities because equity is an important aspects of liberty which plays an important role in making a man self reliant. Liberty is the pre-condition of welfare, liberty and welfare are complementary to each other and are the means to the same end-creation such conditions and opportunities for individual as enable them to become self-directing, responsible persons. In the words of Elliot Dodds, “Welfare is actually a form of liberty in as much as it liberates men from social conditions which narrow their choices and thwart their self-development as truly as any governmental or person coercion.\textsuperscript{93}

Liberty and welfare are thus closely related and both serve as instruments for the complete and balanced growth of persons. Since the state came into being under the theory of social contract to protect the inalienable rights of the people. The state is a mean to an end and it is not an end in itself and being means, it has to perform certain functions. Thus, it has to promote the prosperity and well-being of the people. It brings all the citizens of the within its scope. In the words of R. M. Titumuss “A welfare state is regarded as a proper function or even obligation of a government to wards off distress and strain not only among the poor but among the citizens of society.”\textsuperscript{94}

\textsuperscript{91} Article 21 Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law."


\textsuperscript{93} Elliot Dodds, Liberty and Welfare, 17(George Watson Ed. 1957).

\textsuperscript{94} V.K. Malhotra, Welfare State and Supreme Court in India, 25(Deep and Deep Publications, New Delhi, Ed. 1986).
Judicial activism in the words of Black Law’s Dictionary\textsuperscript{95} is the philosophy of judicial decision making whereby the judges are allow for their personal views about public policy, among other factors to guide their decisions.”

In India judiciary is independent and empowered under the Constitution with certain inherent powers to maintain and promote justice in a welfare state.\textsuperscript{96}

Article 13, 32, 141\textsuperscript{97}, and 142\textsuperscript{98} are of considerable importance to the judicial activism. The Public Interest Litigation may be taken to mean a legal action in a court of law for the enforcement of the public interest in which the public or community have some interest because it will affect their legal right or liabilities. The Public Interest Litigation object to provide an effective remedy to the poor, illiterate and weak persons to enforce their rights and interest. From the Preamble of the Indian Constitution it becomes clear that the Constitution emphasis on the Equality of status and Equal opportunity to all person before law. Article’s 38 and 39A of the Directive Principle of State Policy contained the concept of public interest litigation\textsuperscript{99}.

However, in case of \textit{Maneka Gandhi v. Union of India}, it was held that the most of human rights violation had take place during the emergency period 1975-1977. The Supreme Court of India rejected the narrow interpretation of the Constitutional text as espoused in Gopalan case. In this case the Supreme Court recognised a liberal interpretation to the term ‘liberty’ as defined in Article 21 and provide a wide/broad protection of individual freedom against arbitrary and unreasonable restriction. This paved the way for a dramatic increase in Constitutional protection of fundamental

\textsuperscript{95} Black Law Dictionary, 10th edition, 2014
\textsuperscript{97} Article 141. Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India ( Bare Act of the Constitution of India)
\textsuperscript{98} Article 142 Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe (2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself. ( Bare Act of the Constitution of India)
rights/ human rights in India under the mantle of PIL movement. Article 21 of the Constitution says, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Thus, Maneka Gandhi case is a landmark judgement for the interpretation of Article 21. Before, Maneka Gandhi case decision, Article 21, provide protection against arbitrary action of the executive and not against the legislative actions. But, after the decision of Maneka Gandhi Case, it was extending this protection against legislative action also. Thus, deprived a person from personal liberty has not only stand the test only Article 21. But, it must stand the test of Article 19 and Article 14 of the Constitution of India.

When one speaks of judicial activism, we immediately reminds of the innovation of Public Interest Litigation. Public Interest Litigation and Judicial Activism go hand in hand because Public Interest Litigation itself is the result of Judicial Activism. The innovation of Public Interest Litigation has liberalized the concept of Locus Standi. In Judicial Activism, the court has devised new ways and tools in dealing with the cases. The judicial activism has taken through the suo moto initiative by the courts. There are instances when the court have taken up the cases on their own or on the basis of newspapers.  

4.7.2 Emergence of Judicial Activism:

1. Traditional Legal Theory of Judicial Process: Role of Court

The traditional legal theory of judicial process envisioned a passive role for the courts. It postulates that- (1) the court merely declares the law but did not make it. (2) in any case, if they made the law, they did so only to fill the vacuum left by the statute and only to such extent necessary for the disposal of the matter before them. (3) when the court disposal a matter, and has given its decision, that decision is binding on the parties and the same matter cannot be raised before the same court or a court of concurrent jurisdiction. However, an appeal lies against the decision to the higher court. The decision of higher court is final and binding. Decided matter in appeal cannot be raised before any court. Only a person aggrieved whose right is violated

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can approach to the court and initiate a judicial process. This process is known as a locus standi. This concept was prevalent during the 19th century 101

The spirit behind fundamental rights signifies positivistic perception for such rights being identifiable in cases of transgression by legislatures. The constitution of India is view by the courts as the ground norm to which all the statutes have to conform and the validity of all legislative and executive processes has to be in accordance with the supreme norm. The courts have been treating fundamental rights as binding, obligatory and limitation upon the powers of the legislature and the executive. In India, there has been enough controversy as to whether should remain indifferent to political and social change or should the fundamental rights of the individuals who are unequally placed in society with laws that have tried to uphold the directive principles of state policy. In a series crucial decisions of the Indian Supreme Court involving socio-economic justice have been barely influence by this kind of legal positivism. Let us illustrate a few cases of the Supreme Court involving legal positivism. The court have exercised judicial activism power in following cases on the following issues 102

1. **State of Madras v. Champakam Dorairajan**103: the court struck sown the seat reservations on the basis of religion, race, and caste in State Medical and Engineering College.

