CHAPTER 5

LEGAL POSITIVISM AND INDIAN CONSTITUTION:
AN ANALYTICAL STUDY

‘Every Constitution has a philosophy of its own.’

5.1 Introduction

The growth of human society can not exist or survive without law and no nations can continue its existence without a Constitution. Generally, every Constitution includes aspirations of the people. It also becomes essential that every Constitution must provide solution 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 values of the people.¹

In other words, the Constitution embodies the laws and rules which deals with association of the state and relations between the governments and its subjects.²

Dr. Ambedkar said, “I feel that the Constitution is workable, it is flexible and it is strong enough to hold the country together both in peacetime and in war time indeed. If I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is that man was vile.³”

Every Constitution contains the most general guidance to community expectations and obviously the development of a full system of law requires a vast and a complex array of guiding principles and rules running through levels of decreasing generality right down to the specific decision in a concrete situation.⁴

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¹ Rajeev Dhawan and Alice Jacob, Indian Constitution trends and issues, 56(N. M Tripathi Pvt. Ltd: Bombay 1978).
³ Gopal Sankaranaripn, The Constitution of India, 1(Eastern Book Company, 10th Ed.: Lucknow)
⁴ L. Oppenheium, International Law Treaties, 736-742(Vol. 1 Fb & C limited, 2016 Reprint.).
A Constitution is not only an enacted document but it is something more. It is living and growing thing embodying the spirit of the nation. A Constitution may be defined as a body of principles which regulate not only the relations among the organs of government inter se by mapping out their natural powers and jurisdiction; it also determines the relation between the government and the governed. Due to that every Constitution possesses a part of a chapter dealing with the fundamental rights guaranteed citizens and in some cases to the residents of the state. Every civilized state is shown by the system of rights it maintains. The Constitution of India provides a body of rights, another set of Directive principles of state policy and has prescribed certain fundamental duties for the citizens. The constituent assembly have formulated a Constitution which is the best product of prevailing circumstances and the later generation are free either to adapt the Constitution or if necessary, to amend it to suit the changed circumstances. This is done by the method of Constitutional amendments.5

Infact, the power of nature is a power of higher grate and of more potential importance than tiny other power provided for in the Constitution.6

Every state necessarily has a Constitution which is the fundamental law or body of law’s written or unwritten, in which may found: 7 (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 Constitution of India is unique, apart from being the longest in the world. It is the meant for the second largest population with diverse people speaking different languages and professing varying religions. It was chiseled and shaped by great political leaders and legal luminaries, most of whom had taken an active part in struggle for freedom the British yoke and who knew what domination of a foreign rule meant in the way of deprivation of the basic freedoms and from the point of view of exploitation of the millions of Indians. The Constitution is an organic document which must grow and it must take the stock of the vast socio-economic problems, particularly, of improving the lot of the common man consistent with the dignity and

5 Satya Prakash Dash, Constitutional & Political Dynamic of India, 17-19(Sarup & Sons, New Delhi, 2004).
7 R. G. Gettel, Reading in Political Science, 283, (Boston (Massi) 1911).
unity of the nation. Thus the Constitution being supreme all the organs and bodies
owe their existence to it. None can claim superiority over the other and each of them
has to function with in the four corners of the Constitutional provisions.\textsuperscript{8}

Therefore, the Constitution of India is written and supreme law of the land. The
Preamble of the Constitution objective is to establishing a Sovereign, Socialist,
Secular, Democratic and Republic so as to secure to all of its citizens, social,
economic and political justice, liberty of thought, expression, beliefs, faith etc.\textsuperscript{9}

But, the start of 19\textsuperscript{th} century might be taken as the mark of beginning of the positivist
movement. The term ‘positivism’ has many meaning which were tabulated by Prof.
Hart as follows\textsuperscript{10}:-

\begin{enumerate}
\item Laws are commands,
\item The analysis of legal concept is worth pursuing distinct from sociological and
    historical inquires.
\item Decisions can be deduced logically from pre-determined rules without recourse
ten social aims, policy or morality.
\item Moral judgements can not be established or defended by rationale, arguments,
evidence or proof;
\item The law as it is actually laid down has to kept separate from the law that ought
to be.
\item The rights of the individuals as against the authorities of state.
\end{enumerate}

Therefore, from the above said definition, it is clear that state is sovereign and the
people are inferior. Every positive law is group of sovereign person and their power
is incapable of legal restrictions. Legal positivist is said that human agency is said to
be sovereign and not the Constitution..

But, the Preamble of Constitution of India shows that the authority of the government
of the India is derived from the people of India. As the Constitution is given by the
people of India in their aggregate capacity, and not created by the states forming part

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\textsuperscript{8} B.M.Gandhi, \textit{V.D.Kulshrestha’s Landmarks in Indian Legal and Constitutional History}, 416(Eastern
Book Company, Lucknow 2009).

\textsuperscript{9} J.J.R. Upadhya, Administrative Law, 19(Central Law Agency: Allahabad).

\textsuperscript{10} Article on ‘Analytical School/ Positivism Theory of Law’, available at:
www.lawdessertation.blogspot.in (visited on November 4, 2016).
\end{flushright}
of the Union or by the people of several states, no state or group of states can either put an end to the Constitution. India is declared a ‘Sovereign Socialist Secular Democratic and Republic’ in the Constitution. It also points out to the source of the Constitution. The Preamble of India states the objective which the Constitution was designed to secure all the people of India: social, economic and political justice; freedom of thought, expression, faith, belief and worship, equality of status and of opportunity and equality before law, fraternity assuring the dignity of the individual and unity and integrity of the nation.\textsuperscript{11}

It will be seen the above ideal faithfully reflected in the Preamble to the Constitution of India. The preamble to the Constitution serves two purposes:\textsuperscript{12}

1. It indicates the source from which the Constitution derives its authority.

2. It also states the objects which the Constitution seeks to establish and promote.

Before reference is made to the Objectives Resolution adopted in January 22, 1947 it must be borne in mind that the post war period in Europe had witnessed a fundamental orientation in juristic thinking, particularly in West Germany, characterized by a farewell to positivism, under the influence of positivist legal thinking. During the pre-war period most of the German Constitutions did not provide for judicial review which was conspicuously absent from the Weimar Constitution even though Hugo Preuss, often called the Father of that Constitution, insisted on its inclusion. After World War II when the disastrous effects of the positivist doctrines came to be realized there was reaction in favour of making certain norms immune from amendment or abrogation. This was done in the Constitution of the Federal Republic of Germany. The atrocities committed during Second World War and the world wide agitation for human rights ultimately embodied in the U.N. Declaration of Human Rights on, which a number of the provisions in Parts III and IV of our Constitution are shaped, must not be forgotten while considering these matters. Even in Great Britain, where the Doctrine of the Legal Sovereignty of Parliament has prevailed since the days of Erskine, Blackstone, Austin and lastly Dicey, the new trend in judicial decisions is to hold that there can be at least procedural limitations (requirement of form and manner) on the legislative powers of the legislature. This

\textsuperscript{11} supra note 8 at 419.

\textsuperscript{12} Dr. Durga Daa Basu, \textit{Introduction to the Constitution of India}, 20-21(Lexis Nexis Publications, 2013)
follows from the decisions in Moore v. The Attorney General for the Irish Free State (1935) A.C. 484 & Attorney General for New South Wales v. Trethowan (1932) A.C. 526. The Objective's Resolution declared, inter alia, the firm, and the solemn resolve to proclaim India as Independent Sovereign Republic and to draw up for her future governance a Constitution. Residuary powers were to vest in the States. All power and authority of the Sovereign Independent India, its constituent parts and organs of government, were derived from the people and it was stated:\textsuperscript{13}:

1. wherein shall be guaranteed and secured to all the people of India, justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

2. Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

3. Whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilized nations.

In Primitive society, individual had to resort to self help and it was based on private vengeance. After the individuals organized themselves in the form of society then the administration of justice was abhorred by the society. The society made efforts to provide remedy to the individual. The slowly and gradually, the state came into being for the protection of the citizen and for its own protection. It became necessary for state to maintain law and order. This is the beginning of the term judiciary in its modern sense.\textsuperscript{14}

All the legislative actions of the legislation have been expressly embodied in the Constitution with in the purview of Article 13 by defining ‘law’ as including ‘order, rule, bye law, and notification etc. have the force of law.\textsuperscript{15}

Indian Constitution provides a mechanism for their amendment. The formal amendment power is found in Article 368 of the Indian Constitution. From the abolition of Privy Purse to the creation of local government to radical changes to the

\textsuperscript{13} Kesavananda Bharati v. State of Kerala, (1973) Sup SCR 1 also available on Docid # IndiaLawLib/289511


\textsuperscript{15} Supra note 9 at 20.
right of property and right to equality, amendments to the Constitution have been frequent and wide ranging. The moment judges review Constitution amendments; they are reviewing the expression of the sovereignty. A legislature has the power to amend a Constitution through a super majority. The judicial review of such amendment might be considered as a challenge to the legislature’s capacity to represent popular sovereignty.\textsuperscript{16}

The edifice of any democratic government rests on three pillars- the executive, the legislature and the judiciary. These three pillars constitute the three organs of machinery. The power and functions of these organs are defined in the Constitution, which constitute the supreme law of the democratic government. Under the Constitution, the primary function of the legislature to make law, that of executive to execute law & that of a judiciary is to enforce law. In the enforcement of law, the Constitution assigns three pillars to the highest judiciary-firstly, as an interpreter of the Constitution to solve any ambiguity in the language of any provision of the Constitution.; secondly, as the protector of the fundamental rights which are the guaranteed by the Constitution to its people, & thirdly, to solve any disputes which have come by ways of appeals from lower judiciary. In playing its assigned roles, the judiciary review the actions of the other two organs- the legislature and the executive, as to whether they exceeded the limits set by the Constitution or whether they encroached the rights of the people through arbitrary laws & arbitrary actions. This is where judicial activism comes in to play. Through judicial activism, the judiciary plays an activist role in performing the tasks assigned to it by the Constitution.\textsuperscript{17}

Law day is significant not only to celebrate our journey on the path of the Constitutional democracy but also to take a stock of the promises which, we the people of India have given into ourselves almost six decades. During the six decades, by all accounts, the judiciary compared to the other two wings of the government has performed well sustaining the trust of the people in its independence, fair ness and impartiality.\textsuperscript{18}


In its function of the courts to maintain rule of law in the country and to assure that the government run according to law. In a country with a written constitution, courts have the additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and keeping all the authorities within the Constitutional framework.\textsuperscript{19}

The arch of the Constitution of India pregnant from its Preamble, Part-III and Part-IV of the Indian Constitution is to establish an egalitarian social order guaranteeing fundamental freedoms and to secure social justice, economics and political to every citizen through rule of law. For removing inequalities and making equality as a reality, we have opted for the American Constitutional model of separation of powers within the framework of West Minister’s, Parliamentary Democracy. The Parliament position has been given to the judiciary under Article’s 32 and 226 of the Constitution as in a democracy governed by the rules of law under a written Constitution; judiciary is sentinel on the quinines to protect the fundamental Right and to poise even scales of justice between the citizen and the state or the State entries. The Supreme Court and the High Courts though can not usurp. Executive function yet they are vested with the power to check and abuse of these functions. The Legislature can not claim immunity for its lapses. In the Meneka Gandhi case, the apex court ruled that if the legislature enacts any law which is harsh, arbitrary and oppressive, the same can be struck down as illegal and declared void. In fact, the existing social inequalities and extraordinary complexity of modern litigation requires the judges not merely to interpret the law but also to mould it in the proper perspective in order to provide relief commensurate with given facts and circumstances. The judges are also required to command the executive and other agencies to enforce and given effect to the writ, order or direction and prohibit them to do unconstitutional acts. In this ongoing adjudicatory process, the role of judges are not merely to interpret the law but also to lay down new norms of law and to mould the law to suit the changing social and political scenario to make the ideals enshrined in the Constitution of India meaningful and a reality. Thus, the society demands active roles which formally were considered exceptional but now as normal ones.\textsuperscript{20}


\textsuperscript{20} Supra note 14 at 106.
This not only an erroneous or imperfect Constitution can be implored by amending Constitution by it can be also enabled to withstand unforeseen stress and strains, put on it by the onward march of time. Therefore, it is clear that the process of amendment is of paramount importance in the life of the Constitution. It may be revivify and rejuvenate it from time to time.

Mr. Nehru, the first Prime Minister of India was said that “A constitution to be living must be growing; must be adaptable, must be flexible, must be changeable. And if there is one thing which the history of political development has pointed out, I say with great force it is this that the greatest strength of the British Nation and the British people as laid in their flexible Constitution. They have known how to adapt themselves to changes, to the biggest changes constitutionally. Sometime they went through the process of fire and revolution. Even so, they tried to adapt their Constitution and went on with it.”

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.

The organisation of the state for the accomplishment of future changes in the Constitution or the organisation of sovereignty within the Constitution is identified by political thinkers as a fundamental requisite in any Constitution. A Constitution which may be erroneous and imperfect can be easily supplemented and corrected if the state be truthfully organised in the Constitution. But if this not be accomplished, error will accumulate until nothing short of revolution can save the life of the State.