2. **Union of India v. Deoki Nandan Aggarwal**104, the apex court held that Court shall decide what the law is and not what it should be.

3. **Raja Bahadur Motilal Poona Mills Ltd v. Tukaram, Piraji Musala**105, the court give a narrow positivistic approach to the word ‘strike’ and decided that the court has no power to legislate.

4. **Re. Kerala Education Bill (1957)**: the Supreme Court propounded the Doctrine of Harmonious Construction to avoid a conflict while enforcing the Directive Principles of the State Policy and the Fundamental Rights. As per this doctrine the court held that there is no inherent conflict between the Directive

101 Supra note 89 at 103-104.
102 ‘Fundamental Rights Vis-à-vis legal Positivism’ Available at: lawdessertation.blogspot.in/2015/09/fundamentalrights-vis-a-vis-legal.html., (visited November 17, 2017).
103 AIR 1951 SC 226
104 AIR 1992 SC 96
105 AIR 1957 SC 73
Principles of the State Policy and the Fundamental Rights and the courts while interpreting a law should attempt to give effect to both as far as possible i.e. should try to harmonize the two as far as possible

5. **Golak Nath Case (1967):** fundamental rights can not be abridged or diluted. The Parliament responded by bringing 25th Amendment Act of the Constitution which inserted Article 31C in Part III. Article 31C contained two provisions:

a. if a law is made to go give effect to Directive Principles of the State Policy in Article 39(b) and Article 39(c) and in the process of law violates article 14, Article 19 or Article 31, then the law should not be declared unconstitutional and merely on this ground.

b. Any such law which contains the declaration that it is to give effect to Directive Principles of the State Policy in Article 39(b) and (c) shall not be questioned in a court of law.

4 **Kesavananda Bharati Case, (1973):** the above amendment was challenged in Kesavananda Bharati case. The Supreme Court upheld that parliament can amend any part of the Constitution, but could not destroy the basic structure of the Constitution. However, the Supreme Court upheld the first provision of the Article 31(C). The court also held that the power of judicial review cannot be taken out by Parliament. Finally, in Kesvananda landmark judgement the apex court rejects the Bentham- Austin Axis separation of law and morals and makes judges the citadel of secularism, democracy and social justice.

5. **Minerva Mill Case (1980):** The 42nd Amendment was added clauses (4) and (5) in Article 368 of the Constitution and inserted that Article 368 is not subject to judicial review. But the court struck the clause (4) and (5) in Article 368 and declared that judicial review is the feature of basic structure and cannot taken away by way of amending Constitution.

2. **Modern Legal Theory of Judicial Process**

It is clear from above mentioned leading judgements, the positivistic approach is often considered too narrow sterile in face of the complex normative structure of contemporary legal systems.\(^\text{106}\)

But the judicial function of the judges was change when the court undertook the function of judicial review. In the judicial review the courts were to secure the individual against the illegality of the government and protect the individual liberty. The traditional approach of legal theory led to change when courts started resolving the conflicts between the liberty and authority and more over when the concept of state underwent a change. With the transition from laissez fair state to welfare state, the nature of judicial review changed and court cannot remain continue passive. Therefore, the role of court had to gradually involve a new paradigm of judicial process for public law and adjudication.\textsuperscript{107}

In reality no human society can exist or survive without law and no nations can continue its existence without a constitution. Generally, every constitution includes and aspirations of the people. It also become essential that every constitution must provide solution to any problems inherited to any problems inherited from the past, those inherent in the present and those likely to emerge in future.

Thus, it is rightly observed “flexibility and responsiveness are the essence of any living social organism. The words and from must sometimes change in order to preserve the spirit. The Constitution of any country is not only legal document but also reflecting the hopes and aspirations of the peoples. Constitution should be a document which carry out the socio-economic and political changes and also bring about the cherished valued of the people.

Every state necessarily has a constitution which is the fundamental law or body of law’s written or unwritten, in which may found\textsuperscript{108}:

1. The form of organisation of the state.
2. The extent of power available with the state and
3. The limitations and manner in which the powers are to be exercised.

The primary function of the judiciary, as on institution, is to laid down the law and redress grievances within the parameters of law enacted by legislature. For the successful functioning of any democracy it is essential that elector representatives behave like true democrats. But when the legislature fails to meet the need and to fulfill the aspirations of the society and the executive fails to assume a dynamic role

\textsuperscript{107} Supra note 89.
\textsuperscript{108} R. G. Gettel, Reading in Political Science, 283(Boston :Massi, 1911).
in the process of social revolution i.e. faithfully and obediently implementing social as well as legislative policies and desisting arbitrarily in performing administrative actions, then, the judiciary must take step actively with open eyes. The courts are compelled to take up the issues, which they have, traditionally, not touched. This dynamism and compulsion is innovation of craftsmanship and creativity.

The lack of concern by the legislature for pressing some problems of the people and the near disappearance of responsible and responsive governance by the executive have compelled the court to enforce the rights of citizen through novel and innovative strategies to meet the needs of the time. The judiciary should have the creative approach in connection with the interpretation of constitutional law guaranteeing human rights and fundamental freedom.