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21 Parliamentary Debates, 1951, Vol. 12 Col. 9625-26
22 John William Burgess, Political Science and Comparative Constitutional Law, 137(Gin writing books, 1896).
The Supreme Court held in *H.S. Jain and Ors. v. Union of India*,\textsuperscript{24} that it is necessary to consider the principles of interpretation of Constitutional provisions. Therefore, in this connection it may be mentioned that there are two methods of interpreting a Constitution. The first method is to treat the Constitution as an ordinary statute and to apply to it all the ordinary rules of statutory construction. Under such a process, legal positivism prevails over the juristic philosophy which underlies the Constitutional document. The second method is to recognise the Constitution as an organic instrument, apart from and superior to the ordinary statute enacted by the legislature. It is now universally accepted that the second method is the correct method of interpreting a Constitution, because it is a living and organic document and "is intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs". As Chief Justice Marshall observed in the case of *McCulloch v. Maryland*, (1819) 17 US 316, the Constitution is not a tightly drawn legal document like a title deed to be technically construed; it is rather a matter of "great outlines", broadly drawn for an unknown future.

It is settled by apex court in *Kedari Lal v. Board of Revenue and Ors.*\textsuperscript{25}, that judicial decisions must be made even when guidance from within the law is lacking, and in that event, Judicial discretion must be conceived in positivism as permitting Judges to look outside the law for standard to guide them in supplementing old legal rules or creating new ones. In this process, the Courts should rightly reflect the moral and ethical ideals of the society and may adopt extra legal more standards in statutory and constitutional interpretations.

**5.2 Growth of the Constitution:**

Every Constitution is a living instrument and it growth with the passage of time. Old provisions are either deleted or amended so as to meet the new conditions and requirements. In course of time it changes so much so that if the founding fathers were brought back to life by any source of alchemy, they would probably not be able to recognise their own creation. Thus, a Constitution becomes both a make and a growth.\textsuperscript{26}

\textsuperscript{23} Supra note 7 at .287-28
\textsuperscript{24} (1996) 4 UPLBEC 2515 available at: Docid # IndiaLawLib/84744 (visited on February 9, 2018)
\textsuperscript{25} (2004) AIHC 1861
The founding fathers of our Constitution were able and wise men and have given us one of the best Constitution. The founding fathers of our Constitution in spite of the hard labour that went into the making of our best Constitution, provided for future amendments to the Constitution. Provisions in this behalf have been made in the part of Constitution. It consists of a single Article i.e. 368.

In its span of almost half of century, the Constitution of India has been amended several times.

5.2.1. Meaning of Amendment:

The word amendment has come from the latin word “Amedare’ which means removal of faults or errors, reformation or the alternation of a Bill before the Parliament. 27

According to Webster’s Dictionary: Amendment means, “An alternation or changes for the better in legislative or deliverative proceedings; any formal alternation in a bill, motion or law: in law the correction of an error in a writ or process.

The Supreme Court of India rejecting the dictionary meaning of the word ‘amendment’ in Sajan Singh v. State of Rajasthan, 28 and took the view that “in the context relevance on the dictionary meaning of the word is singularly inappropriate because what Article 368 authorizes is amendment of the provision of the constitution. It is well known that the amendment of the law may in proper case include the deletion of any one or more of the provisions of law and substitution in their place new provisions. Similarly, an amendment may include modifications or change of the provisions of making the said provisions in applicable in certain cases.

Another question with regard to the meaning of ‘Amendment’ under Article 368 may strike our mind that whether amendment includes amendment of the whole Constitution. Answer of this question was given in a case Keshavananda Bharati v. State of Kerala, 29 that the word ‘amendment’ in the Constitution is not a coinage of the framers of our Constitution.

Role of Judiciary is significant in adapting the Constitution to new circumstances. The methods of adopting the Constitution to new circumstances may be formal, informal.

27 Concise Oxford Dictionary, 1976 P.36
28 AIR 1956 SC 845
29 AIR 1973 SC 1975
or implied. Informal amendment of the Constitution takes place through Constitutional conventions and judicial interpretation given from time to time in order to adopt the Constitution to the changing socio-economic and political needs of the country. The cases which led to the necessity of the Indian Constitution First Amendment Act, in 1951 were: *State of Madras v. Champakan Dorairajan*\(^30\). The court has on several occasions changed its view about the significance and meaning of several Constitutional provisions. The leading example of Article 368 is Keshavananda Bharati’s case. Wherein the Supreme Court changed its decision frequently with regard to question as to whether the Indian Parliament is empowered to amend the fundamental rights enshrined in Part III of Constitution of India or not? Virtually, judicial interpretation of Article 368 through Keshavananda Bharati case and onwards has added a proviso to Article 368.

5.2.2.1 Article 368 read with the proviso that, “Power of Parliament to Amend the Constitution and Procedure therefore\(^31\).-

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, [it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in -

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) Any of the Lists in the Seventh Schedule, or

(d) The representation of States in Parliament, or


\(^{31}\) Bare Act of the Constitution of India.
(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one-half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in Article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

From the constitutional provisions, it is clear that the Constitution of India provides three types of amendments. Firstly, Amendments which can be made by the simple majority as required for the passing of ordinary laws. Secondly, Amendments, which required special majority. Thirdly, amendments which require in addition to special majority, approval by the legislature of not less than half of legislature of states.

The Constitution of India expressly given amending power to Parliament but it is the Supreme Court which has to finally interpret the scope of such power and to point out the limitations, if any, on such amending powers. The higher courts of India are empowered with the power of judicial review of legislation. It is powers of the courts to struck down the legislation if they to be unconstitutional and hence void.32

That is an expression well-known in modern Constitution and it is commonly accepted as standing for the alteration, variation or change in its provisions.

So the course of the matter Justice Wanchoo remarked in Golak Nath case, “To say that amendment in law means a change which results in improvement would make amendments impossible for what is improvement of an existing law is matter of opinion and what. For example, the legislature may consider an improvement may not be considered by the others.

Further the Supreme Court upheld in the case of *Glanrock Estate Pvt. Ltd. v. State of Tamil Naidu*\textsuperscript{33} that, the power of amendment under Article 368 is not unlimited power but it is a derivative power. Amendments can affect the ordinary principle of equality, but the basic structure of the Constitution cannot be amended.

### 5.2.2 Necessity of Amending Provisions:

In all human societies there has been a regular friction between stability and change. When stability has reached on its optimum there have been upheavals and revolutions. If changes can not be effected peacefully, they are affected by violence. This is one of the norms of developing societies that in those societies changes must occurs from time to time according to the need of an hour. Hence, provision for the amendments of the provisions of the Constitution and Constitution itself is necessary with a view to over come the difficulties which may occur in future in the working of the Constitution. No generation has monopoly of wisdom nor has it any right to put limitation to mould the machinery of Government according to their needs. It is worth mentioning here that if there is no provision made for the amendment of the constitution of the future generation would resort to extra Constitutional measure likes evolution to change the Constitution. Thus, the purpose for providing for the amendment of the Constitution is to make it possible gradually to change the Constitution according to social condition.

In a written Constitution, the provision relating to its adaptability to the social change is the real test of its viability. A Constitution which does not contain an amending provision to enable it to be brought in consonance with development, growth and expansion of the people whom it seeks to govern will be a most inadequate and imperfect document. So, a good Constitution lays smooth procedure of its amendment in such a manner as to forestall any revolutionary unravels.

### 5.2.3. Can the Federal or Democratic Structure of the Indian Constitution can be amended:

In Keshavananda Bharati case, the question before the apex court was as to what is the extent of the amending power conferred by Article 368 of the Constitution of

\textsuperscript{33}(2010)10 SCC 96.
India. As regards the scope of the amending power contained in Article 368, held that there are inherent or implied limitations on the amending power of the parliament and Article 368 does not confer power to amend the Constitution so as to damage or destroy the essential elements or basic structure of the Constitution. Thus majority of judges [C.J. Sikri, Grover, Mukherjee, Reddy, Shetal, Hedge and Khanna] laid down that democratic and federal character of Indian Constitution is a basic feature of Indian Constitution, so it can not be amended.

“The judiciary is an arm of the social revolution upholding the equality that Indian had longed for.”

The Supreme Court is guardian of the Constitution of India. A Constitution is a fundamental document governing the subjects of state. It contains the organizational structure of a state functions, powers and duties of its organs and basic rights of the people. It is no significant when anything conflict or repugnant to the Constitution of India provisions is declared void. In the Part-III of the Constitution of India, contains Fundamental rights granted to the citizen of India. Some other’s law provisions were challenged in the Supreme Court, on the ground that they were inconsistent with the provisions of the Constitution.

Thus role of Supreme Court in Justice delivery system can be studied under the following four stages\(^{34}\):

1. The first period began in 1951 with the Shankri Prasad’s case and ended in 1967 with the Golak Nath case.

2. The second period began with Golak Nath case and ended in 1973 with Kesvananda Bharati case.

3. The third period began with Kesvananda Bharati case an ended with Indira Gandhi v. Raj Narain.

4. The fourth period began with two important decisions namely Minerva Mills Ltd. v. Union of India, and Waman Rao v. Union of India.

There are as under:

5.2.3. 1. The First Period Began in 1951 with the Shankri Prasad’s case and ended in 1967 with the Golak Nath case:

Since 1951, questions about the scope of the amending power contained in Article 368 of Constitution of India and of the Judiciary’s right to intervene have been raised and again and the decisions thereof always giving new controversies. Judicial review of Constitutional amendment is a different feature of Indian Constitutional system. In six cases, the Supreme Court has determined Constitutionality of different Constitutional amendment and in one case (A. K. Ray v. UOI, AIR 1982) considered its power to give directions to government to enforce the Constitutional amendment.

The question whether amendment of fundamental rights are covered under Article 368 came for the consideration in Shankri Prasad Deo v. Union of India, an unanimous opinion handed down in 1951 a bench of five judges of the Supreme Court in unhesitatingly answered the question in the affirmative with further Constitutional amendments making more inroads into fundamental rights. The validity of the first Amendment was challenged which inserted Article 31A and 31B and curtailed

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35 AIR 1951 SC 455,
36 The First Amendment of the Constitution of India, enacted in 1951, made several changes to the Fundamental Rights provisions of the Constitution. It provided against abuse of freedom of speech and expression, validation of zamindari abolition laws, and clarified that the right to equality does not bar the enactment of laws which provide "special consideration" for weaker sections of society. (J.N. Pandey, Constitution of India.
37 Article 31A. Saving of laws providing for acquisition of estates, etc (1) Notwithstanding anything contained in Article 13, no law providing for (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19: Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent: Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to
the right to property. The Supreme Court held that parliament power to amend the Constitution including fundamental rights also.

Same opinion was followed in the case Sajjan Singh v. State of Rajasthan. The 17th Amendment of 1964 was in the question of judicial review of constitutional amendment was attempted to be reopened. In the case of it reiterated the bench of Five Judges of the Supreme Court that Parliament could by Constitutional amendment abridge or take away fundamental rights, but it did so only by majority. The strong reservations of the minority of two justices in Sajjan Singh case promoted Chief Justice Subba Rao to constitute a larger bench to reconsider the constitutional validity of the first, fourth and seventeen amendments to the constitution.

Thus, Shankari Prasad v. Union of India & Sajjan Singh v. State of Rajasthan, the SC took the position that ‘the fundamental rights of the individual under the Constitution though the sacrosanct and constituting limitations on the power of the executive and legislature are not the immutable and absolute character but subject to Parliament’s power to amend the constitution under article 368. In other words, the court made no distinction between the term ‘law’ used in Article 13(2) and in Article 368 and upheld the power of the Indian Parliament of amending any part of the Constitution including the fundamental rights.

In Bela Banerjee’s case, it was held that the Court compelled for compensation in case of compulsory acquisition of property to appropriate government only in urgency cases. The court cleared the meaning of word ‘compensation’ and that meant just equivalent to the owner had been deprived of.

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39 AIR 1965 SC 845
40 The 17th Amendment of 1964 enacted to secure the constitutional validity of acquisition of estate and place of land acquisition laws in schedule 9th of the Constitution of India.
41 AIR 1965 SC 845
5.2.3.2. The Second Period began with Golak Nath case and ended in 1973 with Kesavananda Bharati case:

The larger bench (eleven judges) constituted and prescribed by justice Subba Rao sat in *Golak Nath Vs State of Punjab*.\(^{43}\) The family of Henry and William Golak Nath held over 500 acres of farm land in Jalandhar, Punjab. In the period of the 1953 Punjab Security and Land Tenures Act, the state government held that the brothers could keep only thirty acres each and a few acres would go to tenants and the rest was declared 'surplus land'. This was challenged by the Golak Nath family in the courts and the case was referred to the Supreme Court in 1965. The family filed a petition under Article 32 challenging the Punjab Act 1953 on the ground that it denied them their constitutional rights to acquire and hold property and practice any profession (Articles 19(f) and (g)) and to equality before and equal protection of the law (Article 14). They also sought to have the Seventeenth Amendment which had placed the Punjab Act in the Ninth Schedule declared void. The apex court overruled Shankri Prasad and Sajjan Singh’s case decisions. The judgement of this case gave rise to an acute controversy between the legislative and judicial branches of the State. It was held that Constitutional amendments were ‘laws’ under Article 13(2)\(^{44}\) of the Constitution and as such subject to the mandate of that article, the state could not abridge or take away fundamental rights by enacting laws, whether in exercise of legislative power or in exercise of constituent power. The First, Fourth and Seventeen amendments were declared invalid, but only prospectively. The Part III of the

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\(^{43}\) AIR 1967 SC 1643

\(^{44}\) Article 13. Laws inconsistent with or in derogation of the fundamental rights.-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires.-

“law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law;

“laws in force” includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368. (Bare Act of Constitution of India)
Constitution was placed beyond the reach of the amending power. Further, the
Supreme Court declared that the judiciary did not merely interpret the Constitution as
it but also interpreted the Constitution from the vantage point that what it should be.
Further, the court upheld that is beyond the competence of Parliament acting under
Article 368 to take away or abridge the fundamental rights. While pronouncing the
judgement, Chief Justice Subba Rao made a distinction in the term ‘law’ used in
Article 13(2) and in Article 368, i.e. the term ‘law’ used under Article 13(2) is a
Constitutional law and the term used under Art. 368 simply deal with the procedure
and it does not confer any power on Parliament to amend the fundamental rights. The
Supreme Court further held that fundamental rights are natural rights or moral rights
which every human being ought to possess. According to the judgement, ‘the
Parliament will have no power from the date of this decision (27th February 1967) to
amend any of the provisions of Part III of the Constitution so as to take away or
abridge the fundamental rights. It showed that the apex court in this case gave a status
to the judges and court from positivist court to activist court.

5.2.3.3. The Third Period began with Kesavananda Bharati case an ended with
Indira Gandhi v. Raj Narain.

In Kesavananda Bharati Case\textsuperscript{45} the majority judgement delivered in the case of
Golak Nath v. State of Punjab was overruled by the SC itself while pronouncing the
judgement in the case of Kesavananda Bharati v. State of Kerala (1973)

The factual summary of this case is as follows\textsuperscript{46}:

1. In February 1970 Swami HH Sri Kesavananda Bharati, Senior head of
   “Edneer Mutt” challenged the Kerala government’s attempts, under two state
   land reform acts, to impose restrictions on the management of its property.

2. Although the state invoked its authority under Article 21\textsuperscript{47}, an Indian jurist, N.
   Palkivala convinced the Swami into filing his petition under Article 26\textsuperscript{48},

\textsuperscript{45} (1973)4 SCC
\textsuperscript{46} Available at: \url{http://lawnn.com/case-study-kesavananda-bharati-vs-state-of-kerala/} (visited on
February 11, 2018).
\textsuperscript{47} Article 21 No person shall be deprived of his life or personal liberty except according to procedure
established by law(Bare Act of Constitution of India)
concerning the right to manage religiously owned property without government interference.

3. The big fight was anticipated. Major amendments to the Constitution (the 24th, 25th, 26th and 29th) had been enacted by Indira Gandhi’s government through Parliament to get over the judgments of the Supreme Court in *Rustom Cavasjee Cooper* (1970), *Madhavrao Scindia (1970)* and *Golak Nath*.

4. The first case had struck down bank nationalization, the second case had annulled the abolition of privy purses of former rulers and the third case had held that the amending power could not touch Fundamental Rights.

5. All these amendments were under challenge in Kesavananda. Since Golak Nath was decided by eleven judges, a larger bench was required to test its correctness. And so, 13 judges were to sit on the Kesavananda bench, and the SC upheld that Parliament is empowered to amend any part of the Constitution including the fundamental rights but cannot alter the basic structure of the Constitution and thus limited the amendment power of Parliament.

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48 Article: 26 Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right
(a) To establish and maintain institutions for religious and charitable purposes;
(b) To manage its own affairs in matters of religion;
(c) To own and acquire movable and immovable property; and
(d) To administer such property in accordance with law(Bare Act of Constitution of India)

49 The Twenty-fourth Amendment of the Constitution of India, enables Parliament to dilute Fundamental Rights through Amendments of the Constitution. It also amended article 368 to provide expressly that Parliament has power to amend any provision of the Constitution. The amendment further made it obligatory for the President to give his assent, when a Constitution Amendment Bill was presented to him

50 The Constitution (Twenty-fifth Amendment) Act, 1971, curtailed the right to property, and permitted the acquisition of private property by the government for public use, on the payment of compensation which would be determined by the Parliament and not the courts. The amendment also exempted any law giving effect to the article 39(b) and (c) of Directive Principles of State Policy from judicial review, even if it violated the Fundamental Rights.

51 Abolition of Privy Purse paid to the rulers of princely states.

52 The Constitution (Twenty-ninth Amendment) Act, 1972, added the Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971 to the Ninth Schedule to the Constitution in order to secure their constitutional validity and prevent them from being struck down by the judiciary on the ground that they are inconsistent with any of the provisions of Part III of the Constitution relating to Fundamental Rights.

53 The Supreme Court held in *R.C. Cooper v. Union Of India*, popularly known as the Bank Nationalization case that the Constitution guarantees the right to compensation, that is, the equivalent money of the property compulsorily acquired. The Court also held that a law which seeks to acquire or requisition property of public purposes must satisfy the requirement of Article19(1)(f).

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The Supreme Court in this case In Smt. Indira Nehru Gandhi v. Raj Narain\(^{54}\) applied the theory of basic structure of the Constitution and the (24\(^{th}\) Amendment)\(^{55}\) Act, 1971 of the Constitution was reaffirmed (popularly known as Election case. This case is regarding Election Disputes involving the Prime Minister Indira Gandhi guilty of electoral malpractices and purpose of 39th\(^{56}\) Amendment of the Constitution. In this case, an appeal was filed by the appellant against the decision of the Allahabad High Court invalidating Smt. Indira Gandhi’s election on the ground of corrupt practices. In the meantime, the Parliament passed the 39th Constitutional Amendment, which introduced and added a new Article 392A to the Constitution of India. It was stated by this Article 392A that the election of the Prime Minster and the Speaker cannot be challenged in any court in the country. It can be rather challenged before a committee formed by the Parliament itself. Although the Supreme Court validated the election of Indira Gandhi but declared the 39th Amendment to be unconstitutional as it violated the basic structure of the constitution. The 39th Amendment was made to validate with retrospective effect the election of the then Prime Minister which was set aside by the Allahabad High Court. The Apex Court struck down Clause 4 of the Constitution 39th Amendment Act, 1975 on the ground that it violated free and fair an election which was an essential feature that formed the Basic Structure of the Indian Constitution. It was held by the Court that these provisions were arbitrary and were calculated to damage and destroys the Rule of Law. Justice H.R. Khanna held that the democracy is the Basic Structure of the Constitution and it includes free and fair election which cannot be violated. The Supreme Court in this case, added the following feature as ‘Basic Features” to the list of basic features laid down in Keshavananda Case. These are: \(^{57}\)

1. Rule of Law
2. Democracy, that implies free and fair elections
3. Judicial Review
4. Jurisdiction of Supreme Court under Article 32

\(^{54}\) AIR 1975 SC 2299.
\(^{55}\) The Constitution Twenty-fourth Amendment1971, enables Parliament to dilute Fundamental Rights through Amendments of the Constitution
\(^{56}\) The Thirty-ninth Amendment of the Constitution of India enacted on 10 August 1975, placed the election of the Prime Minster, President, the Vice President and Speaker of the Lower House beyond the scrutiny of the Indian courts. It was passed during the Emergency of 1975-1977
\(^{57}\) Available at: http://lawnn.com/case-study-indira-nehru-gandhi-v-raj-narain-air-1975/ (visited on February 15, 2018)
5.2.3.4. The Fourth Period began with two important decisions namely Minerva Mills Ltd. v. Union of India, and Waman Rao v. Union of India:

*In Minerva Mills v. Union of India*\(^{58}\) Fact of the case that Petitioner is a limited company owned a textile undertaking called Minerva Mills situated in the State of Karnataka. This undertaking was nationalized and taken over by the Central Government under the provisions of the Sick Textile Undertakings (Nationalization) Act, 1974. In this case the validity of 42nd amendment Act\(^{59}\) was challenged on the ground that they are destructive of the ‘basic structure’ of the Constitution. The Supreme Court by majority by 4 to 1 struck down clauses (4) and (5) of the article 368 inserted by 42nd Amendment of the Indian Constitution. It was ruled by the court that a limited amending power itself is a basic feature of the Constitution. This Judgment laid down that the amendment made to Article 31C by the 42nd Amendment is invalid because it damaged the essential features of the Constitution. Clauses (4) and (5) are invalid on the ground that they violate two basic features of the Constitution. The Judgment of the Supreme Court thus makes it clear that the Constitution is Supreme not the Parliament. Parliament cannot have unlimited amending power so as to damage or destroy the Constitution. The Fundamental Rights and the Directive Principles are required to be viewed as the two sides of the same coin. Both should be complementary to each other and there should be no confrontation between them. Hence a harmonious balance should be maintained between Part III and Part IV of the Constitution and real blend should come out only from harmonizing the spirit of political democracy with the spirit of economic democracy.\(^{60}\)

Since the Constitution had conferred a limited amendment power on the Parliament; Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power.

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\(^{58}\) AIR 1980 SC 1789

\(^{59}\) It amended Article 368 i.e. judiciary can't check the constitutional validity of constitutional amendments. Article 31C was added in constitution by 42\(^{nd}\) Amendment and added that any law that is made to implement any directive principles of state policy will be above judicial review.

In *Waman Rao v. Union of India*[^61]: The ceiling on agricultural holdings was imposed in Maharashtra by the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 27 of 1961, which was brought into operation on January 26, 1962. The validity of these Acts was challenged in the Bombay High Court in a large group of over 2660 petitions. Once again the Supreme Court reiterated and applied the doctrine of basic features of the Constitution. In this case, implications of the basic structure doctrine for Art.31-B were reexamined by a five-judge bench of the Supreme Court. Insofar as Art.31-B was concerned, the Court drew a line of demarcation at April 24th, 1973 i.e. the date of Kesavananda Bharati’s decision and held it should not be applied retrospectively to reopen the validity of any amendment to the Constitution which took place prior to 24-04-1973, that means all the amendments which added to the Ninth Schedule before that date were valid. All future amendments were held to be challengeable on the grounds that the Acts and Regulations which they inserted to the Ninth Schedule damaged the basic structure.[^62]

It was made cleared again in the case of *A.D.M. Jabalpur v. Shiv Kant Shukla*,[^63] It is rightly observed that in constitutional jurisprudence the Constitution is supreme law of the law, even supreme above the law, and itself governing all other laws. The supremacy of this Constitution is beyond the reach of the legislature, the executive and the judicial power created by the construction itself. The canopy of the constitution can not be perched while constitution stands as the supreme law of the law, beyond the reach of courts and jurisprudence, yet it consents to the vulnerability when it usually provides for its own amendments of the Constitution under the Constitution, according to the vary previous of the Constitution itself, within the field of justifiability[^64]

The constitutional validity of any law passed by the Parliament can be challenged on the following grounds:

1. It is repugnant or ultra-vires to the provisions of the Constitution.

[^62]: Available at: [https://www.gktoday.in/gk/basic-structure
doctrine/#Minerva_Mills_v_Union_of_India1980_and_Waman_Rao_v_Union_of_India1981](https://www.gktoday.in/gk/basic-structure
[^63]: AIR 1965 SC 845.
2. It is not within the jurisdiction or competency of legislation which passed it or when legislation exceeds its limits of power.

3. It violates or contravention of any fundamental rights.

The Parliament makes law and judiciary interpret it. So, the Parliament approval is necessary for the maintenance of judicial system. In the United States (Congress) and India (Parliament), prescribe the procedure for appointment of number of judges, fix salaries and constitute new courts. But on the other side, judiciary may exercise considerable control over the legislation by judicial review in order to determine their constitutionality.65

5.3 Doctrine of Basic Structure: Analysis of the Indian legal Provisions:-

More than the four decades ago, in 1973, in the famous case of Kesavananda Bharati v. State of Kerala. The Supreme Court exhibited extreme creativeness and courage and come up with its most innovation in the country’s Constitutional history. In this case, it came up with the ‘Doctrine of Basic Structure’. This is a particular importance in halting the legislature’s ever extending arms of amending the Constitution under Article 368 that the power of parliament is absolute and covers all parts of the Constitution but court put a break on the legislature and executive. But overzealous which would alter the fundamental structure of the Indian Constitution by this Basic Structure Doctrine.

The Basic Structure Doctrine evolved in the context of challenges to the Constitutionality of land reform legislation. In the early 1950s the Constitutional of validity of land reforms legislation was challenged before the courts and some of this legislation was declared unconstitutional. Hence, the Constitution was amended to undo the Constitutional basis for these challenges to the validity of these legislations.66 Thus, the Basic structure consists of the principles keeping which in mind, the Constitution was framed. As for example, objectives specified in the preamble, Right to equality, Right to life, and personal liberty, right to freedom of

speech and expression, separation of power etc. may be called as some of such principles and hence may be said to form the part of basic structure of the Constitution. The provision which enshrine these principles if changed in such a way that they serve same purpose in the same way or in a better way, it would not imply changing the basic structure of the Constitution.\(^{67}\) Thus, Kesvananda Bharati case, was a landmark case with profound implications for constitutionalism in India. The supreme court of India, in this case, took the view that any constitutional amendment, even if enacted under procedure laid down under Article 368 of the constitution could be declared invalid, if it violated the basic structure of the constitution. Article 368, on this view laid down did not give parliament unlimited power to amend the constitution and the court reserved the right to review even amendments of the Constitution.\(^{68}\) The attitude changed from absolute to relative but law can never be static hence absolute, otherwise it becomes vague and useless.\(^{69}\)

### 5.3.1 Theory of Basic Structure Determined by Judges

The judges enumerated certain essential features of the Constitution of India. But the judges also made cleared with list that they are just illustrative and not exhaustive. They will determined the following features as a Basic Structure on the basis of fact of the case (Kesavananda Bharati)\(^ {70} \). According to C.J. Sikri

2. Democratic and Republican form of the government.
4. Separation of the power between Legislature, Executive and Judiciary.