The family courts, lok adalats, administrative tribunals, free legal aid clinic or services, consumer protection redressal forum, etc. setting up with the purpose of promoting justice and provide a speedy relief to aggrieved persons against injustice. The apex court revived people’s faith in judicial system by protecting their human rights through Public Interest Litigation and Judicial Activism. These new developments evince of these days that the principle of Natural law and natural justice principles embody higher value of liberty, equality and justice and three principles have gained importance in the Indian legal system to achieve objects of framers of the Constitution

According to chief justice P.N. Bhagwati, “the creative approach in the interpretation of fundamental rights embodied in the constitution with a view to advance human rights jurisprudence”.109

During the past decades, instances of judicial activism have gained prominence. The activist phase of the Supreme Court became discernible clear after the emergency was revoked in 1977. Infact, after the emergency, judicial activism had a strong moral basis. The Supreme Court came out to protect the right to equality and right to life and personal liberty. In similar vein, judiciary came out to enforced socio-economic rights though they are not considered enforceable by the Constitution.110

This power of the court to check the acts of other organs of the states provides the legitimacy to the concept of judicial activism. The power of judicial review given to higher judiciary under the constitution is the source of judicial activism. The notion of judicial activism has acquired legitimacy in the post emergency era due to various reasons including political changes when people felt that there must be an independent judiciary with the power of judicial review in order to preserve Indian democratic values. Judicial activism would mean an activism by taking recourse to the judicial process leading to judicial pronouncement on different complex issues whereby new approaches emerged to tackle the contemporary problems of society. The main function of Judiciary under a written constitution is to maintain the power of authorities within the constitutional limitations this can be performed by way of judicial review. It has more significance in public law in countries having written constitution like India.\textsuperscript{111}

Justice V.R. Krishna Iyer observed, “Judicial activism is a device to accomplish the cherished goal of social justice. The Constitution projects social justice in the constitutional promise, the performance of which assigns an activist role to the court. This is a radical departure from the conventional judicial function of the British and even American judges.”\textsuperscript{112}

In short, the judicial activism has been a tool and way to check and prevent legislative arbitrariness and executive discretion. The areas in which judiciary has become active are health, child labour, political corruption, environment, education etc. through various cases relating to Bandhua Mukti Morcha case, Bihar Under Trials, Pavement Dwellers, the judiciary has shown its firm commitment to participatory justice, just standards of procedures, immediate access to justice, and preventing arbitrary state action.\textsuperscript{113} Judicial activism’s some instance in India as follow:

In India, judicial review was provided in expressly in the Constitution of India. In \textbf{A.K. Gopalan v. State of Madras}\textsuperscript{114} in this case judicial review was faced by the Supreme Court first time. The Supreme Court gave a narrow meaning the words ‘Procedure established by law under Article 21’ of the Constitution.

\textsuperscript{111} Supra note 92.
\textsuperscript{112} Supra note 51 at 417.
\textsuperscript{113} Supra note 89 at 15.
\textsuperscript{114} AIR 1976 SC 1207.
The decision of Gopalan case was consistent with the intention of the constituent assembly. Nehru did not appreciate that the court could have any role as a law-maker. He shared the England view of the judicial process, which assigned a limited function of applying the existing law to a given situation without bothering about the results of such application. Whether the law was just and whether a particular view of the law produced justice was not the concern of the judiciary. This is what is called the technocratic model of the judicial process.\(^{115}\) \textit{In Kharak Singh v. State of U.P.}\(^ {116}\) in this case the Supreme Court gave a wider meaning to the words ‘personal liberty’ in Article 21 while exercising a power of judicial activism.

In the year Our Constitution is an important document and basic law for all of us but the constitutional authorities have to function effectively and efficiently to realize dreams of the founding fathers of the constitution. When we say that our constitution is a living law, it is usually understood to refer to the doctrines and understandings that the courts have invented, developed and applied to make the constitution works in every situation. The law must go ahead with times and the judiciary has remained alive to this reality. Judicial activism is a means for development and growth of the law and role of judiciary is expected not only in our country but almost in all common law countries.

\subsection*{4.7.3 Public Interest Litigation: an Innovative aspect of Judicial Activism}

PIL has played an important role in the field of judicial activism and the Supreme Court was inspired by the events in comparative legal systems especially in the United States while developing this jurisprudence. Unless there is a judicial activism we cannot keep our constitution as a living law.\(^ {117}\)

The most significant contribution of the judicial activism was the emergence of PIL. The doors of higher court were opened for the poor, neglected persons and deprived sections of the society\(^ {118}\).

\begin{footnotesize}
\begin{itemize}
\item \(^{115}\) Supra note 47 at 178.
\item \(^{116}\) AIR 1963SC1295
\end{itemize}
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Judicial activism became a necessity because change in the moral values of society, change in political scenario and increase in the scope of Public Interest Litigation.\footnote{Dr. Moreshwar Kothawade, Need for Judicial Activism, available at: https://books.google.co.in/books?id=WUA6CgAAQBAJ&printsec=frontcover&dq=judicial+activism&hl=en&sa=X&ved=0ahUKEwj1tiium1mYfYAhXGsY8KHlICgJQ6AwEjIYHv=onpage&q=judicial%20activism&f=false (visited on December 12, 2017).}

The Supreme Court in *Romesh Thapper v. State of Madras*\footnote{Dr. Swapna Deka Mandrinath, Judicial Activism in Post-emergency Era, (Notion Press: Chennai:2015) available at: https://books.google.co.in/books?id=ao5CBgAAQBAJ&printsec=frontcover&dq=judicial+activism&hl=en&sa=X&ved=0ahUKEwi1tiium1mYfYAhXGsY8KHlICgJQ6AwEjIYHv=onpage&q=judicial%20activism&f=false (visited on December 13, 2017).} held that, “the court is constituted as a protector and guardian of the fundamental rights and it cannot consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against violation of such rights”.

Judicial activism happens when the court have power to review the state action. Article 13 read with Article’s 32 and 226 of the Constitution of India gives the power of judicial review to the higher judiciary to declare any legislative, executive and administrative actions, void if it is violate the Constitution provisions. The power of judicial review is the basic structure of the Constitution.\footnote{Prof. Dr. Nishtha Jaswal and Dr. Lakhwinder Singh, “Judicial Activism in India”, Bharati Law Review, Jan-March 2017 available at: http://docs.manupatra.in/newsline/articles/Upload/0BD8AAFS-4031-484F-AB92-2B84EFE0ABCA.pdf (visited on December 15, 2017).}

Therefore, an article’s 13, 32, 226, indicates the importance of judicial activism. Through above said Articles, the judiciary has played a significant role to solve a social issues, environmental problems etc. *Marbury v. Maddison* case deals with judicial review. The journey from judicial activism to anarchism is an interesting development in the Constitution of India. Public interest litigations are great innovations of judicial activism.

The concept of judicial activism which is another name for innovative interpretation was not of the recent past. It was born in 1804 when chief justice Marshall, decided in the case of *Marbury v. Maidon* that the constitution was the fundamental and paramount law of the nation and “it is for the court to say what the law is. He concluded that the particular phraseology of the constitution, confirms and strengthens the principle supposed to the essential to all written constitutions. That a law repugnant to the constitution is void and that the courts as well as other
departments are bound by that instrument. If there is conflict between a law made by the parliament and provisions in the constitution. It was the duty of the court to enforce the constitution and ignore the law. The twin concepts of judicial review and judicial activism were thus born.”

The Supreme Court of India gaze has now gone beyond the protection of socially and economically downtrodden peoples, and into the realm of public administration.

The first Amendment introduced two new articles in the fundamental rights article 31-A and 31-B, they provided that legislation for effectuating agrarian reforms were outside the pale of protection of Article 19 (i) (f) [the fundamental right to property] and acquisition of such property as part of payment of compensation guaranteed under Article 31. Article 31-B was innovation, it provided that whatever enactments by constitutional amendments were included in the 9th schedule to the Constitution they should be deemed never to be void or to have never become void because of any infringement of fundamental rights, any judgement of the court to the contrary notwithstanding. It was the challenge to the first amendment that raised for the first time the question whether parliament could be special majority and after following the requisite procedure prescribed in Article 368 amend the Constitution so as to abridge or take away any of fundamental rights set out in part III of the Constitution.

In the early 1950-1960 the more emphasis was on the property rights and land rights. But today, the Supreme Court gives more emphasis to the human rights of the people. The directions and order issued by the apex court have resulted translating the fundamental rights from dry and parchment promises into living reality.

Now, the term natural law has been understood to mean a variety of things to different people at different times. Natural law thinking is all inclusive and is encountered in various contexts. In other words, natural law deals with values. Values are indispensable part of day to day administration of law. It is used either to support power or to ensure freedom from power according to social needs of the times. For example, in Additional District Magistrate, Jabalpur v. Shivkant Shukla (AIR 1976

123 Supra note 110 at 303.
In this case, J. Khanna observes that even in the absence of Article 21 of the constitution, the state has got no power to deprive a person of his life or liberty without the authority of law; that sanctity for live of higher values which mankind begin to cherish in its evolution from a civilized existence. There are two kinds of natural law thought:

1. Natural law of method: It is an attempt to discover the method by which just rule may be devised i.e. prescription for rule making. For example, one of the principles of natural justice is to give a fair hearing. Methods of arriving at fair hearing are opportunity to examine, cross examine, assign a competent advocate etc.

2. Natural law and content: Attempt to deduce entire body of rules from some absolute first principle. The high aim was to arrive at perpetual peace. It was this ‘natural law of content’ which came under damaging criticism. Natural law thinking therefore started fading and it reached its nadir (all times law) in the 19th century and was superseded by positivism (manmade law) flourished under stable social conditions. But when accepted social and natural beliefs were challenged. Positivism gave no guidance; positivism failed when it could not tackle monstrous abuses of power and liberty. There was then a new concept of social justice which included revival of natural law doctrine.