According to Judges Shelat and Grover, the following are illustrations of Basic Structure:

1. Sovereignty of India
2. the unity of the county

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\(^{68}\) Zoya Hassan and Eswaran Sredharan, *India’s Living Constitution: Ideas, Practices, Controversies*.


\(^{70}\) Supra note 14 at 666.
3. The Democratic Character of the government.

4. Essential features of the freedoms of individual’s secured dignity of the citizens.

5. Mandate to build the welfare state.

Further they said list of above features is not exhaustive but illustrate only.

But According to Justice Khanna Doctrine of Basic Structure includes: “the amendment of the Constitution necessarily complied that the Constitution has not be abrogated. The word ‘amendment’ postulates old Constitution survives without loss of its identity despite the change and continues even though it has subject of changes.”

It is cleared from above said contentions that the power of Amendment given under Article 368 of the Constitution does not consist of the abrogated the Constitution nor does it include the power to change the basic structure of the Constitution. Further, the apex court said that every part of the Constitution can be amended provided that the basic features continue same even after amendment.

5.4 Concept of Rule of Law: The Constitution of India and Legal Positivism

The term ‘rule of law’ means the principle of legality which referred to the government based on the principles of law and not of men. In this sense it is clear that the concept of rule of law is opposed to the arbitrary power.71 According to Dicey, Rule of law is one of the basic features of the Constitutional system. Origin of the rule of law is ascribed to Edward Coke in England when he remarked that the king must be under the God and law. According to Coke, there is supremacy of law over the executive.72

Prof A.L. Good Hart says, “Public officers are governed by law, which limits their powers. It means government under law supremacy of law over the government is distinct from the government by law. The mere supremacy of law in society generally which would apply also totalitarian states.”73

71 Supra note 9 at 23.
72 Dr. U.P.D. Kesari, Lectures on Administrative Law, 23(Central Law Publications: 8th ed.).
According to Wade, “Rule of law requires that government should be subjected to law, rather than the law be subjected to the government.”  

The concept of rule of law embraces within its fold two legislation (enacted law i.e. lex) and principles of natural justice (i.e. jus). Rule of law is so powerful and all pervading that no democratic country can afford to disregard it.

The period of 1939 to 1945 was period of World War-II. During this period, the Defence of India Act and the Rules were enacted. These enactments gave vast unguided and absolute powers to legislature and executive which interfered with the life, liberty and property of individuals. An acute need to control uncontrolled and absolute power of the legislature and executive for the interest of affected person. After won independence on August 1947, India became a welfare state. The various Acts depict the social security measures was passed to curb anti-social activities. The progress was all towards establishing rule of law. Constitution of India embodies within itself the concept of rule of law as could be observed from the following provisions:

1. The Preamble declares the ideals of Justice, Liberty, Equality and Fraternity.
2. Part- III enshrines Fundamental Rights.

The Part-III of the Constitution of India indicates the present basis of the rule of law and Part- IV is the indicator of the future of rule of law.

However, the natural law is the superset of all rights. Natural law always appealed to oppressed as the means of deliverance as it is guaranteed rights which was preordained by nature. Therefore, it can be concluded that natural law is based on the premise that there is a higher law which is unamendable and is thus above the whims of the sovereign. The entire body is hence attributed to natural law and is thus the ultimate rights preset. From natural law arose the doctrine of human rights. The Stoics argued that all human have reason with them and can therefore know and obey its law. In India, human rights were guaranteed in part III of the Constitution. The basic

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74 Supra note 9 at 24.
76 Ibid 540.
structure doctrine was an attempt of the judiciary to prevent the all assuming executive from altering any fundamental features of the Constitution. The Basic Structure protected the Constitutional Supremacy, democratic and republic form of the government and separation of power etc.\textsuperscript{77}

The Supreme Court of India has generated more than half century of Constitutional jurisprudence in world’s most populous democracy. It has wielded considerable formal power, including the exceptional power to strike down Constitutional amendments. The court has developed a coherent philosophy of textual interpretation, maintained even enhanced judicial independence in the areas of judicial appointments and transfer, preserved judicial review against sustained attack, even to the point of declaring several Constitutional amendments unconstitutional; protected fundamental rights of speech, equality, religious freedom and personal liberty although it has sustained India’s repeated resort to preventive detention, and initiated a dramatic experiments, known as Public Interest Litigation (PIL), in an effort to make the rule of law a reality for the weak. Thus, the value of open society is carefully preserved in the fundamental rights Articles of the Constitution. The Supreme Court jurisdiction is reinforced by an explicit grant of power under Article 13 to invalidate any ‘law’ as defined in the Article that contravenes enumerated fundamental rights.\textsuperscript{78}

The rule of law is a cornerstone of contemporary Constitutional democracy in Eastern Europe and elsewhere. In the broadest terms, the rule of law requires that state only subject the citizenry to publicly promulgated laws, that the state’s legislative function be separate from the adjudicative function, and that no one within the polity be above the law. The three essential characteristic of modern Constitutionalism are limiting the powers of government, adherence to the rule of law, and protection of fundamental rights. In the absence of rule of law, contemporary Constitutional democracy would be impossible.\textsuperscript{79}

\textsuperscript{78} Burt Newborne, “The Supreme Court of India”, available at: \url{http://icon.oxfordjournals.org/content/1/3/476.full.pdf} (visited on November 19, 2016).
\textsuperscript{79} Michel Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’. Available at \url{www.google.com} (visited on December 1, 2016).
The Constitution of India is the supreme as compared to all other laws at national and regional level. It is the pedestal on which every other law is tested for being within the Constitutional limits. The Preamble elucidates the objectives of the Constitution and intention behind framing of the Constitution. It is precluding to the ideals for which the Indian Constitution stands for. It summarizes the spirit of the Constitution. All the provisions of the Constitution are an extrapolation of these ideals.\textsuperscript{80}

Thus, in \textit{Sajjan Singh v. State of Rajasthan}\textsuperscript{81}, the Preamble is an introduction to the statute and very useful to understand the legislative intention and the policy. In \textit{Indira Gandhi v. Raj Narain}\textsuperscript{82}, the Apex Court was required to examine the validity of the provisions with reference to the basic structure limitation upon the power of Constitutional amendment of the parliament.

In a decision \textit{Kasturi Lal V State of J&K}\textsuperscript{83}, the SC observed that the yardstick for determining reasonableness and public purpose was to be found in the Directive Principles. The Court announced in Golak Nath the parliament takes away the fundamental rights of the person. But in \textit{Re Kerala Education Bill (1959 SCR 995)} the Supreme Court observed that nevertheless in determining the scope and ambit of the fundamental rights relied on behalf of any person or body, the court may not entirely ignore Directive Principle of State Policy laid down in Part IV of Constitution of India but should adopt the principle of harmonious construction and shout attempt to give effect to both as much as possible.

On the other side, the positivist theory of law is almost diametrically opposed to the natural law. Under the natural law theory, law were explained, tested and either criticized or justified with the prdstict of dictates of reasons, which in turn were believed to have universal validity. But these were unverified hypothesis which did not satisfy the critical temper of the new scientific learning. As a reaction to the natural law theory emerged the positivist theory. Positivist theory seeks to define the law from the view point of ‘what is the law’ rather than what ought to be’. This theory

\textsuperscript{80} Shatakashi Johri, \textit{Lectures on Constitutional Law}, (Central Law Publications, Allahabad)
\textsuperscript{81} AIR 1975SC 845.
\textsuperscript{82} AIR1975 SC2299.
\textsuperscript{83} (1980) 45 SCC 1
seeks to define the law not with the reference to its content but in relation to its from. According to Austin, Positive law has three characteristic:

- It is type of command.
- The command is laid down by the political sovereign.
- The command is enforceable by sanction.

Infact, over the years the weight of its authority on the Constitutional developments, subject to the limitations of judicial process and its slow formalistic instance technique has often been markedly felt and its functioning as also the thinking, philosophy and approach of the court, as also its readiness to accept the force of socio-economic changes in our society through the various process and new political and moral values of the changing society. Often the court has imperfectly tried to inject a catalytic element in the growth of Constitutional jurisprudence with less than complete success. Its ability to reject judicial conversation, discard the analytical legality, judicial non-commitment to any economic and moral values has been amply demonstrated, although actually not realized. In its march from justice Kania to Bhagwati, the court has been trying to interpret the fundamental rights accord with the felt spirit of the Preamble and in the consonance of Directive Principles.

According to Austin positive law is command of the sovereign and the sovereign himself is not bound by law for one cannot be bound by one’s own commands Constitutional law, however, purports to control the sovereign. Austin, therefore, concludes that Constitutional law is not positive law in the strict sense, but it is merely positive morality or is enforced merely by moral sanctions. According to Constitutional law derives its force only from public opinion regarding its expediency and morality. Therefore, it belongs only to the class of moral rules and cannot be regarded as a past of positive law. But, in the legal system the aim of the government, promote the happiness of the society, by furthering the enjoyment of pleasure and affording security against pain. Pleasure and Pain are the ultimate standard on which a law should be judged. According to Bentham, utility was

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84 Dr. Veena Madhav Tonapi, Text Book on Jurisprudence, 28-29 (Universal Law Publishing Co, New Delhi, 2011).
85 Dr. M.C. Jain Kagji, The Constitution of India, 1381-1382 (India Law House, New Delhi, 2001).
86 G. C. Venkata Subbarao, Jurisprudence and Legal Theory, 64 (Eastern Book Company, Lucknow, 9th Ed. 2012)
pleasure and the absence of pain. In present time, Bentham’s theory of Pleasure and Pain has its value and it is not only used in the legal system but also in the social system. He has discussed moral and social value of human beings by reason he was called Champion of Individual liberty. In all democratic countries are considering Bentham’s theory of pleasure and pain without this concept neither democracy nor society could run and developed our Constitutional makers also incorporate Bentham’s theory of Utility in the constitution of India and Parliament also consider when making policy and enactment. Because the main object of the government is the greatest happiness to the people of the nation. Subsistence abundance, security and equality are four subordinate ends which are universally appropriate for facilitating the greatest happiness.87

According to Inhering, “Doctrine of Pain and Pleasure effect upon a law as a means for the completion of utilitarian purposes will have a tendency to place great faith in the conscious and systematic activity of legislators. It is not mere chance, but necessary, deeply rooted in the nature of law that all thorough reforms of the mode of procedure and of positive law may be traced back to legislation.88


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87 Dr. Shubash Chander, “Relevancy of the doctrine of pleasures and pain in Indian Legal system” (Indian Bar review, Vol. XL III (3) 2016),39.
89 AIR 1985 SC 180
90 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, descent, place of birth. (Bare Act of the Constitution of India).
91 Article 16 Equality of opportunity in matters of public employment
(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment
(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State
39 and 41. Besides that the other legal enactments also embodies the principle of pain and pleasure for e.g. Transfers of property Act 1882, Right to property under Article 300A of Constitution of India. In Article 21 of the Constitution includes the Doctrine of Pleasurism in the form of dignity of any person.”

However, “The silences in the Constitution of India are as profound as are its written provisions.” Constitution is not mere inherent document or the name of book containing the text of the provisions of the Constitution. It is living, dynamic process. Constitution making did not come to an end when “we people of India,” were said to have decided in our Constituent Assembly to adopt, enact and give to ourselves the Constitution. Constitution is always in the making. It keeps constantly growing & evolving under Article 368 of the Constitution, which is the specific provision dealing with the amendment of the Constitution, the procedure for the Constitution amendment, has certain distinctive features which clearly mark out Parliament Constituent capacity from ordinary role as a legislature. During the period 1950-1972

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. (Bare Act of the Constitution of India).

Article 38 State to secure a social order for the promotion of welfare of the people
(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life
(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. (Bare Act of the Constitution of India).

Article 39 Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing
(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(f) that children are given opportunities and facilities 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. (Bare Act of the Constitution of India).

Article 41. Right to work, to education and to public assistance in certain cases The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. (Bare Act of the Constitution of India).

the question of amendability of Fundamental Rights, came before the Supreme Court in three different cases: Shankri Prasad, Sajjan Singh & Golak Nath.

Thus, every Constitution has values of its own. It will be seen the principle embodies in the above Resolution has been faithfully reflected in the Preamble to the Constitution. The importance and utility has been pointed out in several decisions of SC. Though by itself is not enforceable in a court of law. A.K. Gopalan v. State of Madras, it was held that although clause 4 to 6 of Article 31 vouchsafed protection to zamindari abolition legislation then on the legislative anvil, it was soon discovered that there was a shortcoming which had to be filed before those legislative remedies could be sustained in courts of law. The protection claimed under Articles 31 Clause 4 & 6 of the Constitution related to the non-application of the requirements of clause 2 of Article 31. Thus, the zamindars Challenged in the courts the Act [The Bihar land Reforms’ Act, 1950] abolishing their estates.

The court was held in Kaneshwara Singh v. State of Bihar, that the Bihar Land Reforms Act, 1950 was invalid. The reasons for invalidity was that its provisions accorded different treatment to the land owners in regard to the principles relating to compensation and said acquisition (found by the High Court was) thereby offending against Article 14 of the Constitution. Also, in other High Courts, the remedies of agrarian reform was under challenge and was felt that such kind litigation should be avoided by an amendment of the constitution. Therefore, the constitution first amendment Act, 1951 inserted Articles 31-A and 31-B in the constitution and added the 9th schedule to it. Thus, in the 9th schedule, list of enactments was given, were to be immune from attacks based upon fundamentals rights. Thus, the person’s who were affected by Articles 31-A, and 31-B Challenged their Constitutionality of first Amendment and this question had to be considered by the Supreme Court in Shankri Prashad v. Union of India.

The first judges of the court either had been judges of the federal court of India or were elevated from the High Courts. Nationality, they were inheritors of the colonial

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97 (1950) SCR88
98 AIR1951 Patna 91
legal tradition. In *AK Gopalan* case, the first constitution case heard by the court, the influence of the black letter of law tradition was evident.99

In *Union of India v. Madan Gopal Kabra*100 It follows that the amendment of section 2 clause (14-A) of the Indian Act, by the Finance Act, 1950, so as to authorize the levy of tax on income accruing in the territory of Rajasthan in the year 1949-50 is within the competence of Parliament and therefore valid.

But, the Preamble to a written Constitution seeks to establish and promote and also aids the legal interpretation of the Constitution where the language is to be found ambiguous. *Re Berubai Union*101, the Preamble to the Constitution serves two purposes:-

1. It indicates the source from which the Constitution derives its authority.

2. It also be states the objects which the Constitution seeks to establish and promote. One who has to study the Indian Constitution today may come to grief if he has in his hand only text of the Constitution as it was promulgated in November 1949, for momentous changes have since been introduced not only by numerous amendments Acts but by scores of judicial decisions emanating from the highest tribunal of the land. Nearby every provisions of the original Constitution has acquired glass either from formal amendment or from judicial interpretation and an account of the working of the Constitution, over and above this, would in itself be a formidable one. The former of our Constitution were also inspired by the need for the sovereignty to the Parliament elected by universal suffrage to enable it to achieve a dynamic national progress. They therefore, prescribed an easier mode for changing those provisions of the Constitution which did not primarily affect the federal system.102 With the industrial development, urbanization took place, slums came in and new social problems of crime, insanitation housing problem, etc. are crept in. As society alters, new social, political and economic requirements creep in. A serviceable legal system must suit to the new situations. If the system of law is unalterable, the necessary

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100 1954 SCR 541
101 AIR 1960 SC 845.
102 Supra note 12 at 90.
changes can only be brought about by violence. Law which is capable of adaptation due to its flexibility will allow for peaceful change whether by legislation or judicial developments. The legal system must be stable in short period and be flexible in long run. Law has to undergo a progressive change if it is to subject serve the needs of the society which it seeks to govern. Law can be used as a powerful instrument of social change. When there are adious customs, they can be put down by law which abolishes those customs and make it a penal offence to practice those customs. Legislature makes a law which is intended not merely a agency of social control but also a social change.\textsuperscript{103}

The primary subject of justice is the basic structure of society or more exactly the way in which major social institutions distribute fundamental rights and duties and determine the division of advantage from Social Corporation.\textsuperscript{104}

Thus Constitution is a unique document. It enshrines a special kind of norms and stands at the top of the normative pyramid. The Constitutional law of the country consists of both legal as well as non-legal norms. ‘Legal’ norms are enforced and applied by the courts and if such norms are violated, courts give relief and redress. On the other hand, ‘non-legal norms’ arise in the course of time as a result of practice followed over and over again. Such norms are known as Conventions, usages, customs, practices of the Constitution. A written Constitution is the formal source of all Constitutional law in the country. It is regarded as the supreme or fundamental law of the land and it controls and permeates each institution in the country. Every organ in the country must act in accordance with the Constitution. This means that the government created by the Constitution has to function in accordance with it. Any exercise of power outside the Constitution is unconstitutional. Therefore the law made by the legislature or an act done by the executive is inconsistent with the Constitutional provisions, the court will declare the law or the act as unconstitutional or void. It is the obligation of the judiciary to see that the Constitution is not violated by any governmental organ. Hence the judiciary is called as a guardian and protector of the Constitution. Judicial review has come to be regarded as a integral part of a written Constitution. In a written Constitution, the courts not only interpret ordinary laws and do justice between man and man, but they also give a meaning to the cold

\textsuperscript{104} John Rawls, \textit{A Theory of Justice}, 7[Universal Law publishing Co. Pvt. Ltd., New Delhi, 2000].
letter of the Constitution. It is also noted that the parliament functioning under the written Constitution, cannot claim for itself unlimited power to do what it likes. A written Constitution, independent judiciary with the powers of judicial review, the doctrine of rule of law, and transparent democratic government, fundamental rights of the people, decentralization of power, are the some principles and norms which promote Constitutionalism in a country.\textsuperscript{105}

Rule of law is basic characteristic of the Constitution of India, because it excludes the unpredictability and unfairness on the part of the government. Thus, absence of random power of the government, liberty of individuals, independent judiciary etc. are embodied in the concept of rule of law. Rule of law is promoted by the Constitution of India through its provisions. For example: Minerva Mills Ltd. v. Union of India.

The concept of Rule of Law is that the state is governed, not by the ruler or the nominated representatives of the people but by the law. A county that enshrines the rule of law would be one where in the Grundnorm of the country, or the basic and core law from which all other law derives its authority is the supreme authority of the state. The monarch or the representatives of the republic are governed by the laws derived out of the Grundnorm and their powers are limited by the law. The King is not the law but the law is king. The origins of the Rule of Law theory can be traced back to the Ancient Romans during the formation of the first republic; it has since been championed by several medieval thinkers in Europe such as Hobbs, Locke and Rousseau through the Social Contract Theory. Indian philosophers such as Chanakya have also espoused the rule of law theory in their own way; by maintain that the King should be governed by the word of law. The formal origin of the word is attributed to Sir. Edward Coke, and is derived from French phase ‘la principe de legalite’ which means the principle of legality. The firm basis for the Rule of Law theory was expounded by A. V. Dicey and his theory on the rule of law remains the most popular. Dicey’s theory has three pillars based on the concept that “a government should be based on principles of law and not of men”. In modern parlance Rule of Law has come to be understood as a system which has safe guards against official arbitrariness, prevents anarchy and allows people to plan the legal consequences of their actions.\textsuperscript{106}

\textsuperscript{105} Supra note 20 at 1-7.
\textsuperscript{106} Bhavani Kumar, ‘Rule of Law in India’, Available at: https://www.lawctopus.com/academike/rule-of-law-in-india/ (visited on November 23, 2017)
5.4.1 Theoretical Application of Rule of Law in India: Public Interest Litigation:

The term ‘rule of law’ is derived from the French phrase “la Principe de legalite” (the principle of legality) which refers to a government based on principles of laws and not of men. It means no man is above law and that every person, whatever his rank or conditions, is subject to the jurisdiction of ordinary courts. The rule of law also called supremacy of law, in general legal maxim according to which decisions should be made by applying known principles of law, without the intervention of discretions in their applications. The maxim is intended to safeguard against arbitrary governance. According to prominent views, the concept of rule of law per se says nothing of the ‘justness’ of law itself, but it simply how the legal system upholds the law.\(^{107}\)

Indian adopted the Common law system of justice delivery which owes its origins to British jurisprudence, the basis of which is the Rule of Law. Dicey famously maintained that the Englishman does not need Administrative law or any form of written law to keep checks on the government but that the Rule of Law and natural law would be enough to ensure absence of executive arbitrariness. While India also accepts and follows the concept of natural law, there are formal and written laws to ensure compliance. The Constitution of India intended for India to be a country governed by the rule of law. It provides that the Constitution shall be the supreme power in the land and the legislative and the executive derive their authority from the Constitution. Any law that is made by the legislative has to be in conformity with the Constitute failing which it will be declared invalid; this is provided for under Article 13 (1). Article 21 provides a further check against arbitrary executive action by stating that no person shall be deprived of his life or liberty except in accordance with the procedure established by law. Article 14 ensures that all citizens are equal and that no person shall be discriminated on the basis of sex, religion, race or place of birth, finally it ensures that there is separation of power between the three wings of the government and the executive and the legislature have no influence on the judiciary. By these methods, the constitution fulfils all the requirements of Dicey’s theory to be recognized as a country following the Rule of Law.\(^{108}\)

\(^{108}\) Supra note 107.
Justice Dipak Misra observed that “performance of judicial duty in the manner prescribed by law is a fundamental to the concept of Rule of Law in a democratic state. It has been quite often said and rightly so that the judiciary is the protector and preserver of the Rule of Law. The plinth of justice dispensation system is based on the faith, trust and confidence of the people and nothing can be allowed to contaminate and corrode the same”.¹⁰⁹

Thus, the considerable derivative from ‘Rule of Law’ is judicial review. The judicial review involves determination not only the Constitutionality of the law but also the validity of the administrative action.

**Justice Dr D.Y. Chandrachud observed that:**

“In a democracy based on rule of law, the government is accountable to the legislature and through it to the people. The power under Article 226 is wide enough to reach out to injustice wherever it may originate. These powers have been construed liberally and have been applied expensively where human rights have been violated. But the notion of justice is under the law. Justice should not be made to depend upon the individual perception of a decision maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principles. That is the rationale for the principle that judicial review is confined to cases where there is a breach of law or of the Constitution.”¹¹⁰

In democratic countries, the judiciary is given a place of great significance. The Doctrine of Judicial Review is prevails in many countries having a written Constitution. Thus, the concept of judicial review means that the Constitution is supreme law inconsistent or violate with its provision is void. The court play a significant role of expounding the provisions of the Constitution and exercise power of declaring any law and administrative action which violates the Constitutional provisions to be void or unconstitutional. Thus, it restrains governmental organs from exercising powers which may not be sanctioned by the Constitution. While interpreting the Constitution, courts must keep in mind that the society does not stand still; it is dynamic and not static, the social and economic changes condition

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continuous. The words of the Constitution are remains the same but their significance changes from time to time through judicial interpretation. Judicial review has two main functions: (1) check the legitimizing government action. (2) To protect the Constitution against any undue encroachments by the government.\(^\text{111}\)

Judicial review in India explicitly establishes the Doctrine Judicial Review in several Articles, such as article 13, 32, 131-36, 143, 226, 346. The impact of the liberal judicial approach on fundamental rights has been remarkable over period of time.

Article 14 of the Constitution contains the equal clause. Article 15 (1) forbids discrimination on the ground of sex and Article 15 (3) provides special provisions for women in India. Reason behind such provision is that our “constituent Assembly” members were aware of the poor status of women in India. They were determined to change the existing status qua of Indian women. This Article 15 as a fundamental right came to be concluded in the India Constitution which is the bed rock for positive discrimination for women in India.\(^\text{112}\)

The Doctrine of Separation of Powers was propounded by the French jurist Montesquieu. It has been adopted in India. The adoption of this principle is partial in India and not total. This is because even though legislature and the judiciary are independent yet judiciary is entrusted with implementation of the law’s made by the legislature. On the other hand, in case absence of any law’s on particular issues, judiciary issues guidelines and directions for the legislature to follow. The Supreme Court played a crucial role in formulating several principles in public interest litigation cases For instance, the principles of “absolute liability” was propounded in Oleum Gas Leakage case [M. C. Mehta v. Union of India, AIR 1987 SC 965] and “Judicial Activism and Public Interest Litigation in India, “Public Trust Doctrine” in M. C. Mehta v. Kamal Nath (1988) SCC 388\(^\text{113}\)

PIL in Indian Perspective by Justice Krishna Iyer in *Mumbai Kangar Sabha Vs Abdul Bhai*\(^\text{114}\),

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\(^{111}\) Supra note 20 at 1603.


\(^{113}\) R. Chakraborty, *Law Relating to Public Interest Litigation*, 193(Kanal Publishers, New Delhi)

\(^{114}\) AIR 1976, SC 1465
“Mr. Justice P. N. Bhagwati has explained the emergence of the concept of Public Interest Litigation in the Indian legal system in one of his Article contributed under the caption ‘social Action Litigation.”

The judiciary has to play a vital and important role not only in preventing and remedying abuse and misuse of power but also in eliminating exploitation and injustice. The concept of PIL in modern society is related to social, economic, political and ideological cause being faced by the society and various types of people belonging to poor, illiterate weaker sections of the society who have no access to justice because of their limited resources and lack of legal and other concerned competency.