Captain Virendra Kumar, Advocate v. Shiv Raj Patil, Speaker Lok Sabha, In this case, the Supreme Court held that No greater testimony exists to the power and resilience of positivism in modern legal thought than the debate between constitutional lawyers about the nature of parliamentary sovereignty. At the root of almost all analyses of the nature and scope of the doctrine lies an unquestioned separation of legal from political principle. The political notion of the ultimate sovereignty of the electorate must be distinguished from the legal doctrine of legislative supremacy. Further, Dicey gives implicit support for this view when he considers the distinction between legal and political sovereignty in the context of conventions. He observes that, 'if Parliament be in the eye of the law a supreme legislature, the essence of representative government is that the legislature should

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126 (1993) AIR(SCW) 3025 also available at: Docid # IndiaLawLib/269605 (visited on January 12, 2018)
represent or give effect to the will of the political sovereign, i.e. of the electoral body, or of the nation'. His examination of a number of important constitutional conventions leads him in character by the possession of a single purpose— to secure that Parliament and government are ultimately subject to the wishes of the electorate. The right to demand a dissolution is the most striking example, since it represents an appeal from the legal to the political sovereign. The conventions of the Constitution now consist of customs which (whatever their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, through the elective House of Commons, of the nation. Our modern code of constitutional morality secures, though in roundabout way, what is called abroad the 'sovereignty of the people'. Dicey presents conventions as a means of harmonizing legal and political sovereignty, which remain conceptually distinct."

It was held in **Kharak Singh v. State of Uttar Pradesh**\(^ {127} \) that the personal liberty did not mean bodily restraint or confinement in four walls of jail, but it constitutes the personal liberty of person other than reasonable restriction mentioned under Article 19(1).

The apex court held in **Maneka Gandhi v. Union of India**\(^ {128} \), that the right to go abroad was part of 'personal liberty' include a variety of rights which go to constitute the personal liberty of man under Article 19 of the Constitution.

The apex court declared in **Francis Coralie v. Union Territory of Delhi**\(^ {129} \), that right to live is not a mere animal existence. Right to life include right to live with human dignity.

In **Bachan Singh v. State of Punjab**\(^ {130} \), the Supreme Court held that the death sentence would not be constitutional invalid if death sentence given in the rarest of rare cases. Further, Justice Bhagwati said: "the fundamental right to life which is the most precious human right and which form the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person."

\(^ {127} \) AIR 1963 SC 1295
\(^ {128} \) (1978)1SCC248.
\(^ {129} \) AIR 1978 SC 597.
\(^ {130} \) AIR1980SC 898
In *Sunit Batra v. Delhi Administration*\(^{131}\) it was held by the court that solitary confinement and putting bar fetter on convicts was violation of Article 21 of the Constitution.

There are some more illustration of Judicial Activism in India:

In case of *Vishnu Agencies Pvt. Ltd. v. Commercial Tax officer*\(^{132}\), The Supreme Court held that “the constitution must not be constructed in a narrow and pedantic sense, inspire those whose duty it is to interpret it, a constitution of the government is a living and organic thing which of all instruments has the greatest claim to constructed ut res magis valeat quam pereat.”

A habeas Corpus writ petition was filed in *Hussainara Khatton (1) v. Home Secretary*\(^{133}\) on the basis of newspaper report that several under trial prisoners were awaiting their trial for long. In some cases, the pre-trial detention also exceeded the maximum term of the sentence impossible for charged offences. In view of the particular facts of the cases, the Supreme Court ordered their release with on their personal bonds.

Thus, the life of Constitution depends upon its amending provision. One of the jurists has observed about the power of amendment as follows:-

“Upon its existence and truthfulness i.e. its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceful continuity or shall suffer alternations of stagnation, retrogression and revolution. A Constitution which may be imperfect and erroneous in its other pars can be easily supplemented and corrected, if only the state be truthfully organised in the constitution; but if this be not accomplished error will accumulate until nothing short of revolution can save the life of state\(^{134}\).”

In the case of *Prabhu Dutt v. Union of India*\(^{135}\), the court held that while Fundamental Right exercised under Article 19, reasonable restriction imposed in the interest and welfare of society.

\(^{131}\) AIR 1978 SC 1575

\(^{132}\) AIR 1978 SC 449

\(^{133}\) (1980) 1 SCC 81 (Right of Speedy Trial).


\(^{135}\) AIR 1982 SC 6
It was held by the apex court in *T.V. Vatheeanswaran v. State of Tamil Nadu*\(^{136}\), that delay in execution of death sentence for long time (two years) amounts to violation of fundamental right of Article 21.

In the case of *A.K. Roy v. Union of India*\(^ {137}\), Popularly known as NSA case. In this case, The SC upheld the validity of the NSA and ordinance which proceeded the Act. The court held that Act was neither vague nor arbitrary in its provisions providing for detention of person on certain grounds, such as ‘defence of India’, Security of India, Security of the State and to relation with foreign powers. While upholding the validity of the Act and ordinance, the court issued directions with a view to safeguarding the interests of detenues. Under the National Security Act, the court directed as follows:

1. That immediately after detention under the NSA, his Kith and Kin must be informed in writing about his detention.
2. That must be detained in a place where he habitually resides unless an exceptional circumstance requires detention at some other places.
3. No treatment of punitive characters should be meted out to him and he should be treated according to the civilized norms of human dignity.

Further, Article 21 is the blending of both principles of Bentham as well as of Austin Legal Positivism is rigid in comparison to utilitarianism, individualism. For better society which is leaning towards personal liberty in every way there should be harmonious construction between legal positivism and individual utilitarianism.

In the case of *Rudal Shah v. State of Bihar*\(^ {138}\), the accused was remained in jail after his acquittal from court for the period of fourteen years. The court held that it was contravention of his fundamental rights and grants a monetary compensation of amount 50,000 and order for immediate release from custody/jail.

The Apex court in *Bandhua Mukti Morcha v. Union of India*\(^ {139}\), while interpreting the concept ‘right to life’ under Article 21 held that the right to life also included education facilities.

\(^{136}\) AIR 1981 SC 643  
\(^{137}\) AIR 1982 SC 710  
\(^{138}\) 1983(4) SCC141  
\(^{139}\) AIR 1984 SC 802
The Supreme Court upheld in *Lakshmi Kant Pandey v. Union of India*,\(^{140}\) that the nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice. Further the court directed that in India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the Constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children.

In the case of *Olga Tellis v. Bombay Municipal Corporation*\(^{141}\) popularly known as Pavement Dwellers case. It was held by the court that right to live includes right to livelihood. Right to livelihood includes bare necessities of life such as clothing, food, shelter.

The court praised the effort made by the practitioner for the welfare of children in case of *Sheela Barse v. Union of India*\(^{142}\) through Public Interest Litigation. The court directed the states that the Children Act were enacted for delinquent children and enforce effectively.

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\(^{140}\) (1984)2SCC 244.

\(^{141}\) 1985(3) SCC545

\(^{142}\) 1986(3)SCC596

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In case of *M.C. Mehta v. Union of India*\(^{143}\) commonly known as Shriram Food and Fertilizer case. The Supreme Court directed that the company manufacturing hazardous Chemicals and gases to deposit security. Further, there was leakage of harmful gases from the factories or company which posed danger to health of neighbourhood and its workers.

The apex court laid down instructions in *Lakshmikant Pandey v. Union of India*\(^{144}\) for safeguarding rights of children given in adoption.

In *State of Maharashtra v. Maruti Sripathi Dubal*\(^{145}\) and *P. Rathinam v. Union of India*\(^{146}\) the court struck down Section 309 of Indian Penal Code which penalized for attempt to suicide and held that the right to life includes right to die. But it was overruled by the Supreme Court in case of *Gian Kaur v. State of Punjab*\(^{147}\) held that suicide is an unnatural termination of life and it is violation of right to life given under Article 21.

The court issued directions in *M.C. Mehta v. Union of India*\(^{148}\) to the Kanpur Nagar Mahapalika to address the guidelines against the pollution of Ganga River. The pollution of Ganga river water is public nuisance.

The petition filed under Article 32 of the Constitution in *Gourav Jain v. Union of India*\(^{149}\) by way of a Public Interest Litigation asking for direction to the respondents for making provision of separate schools with vocational training facilities and separate hostels for children of prostitutes. The apex court directed to the government that children of prostitutes should not be permitted to live in inferno and the undesirable surroundings of prostitute homes. This is particularly so for young girls whose body and mind are likely to be abused with growing age for being admitted into the profession of their mothers. While we do not accept the plea for separate hostels for prostitute children it is necessary that accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their mothers living in prostitute homes as soon as they are identified.

\(^{143}\) 1986(2)SCC 176.
\(^{144}\) 1987(1)SCC667
\(^{145}\) 1987 Cr. LJ, 549
\(^{146}\) 1994(3)SCC394
\(^{147}\) 1996(2) SCC 648.
\(^{148}\) 1988(1) SCC 471
\(^{149}\) AIR 1990 SC 292
Further the court ordered that Legislation has been brought to control prostitution. Prostitution has, however, been on the increase and what was once restricted to certain areas of human habitation has now spread into several localities. The problem has, therefore, become one of serious nature and requires considerable and) effective attention.

In *Mohini Jain v. State of Karnataka*\(^{150}\) the court declared, “The right to education emanates from right to life.”

In *Delhi Domestic Working Women’s Forum v. Union of India*,\(^{151}\) the Supreme court issued following guidelines for trial of rape cases:

1. The complainants of sexual assault should be provided with legal representation.

2. Legal aid will have to be provided to her at the police station.

3. The police should be under obligation to inform victim of her right to representation before any question asked her.

4. A list of willing lawyer’s to ct in these cases prepared and kept at police station for victims who did not have any particular lawyer in mind.

5. In rape trials, dignity of the victim must be maintained as far necessary.


The Supreme Court again in landmark judgement held in *Unni Krishan v. State of Andhra Pradesh*\(^{152}\) that the right to education is a fundamental right, and it is obligation of the state to provide education to the children till they attain the age of fourteen years.

In the case of *Bijoe Emmanuel v. State of Kerala*\(^{153}\) popularly known as National Anthem case. In this case the pupils were expelled from the school because they

\(^{150}\) AIR 1992 SC 1850  
\(^{151}\) Supra note 96 at 23.  
\(^{152}\) AIR 1993 SC 2178  
\(^{153}\) (1993)3 SCC 615
refused to sing a national anthem song in prayer. The students stood in the prayer but they were not sung national anthem. Reason behind non-singing was that they believed it was against their rituals concerning God Jehovah. The Hon’ble court held that expulsion from the school was violation of there fundamental right guaranteed under Article 19(1) (a).

In *S.R. Bommai v. Union of India*¹⁵⁴ it was held by the apex court that Secularism is a feature of basic structure of the Constitution and it is a natural concept because secularism means equal respect for all religion.

The court declared in *Mr. X v. Hospital Z*¹⁵⁵ that if any case Dr. discloses the report to save partner from getting infected with disease is not violation of right to privacy.