The term ‘Public Interest’ means the larger interest of the public, general welfare and interest of the masses. The word litigation means a legal action including all proceeding initiated in a court of law with the purpose of enforcing a right or seeking a remedy.115

The Judicial intervention becomes the need of hour to safeguard the rule of law, on the foundation of which the superstructure of the democratic rule rests. In this respect the powers and duties assigned to the judiciary under Article 13, 32, 136, 141, 142, & 226, 227 of the Constitution of India.116 The Kind of Judicial approach can be seen in a number of cases cited below:

In the case of State of Rajasthan v. Vidyawati117, it was held that the jeep driver was owned and maintained by the Rajasthan government (State of Rajasthan) drove it rashly on pedestrian while bringing it back from the workshop. The result of this fatally injured, the pedestrian died. The Supreme Court held that the state of Rajasthan was liable and awarded damages. The pedestrian was died while the driver was exercised sovereign function.

Chief Justice Sinha made an important observation in Vidyawati case. The court approved the difference made between sovereign and non-sovereign function in P. and O. Steam Navigation Co. v. Secretary of State of India118 this observation

117 AIR 1962 SC 933
118 5 Bom. H.C.R.Appl.1
indicates that the immunity from liability of the state for tortious acts committed by the servants while exercising sovereign powers delegated to it cannot be sustained.\textsuperscript{119}

The court followed the decision of Steam Navigation Case in \textit{Kasturi Lal v. State of Uttar Pradesh}\textsuperscript{120}. Chief Justice Ganjendragadkar: “if the tortuous act committed by the public servant gives rise to claim for damages”.

The Supreme Court of Indian has further strengthened this mechanism through its various judgements, the foremost of them being, \textit{A D M Jabalpur v. Shivkanth Shukla}\textsuperscript{121} In this case, the question before the court was ‘whether there was any rule of law in India apart from Article 21’. This was in context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The answer of the majority of the bench was in negative for the question of law. The Supreme Court held that there is no bar to judicial review of the validity of proclamation of emergency imposed under article 352 of the Indian Constitution. Therefore, the Supreme Court has by majority of 4 to 1 struck down Article 31-C as amended by 42\textsuperscript{nd} Amendment in that it destroy the basic feature of “Judicial Review” of the Constitution.

However Justice H.R. Khanna dissented from the majority opinion and observed that:

\begin{quote}
“Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life and liberty without the authority of law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning…Rule of Law is now the accepted norm of all civilized societies”\textsuperscript{122}
\end{quote}

The concept of “Principles of Natural Justice” was that some legal Roman’s who believed that some legal principles need to require a statutory basis, but that principles are ‘Natural and self evident. Almost all the judicial and Quasi-Judicial Authorities usually adopt this concept before reaching to the judgment of the deciding case.\textsuperscript{123}

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\textsuperscript{119} Supra note 20 at 579.
\textsuperscript{120} AIR 1965 SC 1039.
\textsuperscript{121} AIR 1967 SC 1207
\textsuperscript{122} A D M Jabalpur v. Shivkanth Shukla, AIR 1976 SC 1207, para 154
\textsuperscript{123} Available at: \url{www.pathlegal.com} (visited on March 24, 2017)
\end{flushleft}
In the case of *I.C. Golak Nath v. State of Punjab*\(^{124}\), the apex court held that the aims of rules of natural justice to prevent miscarriage of justice.

The Supreme Court held in *A.K. Kraipak v. Union of India*\(^{125}\) that the effect of proclamation of emergency on fundamental rights is that the rights guaranteed by Article 14 & 19 are not suspended during emergency but their operation is only suspended.

The case of *M.K. Pathak v. Union of India*\(^{126}\) is relating to election disputes involving the Prime Minister and purpose of 39\(^{th}\) Amendment of the Constitution which introduced and added a new Article 329A to Constitution of India. The Supreme court held that the clause (4) of 39\(^{th}\) Constitutional Amendment was unconstitutional and void on the ground that it was denial the right of equality enshrined in Article 14, it was held that these provisions 39 (4) of constitutional Amendment were arbitrary and destroy the Rule of Law. Further, Supreme Court upheld, democracy is the basis structure of India constitution and it includes free and fair election which cannot be violated.

The case of *Indira Gandhi v. Raj Narain*,\(^{127}\) is popularly known as Habeas Corpus Case, the respondent challenged the validity of the proclamation of emergency under Article 352. The Apex Court held that no person has legal right to move a court through writ petition under Article 226 before a High Court for a habeas Corpus or any other writ or order or direction order on the ground that order is not under or in compliance with the Act or is illegal or vitiated by malafides factual or legal or is based on extra consideration.

The constitutional bench of Supreme Court in *Minerva Mills v. Union of India*,\(^{128}\) that the 9\(^{th}\) schedule laws are subject to judicial review and if it violates or destroy or damage the basic structure of the Constitution, it can be declared invalid. Thus, the Supreme Court upheld the validity of the new Article 31C of the Constitution.

\(^{124}\) AIR 1967 SC 762
\(^{125}\) AIR 1970 SC 1501
\(^{126}\) AIR 1973 SC 106
\(^{127}\) AIR 1975 SC 69
\(^{128}\) AIR 1980 SC 1789
The Supreme Court held in *Waman Rao v. Union of India*¹²⁹, that the Constitution of India amended time to time was valid but if its basic structure effected by the amendment then it was left open challenge on the ground that they were beyond the constituent power of the Parliament

In the case of *Rudal Shah v. State of Bihar*,¹³⁰ the petitioner from bringing a suit to recover appropriate damages from the state and its erring officials. In the exercise of its jurisdiction under Article 32, Supreme Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases. The petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full-dressed trial. He filed a Habeas Corpus petition in this Court for his release from illegal detention. He obtained relief; he was entitled to be compensated for his illegal detention

The Supreme Court treated a letter in *Mrs. Veena Sethi v. State of Bihar*¹³¹ addressed to a Supreme Court judge by the Free Legal Aid Committee as a writ petition. The court further cleared that the rule of law does not exist merely for those who have means to fight for their rights and very often for perpetuation of the status quo which protects and preserves their dominance and permits them to exploit large sections of the community but it exists also for the poor and the down-trodden, the ignorant and the illiterate who constitute the large bulk of humanity in this country. It is the solemn duty of this Court to protect and uphold the basic human rights of the weaker sections of the society, and it is this duty we are trying to discharge in entertaining this public interest litigation.

**In Bandhu Mukti Morcha**¹³² case the petitioner is an organisation dedicated to the cause of release of bonded labourers in the country. The system of bonded labour has been prevalent in various parts of the country since long prior to the attainment of political freedom and it constitutes an ugly and shameful feature of our national life. This system based on exploitation by a few socially and economically powerful persons trading on the misery and suffering of large numbers of men and holding

¹²⁹ AIR 1980 SC 273
¹³⁰ (1983) Cri LJ 1644
¹³¹ AIR 1983 SC 339
¹³² (1984) 2 SCR 67
them in bondage is a relic of a feudal hierarchical society which hypocritically proclaims the divinity of men but treats large masses of people belonging to the lower rungs of the social ladder or economically impoverished segments of society as dirt and chattel. This system under which one person can be bonded to provide labour to another for years and years until an alleged debt is supposed to be wiped out which never seems to happen during the life time of the bonded labourer, is totally incompatible with the new egalitarian socio-economic order which we have promised to build and it is not only an affront to basic human dignity but also constitutes gross and revolting violation of constitutional values. The appalling conditions, in which bonded labourers live, not as humans but as serfs, recall to the mind the following lines from "Man with the Hoe" which almost seems to have been written with reference to this neglected and forlorn species of Indian humanity: Bowed by the weight of centuries he leans upon his hoe and gazes on the ground the emptiness of ages on his. Justice Bhagwati has in his judgment carefully and elaborately discussed all the aspects. Apart from the principal grievance made that the workmen in the instant case are bonded labourers, various grievances on behalf of the workmen have been voiced and denial to the workmen of various other just rights has been alleged. The grievance of denial of other just rights to the workmen and the relief’s claimed for giving the workmen the benefits to which they may be entitled under various legislations enacted for their welfare, are more or less in the nature of consequential relief’s incidental to the main relief of freedom from bonded and forced labour to which the workmen are subjected.

In *Mohd. Ahmed Khan v. Shah Bano Begum*[^133] This case is a landmark judgement to protect the right of Muslim women on the maintenance. The Supreme Court held that section 125 of the Criminal Procedure code, 1973 is applicable on all persons irrespective of any religion. Further, court held that the right conferred by section 125 of Criminal procedure code can be exercised irrespective of personal law of the parties. The petitioner was awarded compensation of Rs. 50,000 for the violation of his Constitutional right of personal liberty under Article 21 of the Constitution of India. N this case, the petitioner was arrested and detained in police custody attending session of the legislative assembly. Shah Bano, a muslim lady, aged 62 years was divorced by her husband Mohd. A Khan in 1978. At that time she filed a case to get

[^133]: AIR 1985 SC 945
maintenance but this was against the Islamic Customs and the government also supports the husband. When consider the welfare and security issue of women, the Hon’ble Supreme Court, favour of the women and held that she entitled for maintenance under section 125 of criminal procedure code.

In the case of *Bhim Singh v. State of Jammu & Kashmir*\(^{134}\) The Supreme Court has power to award compensation to aggrieved person for the violation of fundamental rights. Thus, Article 32 of constitution is remedial in nature, and on violation of fundamental rights, the Supreme Court has power under Article 32 to award compensation. Further, the Supreme Court has issued appropriate direction for the prevention of Ganga water pollution.

The Hon’ble court cleared in *Olga Tellis v. Bombay Municipal Corporation*,\(^{135}\) that no estoppel against Constitution because the Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to save a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. This principle can had no application to representations made regarding the assertion or enforcement of fundamental rights. Further stated that It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation. They rely for their rights on Article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay, which provide the means of bare subsistence. They only choose a pavement or a slum which is nearest to their place of work. In a word, their plea is that the right to life is illusory without a right to the protection of the means by which alone life can be Lived. And, the right to life can only be taken away or abridged by a procedure established by law, which has to be fair and reasonable, not fanciful or arbitrary such as is prescribed by the Bombay Municipal Corporation

\(^{134}\) (1985)4SCC 677

\(^{135}\) (1985) Sup2 SCR 51
Act or the Bombay Police Act. They also rely upon their right to reside and settle in any part of the country which is guaranteed by Article 19(1)(e).

In *Dr. D.C. Fradinva & Others v. State of Bihar*¹³⁶ petitions under Article 32 of the Constitution raise a short question of great Constitutional importance relating to the power of the Governor under Article 213 of the Constitution to re-promulgate ordinances from time to time without getting them replaced by Acts of the Legislature. The question is, can the Governor go on re-promulgating ordinances for an indefinite period of time and thus take over to himself the power of the Legislature to legislate though that power is conferred on him under Article 213 only for the purpose of enabling him to take immediate action at a time when the legislative assembly of the State is not in session or when in a case where there is a legislative council in the State, both Houses of Legislature are not in session. These writ petitions have been filed by four petitioners challenging the validity of the practice of the State of Bihar in promulgating and re-promulgating ordinances on a massive scale and in particular they have challenged the Constitutional validity of three different ordinances issued by the Governor of Bihar, namely, (i) Bihar Forest Produce (Regulations of Trade) Third Ordinance, 1983; (ii) The Bihar Intermediate Education Council Third Ordinance, 1983; and (iii) The Bihar Bricks Supply (Control) Third Ordinance, 1983. the Supreme Court admitting the petition treating as a PIL and struck down the ordinance. The court also appreciated the petitioner and directed the state government to pay Rs. 10,000/

The concept of creamy layers in *M. C. Mehta v. Union of India*¹³⁷ was formed in this case. It was upheld by the Supreme Court that Article 16 (4) is not an exception; it is part of Article 16 (1) this list is not exhaustive nature and shall be subject to alternation in different respect along with the need of the society. Further, it was observed that in no manner reservation shall be exceed 50% of the Criterion. During the reservation policies the creamy layer shall be excluded. There lies no reservation in promotions.

The Supreme Court made it clear in *S.P. Sampat Kumar v. Union of India*¹³⁸ that the amendment does not affect the Basic Structure of the Constitution.

¹³⁶ (1987) 1 SCC 378
¹³⁷ AIR 1987 SC 1086
¹³⁸ AIR 1987 SC 386
The Supreme Court overruled in *Indira Sawhney v. Union of India*\(^{139}\) popularly known as the judges transfer case and held that on the matter of appointment of Judges of the High courts and their transfer the President is bound by the recommendations of the Chief Justice of India. Further, only in exceptional cases and in strong reasons the appointment recommended by the Chief Justice of India may not be made.

In *Supreme Court Advocates on record v. Union of India*\(^{140}\), The Supreme Court granted rupees one lakh fifty thousand to the petitioner for the death of her son in police custody. It has laid down by the Apex court has under Article 32 and 226 of the Indian Constitution the power to award compensation for violation of fundamental rights by state action.

In *Nilabati Behera v. State Of Orissa*,\(^{141}\) In this case, president proclamation has challenged through writ petition. The Supreme Court granted rupees one lakh fifty thousand to the petitioner for the death of her son in police custody. It has laid down by the Apex court has under Article 32 and 226 of the Indian Constitution the power to award compensation for violation of fundamental rights by state action. In this case, President proclamation was challenged through writ petition. The Supreme Court held that the power to impose proclamation of emergency under Article 356 is subject to judicial review. The Supreme Court can struck down the president’s rule if it is imposed on political consideration and the courts restore the dissolved Assembly.\(^{142}\) Because, the power of the President under Article 356 is a Constitutional power and not arbitrary power.