In *Vellore Citizens Welfare Forum v. Union of India*¹⁵⁶ the court upheld that the ‘Polluter Pays Principle’ and ‘Precautionary Principle’ are the essential features of the Constitution of India. Further, The court said, “the Polluter Pays principle means absolute liability for harm/loss to the environment extends not only compensate to the victims of pollution but also given a cost of restoring the environment degradation.”

In *People Union of Civil Liberties v. Union of India*¹⁵⁷ it was declared by the apex court that the telephone tapping of any one is violation of Article 19(1) (a) unless it comes under the reasonable restriction provided under Article 19(1) (b).

In *Gourav Jain v. Union of India*¹⁵⁸, in this landmark judgement the Supreme Court issued a guidelines for save and rehabilitation of children of women fallen in prostitutes and child prostitutes.

It was held by Supreme court in *M. C. Mehta v. Union of India*¹⁵⁹ that the efficacy and ethics of the governmental authorities are progressively coming under challenge before Supreme Court by way of PIL for the failure to perform their statutory duties. It this continues, a day might come when the rule of law will stand reduced to “a rope of sand”.

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¹⁵⁴ AIR 1994 SC 1918  
¹⁵⁵ AIR 1995 SC 495  
¹⁵⁶ 1996(5) SCC 650  
¹⁵⁷ AIR 1997 SC 568.  
¹⁵⁸ AIR 1997 SC 3021  
¹⁵⁹ 1997 (1) SCC 110
In *D.K. Basu v. State of West Bengal*\(^{160}\) the Supreme Court laid down guidelines to be followed by the central and state agencies for arrest and detention of the person. This was the landmark judgement to put a check on custodial torture or inhuman treatment.

In a landmark judgement *Vishaka v. State of Rajasthan*\(^{161}\), the Supreme Court laid down guidelines for the protection of women at workplace. The court held that it shall be the duty of employer and other responsible persons at work places to prevent act of sexual harassment. The employer should take a suitable step to prevent sexual harassment at work places. The guidelines issued by the Supreme Court to be followed at workplaces until the legislation is not enacted for protection of women at workplaces. After 16 years, the guidelines laid down by Supreme Court in Vishaka case convert in to Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. Before this Act guidelines issued by the Supreme Court in Vishaka case would be treated as a law.

It is the scared duty of the state to promote the welfare of its citizens; all the activities of the state are aimed at the general welfare and well-being of citizens. All efforts done by state are geared towards social and general good.\(^{162}\)

In the case of *Chairman Railway Board v. Chandrima Das*\(^{163}\) the court ordered to gave compensation to a Bangladesh woman who was gang raped by the railway employees of Howrah station by applied a human right jurisprudence and Constitutional Principles

In *Danial Latifi v. Union of India*\(^{164}\) A muslim divorced female has a right to take maintenance even the iddat period has been expired under the Muslim Women (Protection of Rights on Divorce) Act, 1986.

In *M.C. Mehta v. Union of India*\(^{165}\), the apex court issued direction to convert all buses moving in Delhi to CNG fuel so that the public health protected against environment pollution..

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\(^{160}\) AIR 1997 SC 610, also available on Shatakshi Johri, Lectures on Constitutional Law, Central Law Publication, 2016) 50

\(^{161}\) AIR 1997 SC 3011

\(^{162}\) Ritu Kohli, Kautilay’s Political theory, (Deep and Deep Publication, New Delhi, 1995]

\(^{163}\) AIR 2000 SC 988

\(^{164}\) AIR 2001 SC 3262

\(^{165}\) AIR2001 SC 1948.
Thus, the idea treat all human beings have a right solely by virtue of their humanity impose a duty upon the state to secure their enjoyment and overall welfare. According to John Locke, the state exists for the good life of its citizens.\textsuperscript{166}

In \textit{T.K. Rangarajan v. State of Tamil Nadu}\textsuperscript{167}, it was held by the court that government servants do not have any type of legal right to go on strike for fulfill of their demands.

In \textit{Re Noise Pollution case}\textsuperscript{168}, the Supreme Court ordered that the freedom from noise pollution is a part of right to life guaranteed under Article 21 of the Indian Constitution.

In \textit{Dinesh Dalmia v. State}\textsuperscript{169} it was held that the narco test is not the contravention of fundamental right of Article 20(3) because it is not testimonial compulsion..

In \textit{T. A Qureshi v. CIT}\textsuperscript{170}, cases are decided not one’s own moral view’s law is different from morality as the positivist jurists Bentham and Austin pointed out.

In the case of \textit{I. R. Coelho v. State of T. N.}\textsuperscript{171} Interpretation of the constitution has to be such as to enable the citizens to enjoy the rights guaranteed by part III in the fullest measure. Thus, it is duty of the supreme court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the constitution. The Supremacy of the constitution mandates all constitutional bodies to comply with the provisions of the constitution.

In \textit{Rajindra Singh v. Prem Mai}\textsuperscript{172}, People in India are simply disgusted with this state of affairs, and are fast losing faith in the judiciary because of the inordinate delay in disposal of cases. We request the authorities concerned to do the needful in the matter urgently to ensure speedy disposal of cases if the people’s faith in the judiciary is to remain”.

\textsuperscript{166} Supra note 24 at 170.
\textsuperscript{167} AIR 2003 SC 3032
\textsuperscript{168} AIR 2005 SC 3136.
\textsuperscript{169} (2006)3Cr.LJ 2401(Madras)
\textsuperscript{170} (2007) 1 SCC 759
\textsuperscript{171} (2007) 2 SCC
\textsuperscript{172} (2007) II SCC 37
In *Dalip Singh v. State of UP*\(^\text{173}\) For many centuries India society cherished two basic value of life i.e. ‘Satya’ (truth) and ‘ashima’ (non-violence) Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these value in their daily life, Truth considered as an integral part of the justice-delivery system which was in vogue in the pre-independence era and the people used to feel proud to tell the truth in the court irrespective of the consequences. However, the post-independence period has been drastic changes in our value system. Materialism overshadowed the old ethos and the quest for personal gain has become so intense that personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, suppression of facts and misrepresentation in court proceedings. So, In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountains of justice with traited hands, is not entitled to any relief, interim or final.

In *Shayara Bano v. Union of India*\(^\text{174}\), The triple Talaq issue was pronounced by five judges Constitutional bench with many those attending the hearing getting the first impression that it was a unanimous verdict. The apex court was set to uphold the validity of triple talaq C.J. J. S. khehar uttered that “triple talaq was a matter of personal law of muslims, it was a matter of faith, practiced by tem for atleast 1400 years,” “does not breach Articles 25 of the constitution and has protection of the constitution government should step in and bring a law. The SC of India has declared the practice of triple talaq as unconstitutional by 3:2 majority. Justice Kurian Joseph UU Lalit and RF Nariman delivered the majority judgement. Chief Justice kehar and Justice Abdul Nazeer dissented. It is clear that this form of talaq is manifestly arbitrary in the sense that the material tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This formed talaq must therefore, be held to be violative the fundamental rights of female contained the constitution of India. In for so as it seeks to recognise and enforce (the 1937) Act triple talaq, is within the meaning of the expression “Law’s in force” in

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\(^{173}\) (2010) 2 SCC 114

\(^{174}\) (2017)6 MLJ378
Article 13 (1) and must be struck down as being void to the extent that it recognise and enforce triple talaq.\textsuperscript{175}

The power of judicial review is recognised as a part of basic structure of the Constitution of India. Judicial activism is a sine qua non of the democracy because without an alert from judiciary, the democracy will reduced to a empty shell. However, judicial activism does not mean governance by the judiciary but it means judiciary must act within the limits of judicial process. I would conclude the judicial activism concept with the quote of chief Justice Dr. A.S. Anand who said, “the Supreme Court is the custodian of the Constitution of India and exercise the judicial control over the acts of both legislature and judiciary. But the courts are not above the Constitution and must be conscious of the conscience with the objective of the preamble.\textsuperscript{176}

By analyzing various decisions of Supreme Court in which it laid down guidelines or decision on policy matter it is evident that the court clearly curtailed the limit and arbitrariness of the power of legislature or executive. It has created various positive rights and directed the government on policy matters such as environmental issues, corruption, child labour, proceeding of legislative assembly etc through judicial activism. The Supreme Court of India has acquired lot of respect and faith of the common people. It can be said that the Supreme Court of India is one of the most dynamic courts when it comes into the matter of protection of Rights. Due to its positive role in the protection of rights of masses it acquires great reputation and credibility and respect from common man.

4.8 Relationship between Indian jurisprudence and Natural Law Theories\textsuperscript{177}:

Ancient Period: The principles of natural law embodied in dharma referred to duties of man towards God, sages, lower animals and creatures. It has been characterized as ‘a belief in the conservation of moral values.’ \textsuperscript{19} It is to be stressed here that it is not the divine but the divine reason which is called the source of law. This is because the

\textsuperscript{175} Available at: Live Law News’s, (visited on August 22, 2017, 1.19PM).


\textsuperscript{177} B.G Gokhale, Indian thought through Ages, 24(1961).
will of God and human reason coincide. This very much shows the natural law philosophy during the ancient times.

1. Medieveal and British Period: During, Medieval and British period in India, natural law found its expression in religions preaching of Ramanuja, Kabir, Nanak, and Swami Dayanand etc. The Bhakti cult and the philosophy of Gandhi also highlighted the natural law values. The natural law philosophy suffered a setback during Mughal rule as the Muslim rules were mostly automatic and did not follow as was preached in the Sariah. Soon after, the British rule bought with itself codification of laws and the principle of justice, equity and good conscience. Natural Law theory was present only in the principle of justice, equity and good conscience, while positivism was reigning the country.

2. Post-Independence Period: The Indian Constitution embodies a number of principles of natural law in Preamble, Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy. The Constitution also provides for fundamental duties. Principles of natural justice also find place in the administrative law of the country where the High Courts and the Supreme Court can exercise control over the administrative and quasi-judicial tribunals and one of the grounds on which orders passed many be set aside is the violation of the principles of ‘natural justice’. The Principle of natural justice have also been incorporated in the Articles 311 of the Constitution of India which says that no civil servant can be dismissed or removed or reduced in rank until he has been given a reasonable opportunity to show cause against the action proposed to be taken against him.

4.9 Conclusion

Lastly, it is said that law has a purpose i.e. welfare of the society. Judiciary under the Constitution of India conceived the status as a arm and guardian of social revolutions. Legislature while makes a law cannot see all the situations arising in future. For solve of those situations, the judicial creativity or craftsmanship is utilized. Judiciary purpose is to fill the gaps between law ‘as it is’ and ‘law as ought to be’. In this process the law is use for society as the proper perception to social values.