It was held in *S. R. Bommai v. Union of India*\(^{143}\) that The Indian Constitution is both a legal and social document. It provides machinery for the governance of the country. It also contains the ideals expected by the nation. The political machinery created by the Constitution is a means to the achieving of this ideal.

The Supreme Court has laid down guidelines in *L. Chandra Kumar v. Union of India*\(^{144}\) for preventing sexual harassment of the working women at work places until

\(^{139}\) AIR 1993 SC 477

\(^{140}\) AIR 1993 SC 441

\(^{141}\) AIR 1993 SC 1960

\(^{142}\) *Nilabati Behera and Ors. Vs State Of Orissa*

\(^{143}\) AIR 1994 SC 1918

\(^{144}\) AIR 1995 SC 399
law enacted for that purpose. The Supreme Court has held that it is duty of the employer to take necessary step in orders to prevent sexual harassment of working women.

In the case of *Vellore Citizens Welfare Forum v. Union of India and other*\(^{145}\) the petitioner Vellore Citizens Welfare Forum filed a public interest litigation petition under Article 32 of scale pollution caused to the river Polar due to discharge of untreated effluents by the tanneries and other industries in the state of Tamil Nadu. The court appointed a committee to report on the matter. The Supreme Court after examining the report submitted by the committee delivered its judgement that sustainable development is a balancing concept between ecology and development.

In *Vishaka & Others v. State of Rajasthan*\(^{146}\) The Supreme Court issued guidelines for preventing a sexual harassment at work place because it is violation of Article 14, 15 & 21.

A very fascinating development in the Indian Constitutional jurisprudence is the extended dimension given to Article 21 by the Supreme Court has asserted that in order to treat a right as a fundamental right, it is not necessary that it should be expressly stated in the constitution as fundamental rights. Political, social and economic changes in the country entail the recognition of new rights. The law in its eternal youth grows to meet the demands of society. Since Meneka Gandhi, Art 21 has proved to be multi-dimensional. This extension in the dimensions of Article 21 has been made possible by giving an extended meaning to the word ‘life’ and ‘liberty’ and interpreted right to life enshrined in Article 21 mean something more than mere survival and mere animal existence. Therefore, it includes all those aspects of life which go to make a man’s life meaningful, complete and worth living. The Supreme Court has implied a whole bundle of human rights out of Article 21 by reading the same along with some directive Principles.\(^{147}\) Another Strategy adopted by the Supreme Court with a view to expand ambit of Article 21 and to imply certain rights there from, has been to interpret Article 21 along with international charters on Human Rights.

\(^{145}\) *AIR 1996 SC 2115*

\(^{146}\) *1997 (6) SCC 241*

\(^{147}\) *Supra note 20 at 112*
For example: *PUCL v. Union of India*\(^{148}\), The Supreme Court has implied the right of privacy from Article 21 by Interpreting it in conformity with Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, 1966. Both of these international documents provide for the right of privacy; India is a signatory to both and they do not go contrary to any part of Indian Municipal law\(^{149}\).

The source of modern public trust law is found in *Kamalnath v. Union of India*,\(^{150}\) that a concept of modern public trust law received much attention in Roman and English law - the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public, accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties - such as the seashore, highways, and running water - "perpetual use was dedicated to the public," it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature. They should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit them use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority.

Three types of restrictions on governmental authority are often thought to be compulsory by the public trust: first, the property subject to the trust must not only be

\(^{148}\) AIR 1997 SC 568

\(^{149}\) Supra note 20 at 1120.

\(^{150}\) (1997)1SCC 88
used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.

In the case of *D. K. Basu v. State of West Bengal* 151 thus, during the last 69 years, Article 21 had quite an eventful journey. In the process of expanding the ambit of Article 21, the Supreme Court has integrated many Directive Principles with Article 21. The result of this judicial activism has been that not only the Directive Principles have been activated but also many new fundamental Rights have been implied by the Supreme Court from Article 21. This becomes clear from the discussion which follows:

The Supreme Court held in *Sheela Barse v. Union of India*, 152 that proceeding in PIL intended to vindicate the public interest by prevention of violation of rights of sizable section of society

Public Interest Litigation is also termed as Active Judicialism or social action litigation. The Philosophical basis of PIL lies in the inability to redress the legal wrong or legal injury caused to a person or to determine class of person by injured or social incapacity as a result of which the authority to initiate the redressal of such legal wrong is conferred by the court on a member of the public. 153

Therefore public minded citizens get an opportunity to move the court in the interests of the public. Further, the Supreme Court in the *S.P. Gupta v. Union of India*, 154 popularly known as Judges Transfer case, Justice Bhagwati firmly established the validity of the public interest litigation. Since then, a good number of public interest litigation interest petitions were filed. The following leading cases on Public Interest Litigation 155:

The court observed in *M. C. Mehta v. Kanal Nath*, 156 that environment pollution is a tort against the community and the person who is guilty of causing environment

151 AIR 1997 SC 617
152 AIR 1981 SC 2211
153 Ajay Gulahti, Public Interest Lawyering legal aid and para legal services 9(Central Law Publications, 2013)
154 AIR 1982 SC 149.
156 2002 (3) SCC 64
pollution has to pay damage to those person who have suffered loss on account of the act of the offender.

In case of Secretary, State of Karnataka and Ors. v. Umadevi and Ors\textsuperscript{157}, the Constitution Bench of this Court has laid down the law in the following terms: “Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution.”

In Union of India and Another v. Gulaba Devi and Others\textsuperscript{158}, The theory of strict liability for hazardous activities can be said to have originated from the historic judgment of J.Blackburn, of the British High Court in Rylands v. Fletcher 1866 LRI Ex 265. Before this decision the accepted legal position in England was that fault, whether by an intentional act or negligence, was the basis of all liability and this principle was in consonance with the then prevailing Laissez Faire Theory. With the advancement 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. Hence, we are satisfied that the fallen down of the eucalyptus tree on the victim is nothing but an accident and Indian Railways are liable for the said accidents as per the theory of strict liability. Thus in cases where the principle of strict liability applies, the defendant has to pay damages for injury or death caused to the victim, even though the defendant may not have been at any fault strictly.

In Rameshwar Prasad v. Union of India (2005), In this case, the petitioner challenged the Constitutional validity of a notification which ordered dissolution of the legislative Assembly of the state of Bihar. The dissolution had been ordered on the ground that attempts were being made to cobble a majority by illegal means and lay claim to form the government in the state which if continued would lead to tampering with Constitutional provisions. The Supreme Court held that the aforementioned notification was unconstitutional.

\textsuperscript{157} AIR 2006 SC 1806
\textsuperscript{158} 2009 All. HC available at Docid # IndiaLawLib/110972 (visited on March 12, 2018)
In *Naz Foundation v Govt of NCT of Delhi (2009)*, the Supreme Court declared Section 377 of the Indian Penal Code, 1860 as unconstitutional. The said section earlier criminalized sexual activities “against the order of nature” which included homosexual acts. This judgment however, was overturned by the Supreme in December.

In *Lily Thomas v. Union of India*, the background facts relevant for appreciating the challenge to Sub-section (4) of Section 8 of the Act are that the Constituent Assembly while drafting the Constitution intended to lay down some disqualifications for persons being chosen as, and for being, a member of either House of Parliament as well as a member of the Legislative Assembly or Legislative Council of the State. Accordingly, in the Constitution which was finally adopted by the Constituent Assembly, Article 102(1) laid down the disqualifications for membership of either House of Parliament and Article 191(1) laid down the disqualifications for membership of the Legislative Assembly or Legislative Council of the State. Looking at the affirmative terms of Articles 102(1)(e) and 191(1)(e) of the Constitution, we hold that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a member of Parliament or a State Legislature and for a sitting member of a House of Parliament or a House of a State Legislature. We also hold that the provisions of Article 101(3)(a) and 190(3)(a) of the Constitution expressly prohibit Parliament to defer the date from which the disqualification will come into effect in case of a sitting member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting Sub-section (4) of Section 8 of the Act and accordingly Sub-section (4) of Section 8 of the Act is ultra vires the Constitution.

In the case of *People Claim for Democratic Rights v. Union of India* commonly known as Asiad case. The Supreme Court allow the writ petition and direct that the Union of India, the Delhi Administration and the Delhi Development Authority do take the necessary steps for enforcing observance of the provisions of the Contract Labour (Regulation and Abolition) Act, 1970, the Minimum Wages Act, 1948, the Equal Remuneration Act, 1976, the Employment of Children Act, 1938 and the Inter-State Migration Workmen (Regulation of Employment and Conditions of Service)
Act, 1979 by the contractors engaged in the construction work of the Indoor Stadium at Indraprastha Estate, Asian Village Complex at Siri Fort Road, Swimming Pool at Talkatora Garden, Fly-overs at Indraprastha Estate, Moolchand Hospital, Oberoi Hotel and Lodi Road and the Hotel Project near Ashoka Hotel and for this purpose carry out weekly inspections and file copies of the inspection reports in this Court in the proceedings of the present writ petition and if any violations of the provisions of these statutes are noticed, then immediately file prosecutions against the defaulting contractors. The Union of India, the Delhi Administration and the Delhi Development Authority are also directed to ensure that the minimum wage is paid by the contractors directly to the Workers without the intervention of the Jamadars and if any commission has to be paid to the Jamadars, the contractor may pay it to the Jamadars without deducting any part of it from the minimum wage payable to the workers and the contractor shall not employ any children below the age of fourteen years in the construction work and shall provide all the facilities and conveniences which are required to be provided under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 and the Inter-state Migration Workmen (Regulation of Employment and Conditions of Service) Act, 1979 which has already come into force with effect from 2nd October 1980 and under which the powers to enforce its Provisions have been delegated to the Delhi Administration on 18th July 1981. The court stated that they would also like to appoint two independent institutions to act as ombudsman for protecting the interests of the workers and ensuring observance of the Contract Labour (Regulation and Abolition) Act, 1970, the Minimum, Wages Act, 1948, the Equal Remuneration Act, 1976, the Employment of Children Act, 1938 and the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 by the contractors.

Thus today, judicial positivism is only a reference in historical retrospect. Ever since, the decision of Maneka Gandhi v. Union of India, which is referred to as a watershed in the constitutional history of India, the Supreme Court and the High Courts have unshackled themselves from the restraints laid in A. K. Gopals v. State of Madras. The Courts are taking up a social responsibility. Today, a revolution is taking place in the form of judicial creativity, conspectus of law is being expanded and the problems of the underprivileged are coming to the forefront, accountability towards law started appearing unmistakably and no individual is immune or above the
authority of law. Judicial activism has come to rescue of people whose rights remained unenforced through the instrumentalities of the state.

Therefore, Article 21 has been interpreted by Supreme Court in dynamic passion and include a plethora of rights are not mentioned in the Constitution of India. Some examples of such rights are: Right of life / livelihood, Right of a speedy trial (Hussainara Khatoon v. State of Bihar, 1980(1) SCC81. Right to health & shelter (Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180, Right against handcuffing, Right to free legal Aid, Right to pollution free environment, (M. C. Mehta v. Union of India).

The Preamble of the Constitution of India together with the Fundamental Rights and Directive Principles constitute the conscience of Indian Sociological Jurisprudence. Its core principles make the people of India the ultimate sovereign, the country socialists democratic and republican in character in order to secure all its citizens justice-social economic & political. To ascertain the various aspects of judicial review, it is manifestly necessary to deal with the fundamental concept of the constitution. As said in the Mahabharat, the law of the constitution combines all the knowledge and in it are centered all the worlds. The Constitution is the life of a nation and by it a nation comes into existence. It is the offspring of democracy and its wing are freedom and liberty. Freedom in a democracy is the glory of the state and liberty is the great companion of freedom. To renounce one’s liberty means to renounce the quality of being a man. A state is democratic when all authority is in the hands of the people themselves. In a modern democracy the court is the essential organ to maintain the fundamental objects of the Constitution.

Thus, the Greek concepts of people’s rule have lost none of its vitality even in the modern age.

The march of Article 21 still continues. The frontiers of Article 21 are still expanding and its new dimensions are still being explored by the courts, It is quite possible that

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161 Mamta Rao, Public Interest Litigation Legal Aid and Lok Adalats,117(Eastern Book Company: Lucknow, 2015)
162 Justice Dr. Arjit Pasayat and justice C K Thaka, Dr. Chakradhar Jha’s Judicial review of legislature Acts, 1 & 2(Lexis NeXis Butterworth Wadhwa Nagpur 2009).
in course of time the court may possibly be able to imply some more rights for the people out of Article 21 because the concept of ‘dignified life’ guaranteed by Article 21.\textsuperscript{164}

The supreme Court directed in \textit{People’s Union for Civil Liberates v. Union of India} (Popularly known as NOTA Case), that the election commission to introduce NOTA [none of the above] option on ballot papers and EVM, so that people could choose a negative vote option in election.

It was held in \textit{Society for Unaided Private Schools of Rajasthan v. Union of India}, \textsuperscript{165} that “An Constitutional statute is NOTA law at all. Whatever form or however solemnly it is enacted. When any legislation is declared unconstitutional by a constitutional court, then the legislation in question is not voted or annulled but declared never to have been law. Thus, the preamble of the Indian Constitution, Fundamental Rights in Part III and the Directive Principles of State Policy in Part-IV are often called and described as “conscience of the constitution and they reflect our civil, political and socio-economic rights which we have to protect for a just and human society.

In \textit{Vodafone International Hollings BV v. Union of India},\textsuperscript{166} The Apex court held that certainly is integral to the rule of law. Further, the Court stated that in taxing act one has to look merely at what is clearly said. There s no room for any interpretation. There is no equity about tax. One can only look fairly at the language used.

It was held in \textit{Ramlila Maidan Incident}\textsuperscript{167}, that every law abiding citizen should respect the law and must stand in conformity with the rule, be as high an individual may be. Here Rule of law means no one high or low, is above the law. Everyone is subject to the lawfully and completely as any other and the Government is no exception. Therefore, the state authorities are under a legal obligation to act in manner that is fair and just. The State actions must be in accordance with reasonable, fair and just procedure established by law which stands the test of fundamental rights.

\textsuperscript{164} Supra note 20 at 1142.
\textsuperscript{165} (2012)6 SCC 1.
\textsuperscript{166} (2012)6 SCC 613.
\textsuperscript{167} (2012)5 SCC1
It is a settled in *Ravi Yashwant Bhoir v. Collector*\(^{168}\), that amendment in the constitution by aiding parts IX and IX-A confers upon the local self government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the constitutional institutions besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be permitted to be removed unceremoniously without following procedure prescribed by law, in violation of the provisions of Article 21 of the constitution. The Court being custodian of law can not be tolerating any attempt towards the institution. Because the democratic set up of the country has always been recognised as a basic feature of the constitution like other feature e.g. supremacy of the constitution rule of law, principle of separation of powers, power of judicial review under Articles 32, 226 and 227 of the Constitution etc.

It was held in case *Union of India v. Assn. for Democratic Reforms*, \(^{169}\) that the consequences of three errors in BALCO\(^{170}\), The Supreme Court concluded in BALCO case (*Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc. (2012) 9SCC 552*) that section 94 of CPC and order 39 may not allow an Indian court to grant interim relief in aid of foreign sealed arbitrations. It would have been preferable had the court considered the possibility of accommodating such a power within the scope of section 151 of CPC 1908

In *Mohd. Ajmal Mohammad Air Kasab v. State of Maharashtra*\(^{171}\), In this case, the appellant (kasab) along with a deceased associates having been trained and indoctrinated by Lashkar-e-toiba [LET] in Pakistan, illegally transgressed into Indian territories from the sea at Mumbai by hijacking an Indian fishing boat and killing its navigator. The Supreme Court by confirming his death sentence imposed by High Court stated that “Speedy trial” and fair trial to a person accused of a crime are integral part of Article 21. However, qualitative difference between the right to speedy trial and the accused’s right fair trial. Unlike the accused’s right of fair trial, deprivation of the right to speedy trial does not per se prejudice. The accused was defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances.

\(^{169}\) AIR 2002 SC 2112  
\(^{171}\) 2012( 9)SCC1
In the case of *Indra Sharma v. N K. V. Sharma*\(^{172}\), the Supreme Court held that the domestic violence Act 2005 enacted to provide protection to women from abuse of their partner.

In the case of *Swaraj Abhyyan v. Union of India*,\(^{173}\) The Supreme Court issued guidelines for disaster / drought management.

The Supreme Court declared in *Supreme Court Advocates on Record Association v. Union of India*,\(^{174}\) that 99\(^{th}\) Amendment of the Constitution Act, 2014 was unconstitutional. Again following Articles has been revised as they prior to 99th amendment: 217(1), 222(1), 224, and 224-A and 231(2) (a).

The Apex Court cleared In the case of *Prakash v. Phulavati*\(^{175}\) that the law which gave equal right to daughters in ancestral property under the Hindu Succession Act is not retrospective effect and its prospectively enforceable. Further the Justice Adarsh Kumar Goel observed in this case that “Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature.”

It was held by Supreme Court in *Subrata Chattoraj v. Union of India*,\(^{176}\) that Fair, Just and reasonable procedure is implicit in Article 21 of the Constitution and article 21 guarantees a right to the accused to be tried speedily. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

*Sharaya Bano v. Union of India, Re: Muslim Women’s Quest For Equality v. Jamiat Ulma-I-Hind, Gulshan Parveen v. Union of India and others, Ishrat Jahan v. Union of India and others, Atiya Sabri v. Union of India and others*, the Supreme Court declared that the practice of triple talaq as an unconstitutional. It is violative of Article 14 of the Constitution of India.\(^ {177}\)

The Supreme Court in *Krishna Kumar Singh v. State of Bihar* held that re-promulgation of ordinances is a fraud on the Constitution and a subversion of

\(^{172}\) AIR 2014 SC 309  
\(^{173}\) Writ Petition (C) NO. 857 OF 2015 available at: www.livelaw.in (visited on March 5, 2018)  
\(^{174}\) WP(Civil) No. 13/2015.  
\(^{175}\) (2016)2SCC 36 para 18  
\(^{176}\) (2016)2SCC1, para 71  
\(^{177}\) Available at: http://www.livelaw.in/read-25-important-judgment-supreme-court-india-delivered-2017/ (Visited on February 8, 2018)
democratic legislative processes. The court also held that the satisfaction of the President under Article 123 and of the Governor under Article 213 while issuing ordinances is not immune from judicial review.\textsuperscript{178}

In this case of \textit{Hussain and Ano. v. Union of India},\textsuperscript{179} Supreme Court directed courts to dispose of bail pleas within one week. It also issued directions to tackle pendency of criminal cases, reiterating that speedy trial is a part of reasonable, fair and just procedure as guaranteed by Article 21 of the Constitution of India.

In \textit{State Bank of India v. Santosh Gupta}\textsuperscript{180} the present appeals arose out of a judgement passed by HC J & K, in which it had held that various key provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) were outside the legislative competence of Parliament, as they would collide with Section 140\textsuperscript{181} of the Transfer of Property Act of J&K, 1920. The Act has been held to be inapplicable to banks such as the state Bank of India which are all India banks. The SC upheld that the provisions of SARFAEI cannot be applied to the state of J&k, it is contradiction in terms to state that SARFAEI can be availed of by banks which originate from the state of J & K for securing monies which are due to them.

In \textit{Binoy Viswan v. Union of India}.\textsuperscript{182} the writ petitions challenged the constitutional validity of section 139AA of the Income Tax Act, 1961, which had been inserted by amendment vide Finance Act, 2017. According to sec. 139AA, in the forms for allotment of Permanent Account Number (PAN) as well as in the income tax returns, the assessee is obliged to quote Aadhaar Number. The SC upheld the validity of the provisions of section 139AA and declared that section 139AA was subject to passing the muster of Article 21 of the Constitution. There shall remain partial stay on the operation of section 139AA of the Act.

\textsuperscript{178} Available at: \url{www.live.law.in} (visited at January 11, 2018).
\textsuperscript{179} Available at \url{https://drive.google.com/file/d/0BzXilfcxe7yuajU1bmpzanFtNnc/view} (visited on March 12, 2018).
\textsuperscript{180} AIR 2017 SC25 also available in Universal Landmarks Judgements, (Universal Law Publishing Co., 12\textsuperscript{th} ed. 2017).
\textsuperscript{181} Sec. 140 OF TPA of J& K, 1920 provides that only certain person are entitled to purchase property in state of J & K..
\textsuperscript{182} (2017) 75CC59. Also available in Universal Landmarks Judgements, (Universal Law Publishing Co., 12\textsuperscript{th} ed. 2017).
In *Re: Hon’ble Shri Justice C.S. Karnan*\(^{183}\) it is the first time in the history of India that a High Court judge has been sentenced to six months imprisonment under the contempt of court act. The Supreme Court has taken aid of Article 142 of the constitution and punished Justice Karan.\(^ {184}\) Further, it was cleared by Supreme Court that the section 3 of the judge protection act says that judge have an immunity from being initiated any contempt proceeding civil or criminal while discharging their judicial or administrative function. Here, what justice Karan has done that he was discharging neither judicial nor administrative function. So, he cannot claim protection under Judge Protection Act 1985. Further stated that with the conviction of justice Karan, “the reputation of Judiciary has been maintained because we are a democratic set up, where judiciary commands certain respect. To uphold that respect the Supreme Court today did was the correct thing to do so that tomorrow such things are not repeated. The present proceedings were initiated suo-motu against Shri Justice C.S. Karnan, for contempt of court towards a large number of the judges and judiciary in general. A bench comprising of the seven senior most of the judges of the SC was constituted, to examine whether or not Shri Justice C.S. Karnan was guilty of having committed contempt. The Bench upheld that the actions of Shri Justice C.S. Karnan constituted the grossest and gravest actions of the contempt of court. He had also committed contempt, in the face of the court. He was liable to be punished, for his actions and behaviour with the imprisonment of six months.

In *Shayara Bano v. Union of India*,\(^ {185}\) the validity of the Section 2 of Muslim Personal Law (Shariat) Application Act, 1937 was challenged on the ground of practice or Talaq-e- Biddat is violate of the fundamental rights. The SC Five Judges Bench upheld that practice of Talaq-e- Biddat is violation of fundamental rights contained under Article 14 of the Constitution of India. the court recognise the validity of The Muslim Personal Law (Shariat) Application Act, 1937 in so far as of Triple Talaq is within the meaning of the expression ‘Law in force’ in Article 13(1). The court set aside the practice of Talaq-e- Biddat(Triple Talaq) by a majority of 3:2.


\(^{184}\) Suo- Motu Contempt Petition Civil No. 1 of 2017.


\(^{185}\) (2017)6 MLJ 378.
In *Justice K.S. Puttaswamy v. Union of India*\(^\text{186}\), the SC held that Right to Privacy is Constitutional protected right because it is essential facet of the dignity of the human being. The court further declared that the constitution must evolve with the left necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the constitution cannot be frozen on the perspectives present when it was adopted. Technological change had given rise to concerns which were not present when decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features. In the above reference, the SC disposed writ in the following terms:-

1. The decision in M.P.Sharma which held that the right to privacy is not protected by the Constitution of India was over-ruled.
2. The decision in Kharak Singh to the extent that it held that the right to privacy is not protected by the Constitution of India was over-ruled.
3. The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by part III of the Constitution.
4. The Supreme Court held that right to privacy is protected under Constitution of India.

In *Abhiram Singh v. C.D Commalhen*\(^\text{187}\), The Apex Court ban on seeking votes on the name of religion, race caste in the electoral process. In a given community, “the basic values do not change from one generation to the next generation. On the contrary, they are reaffirmed and strengthened as the genuine pursuit of enlightenment proceeds. Therefore, every amending body must necessary have limitations on its amending power and it becomes the more so when the delegates of the ultimate exercise this power\(^\text{188}\).

Justice R.K. Aggarwal observed that:


\(^{187}\) (2017)2 SCC629.

\(^{188}\) Lyon, J Noel and Atkey, "Canadian Constitutional law in A. Modern Perspective P.68
“in a modern progressive society it would be unreasonable to confine the intention of legislature to the meaning attributable to the word used at the time the law was made, for a modern legislature making a laws to govern a society which is fast moving must be presumed to be aware of an unlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them. an enactment former days is thus to be read today, in the light of the dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention”.

As a result of judicial decision there have been various amendments of the constitution of India. It will appear from a review of the above position that there is constant stress to bring the law of the country in conformity with its growing social economic and political requirements. The Constitution is for the people and not the people for the constitution.

5.5 Conclusion

The defects of the analytical method are clear enough. It restricts itself to the facts of mature legal systems and treats of law as it is. It must be admitted however, that very often it is not safe to disregard what the law has been in the past. It is only by the light of history of the judgements that we can truly understand and judge legal institutions now existing. The influence of the analytical school was in the period of the 19th century and ascendency of historical school, but the latter on it lost its hold on the world of thought by becoming fatalistic because change in the social needs and moral values. Legal positivism consists too much unconscious for growth of law and repudiating the element of purposeful effort as a factor in legal evolution. This led to the development of combination of sociological jurisprudence, natural law and legal positivism in the present century. However, the present time, the legal system gravity shifted from the statute law to the judgement law, but still the judges interpreted the statutory laws in a manner to fulfill the needs of society. The modern legal

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189 (2016)2 SCC 161 para 48 & 47.
jurisprudence is different from ancient legal jurisprudence. The ancient legal jurisprudence was mainly based on customary laws and traditional basis. The law was remained same almost for centuries because changed in social relation was very slow. Thus, the law was depending upon law of nature. There was no statue law because in the Ancient India no Parliament. All law was originally based on customary laws. On the other hand, modern legal jurisprudence is related to the industrial society because social science and technology are progress rapidly in 18th and 19th centuries. Due to industrial revolution, changes are brought in society within a short time. Consequently the major changes in industrial relation causing major changes in social relation and in law also. Legal norms are continuously changes in modern society for the welfare of citizens. In the end we can say, the modern jurisprudence is combination of Sociological Jurisprudence, Natural Law and Legal Positivism. Moreover in democratic a country aims embodied in the Constitution. The states machinery work accordingly. The test of the validity or invalidity of any law would be always checked by the judiciary on the principles laid down in its judgements. The actual effect of any law checked by the judiciary whether it destroy the basic structure of the Constitution or not.