CHAPTER V

LEGAL PHILOSOPHY IN POST MANEKA GANDHI ERA: A STUDY FROM 1978-1991

The period after the decision after the Maneka Gandhi's case may be termed unique in the history of evolution of Indian Jurisprudence. This period is marked by two very significant developments namely relaxing the rule of *locus standi* and introduction of epistolary jurisdiction. Both of the above developments gave rise to the Public Interest Litigation. Excessive use of public interest litigations and the consequent judicial activism gave rise to another concept of judicial overreach. Thus, one may safely term this period as era of activism. Understandably, therefore, the strictly positive conservative judges were not comfortable with these developments. However, the paradigm shifts was so pronounced and the litigant public so demanding that the positivist conservatives had to relent. Moreover, noteworthy development during this period is the wave of feminist and labour movement which arose from deep within the society and found the echo in the minds of the judges whose reflection can be seen in their judgments. The judgments of this period show three distinct categories-

a. Judgments that looked only at the 'law' and not social and economic conditions- the Kelsonian positivist,
b. Judgments that exhibited a sensitivity to the changing socio-economic scenario but remained well within the boundary of the Constitution of India- the borderliners, and
c. The judgments that were indulging in implicit law making under the garb of interpretationism.

The last category of judgments introduced judicial activism through expansionist interpretation and procedural innovation. In the third category of judgment many of the subject matters of Directive Principles of State Policy became the subject matter of fundamental right under Article 21, education, legal aid, health environment to have a few. The present chapter focuses on these issues to show the significant paradigm shifts of this period. Only the important and leading cases as the researcher could identify are discussed in this chapter.

However, in this chapter cases are dealt with according to subject matter and not chronologically. The period of late seventies and eighties decade was witness to the emergence of feminist movement, what has now come to be known as the second and third wave of feminism. With so much of unique and significant trends in the Indian judiciary, one would have expected the Supreme Court to come out strongly on women's issues. However, that did not happen, rather the judicial pronouncements on that front remained disappointing. It was during 1960s and/ or 1970s (the second wave of feminism in the world) it was realized that cultural and political inequalities are linked together.[1] This gave rise to several movements in order to ensure equality to women in areas of family, sexuality and work.

The Rameeza Bee rape in 1978 had triggered a nation wide awareness of rape of women and women's right. However, this incident did bring awareness both politically and morally. Nevertheless, in *Tukaram & ors.* v. *State of Maharashtra*[2] or Mathura Rape case is a significant case to begin the second wave of feminist movement in India. Judgment in Mathura Rape case led to the modification of 'proof beyond reasonable doubt' principle in cases related to sexual crimes. In this case a girl named Mathura alleged that she was raped by one police personnel, named Ganpat, in the premises of police station when she went there to lodge a complaint. There was another accomplice, named Tukaram, with Ganpat, while committing the crime. In the session court it was contended by the accused was that the victim, Mathura, consented to the sexual act because there was no injury in victim's body. The session court held the victim of questionable character and acquitted Ganpat and Tukaram. An appeal was filed before the Nagpur Division Bench of Bombay High Court where the decision of the session court was reversed on the following ground-

The session court held that there was no rape. It was consensual sex. However, in consensual sexual relationship also there has to be Consent. There is a fundamental difference between Consent and Passive Submission. In this present case even though there is no injury in the victim's body, but it could not be denied that due to the influential position of Ganpat and Tukaram the victim might have passively submitted to the act.

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[1] Rekha Pande, The History of Feminism and Doing Gender in India, Rev. Estud. Fem. 26(3), Florianópolis (2018).

[2] *Tukaram* v. *State of Maharshtra* AIR 1979 SC 185

The Division Bench of High Court imposed imprisonment upon the accused. However, the Supreme Court again reversed the decision of the Division Bench of High Court on appeal by the accused. This appeal in the Supreme Court was heard by three judges Bench consisting of A.D. Koshal J., Jaswant Singh J., and P.S. Kailasam. The Bench reversed the decision of the Division Bench and acquitted two accused on the following grounds-

a. The medical examination of the victim showed previous rupture of her hymen which led the court to assume that the victim was in sexual relationship even before this incident happened. Therefore, it was presumed that a girl being in sexual relationship can not be forced to have sexual intercourse.
b. The burden of proof was upon the prosecution to prove beyond reasonable doubt that the accused forced and threatened her to have sexual intercourse. However, the prosecution failed to prove it. Therefore, there was no doubt regarding taking place of the incident within the premises of police station but it was observed by the Bench that it was not a crime as the victim consented to it.

This judgment attracted a lot criticism and embarrassment for the Indian Judiciary. Finally in 1983 Mathura rape case led to Criminal Law (Amendment) Act, 1983. This amendment brought following significant changes[3]-

a. The definition of Rape under section 375 of IPC, 1860 was modified as-
    i. Any sexual intercourse with a woman without her consent is rape,
    ii. Sexual intercourse with a woman with her consent by putting her or any of her relatives under fear of death or hurt is rape,
b. Section 376 (2) of IPC, 1860 acknowledged custodial rape. This section made police officer criminally liable for sexual offence committed within the premise of the police station or in his custody. The section also criminalized public servants taking advantage of his official position and committing the crime.
c. Section 376 B of IPC, 1860 provided punishment for intercourse by public servant with woman in his custody,

[3] The Criminal Law (Amendment) Act, 1983 brought several modifications. However, only relevant and significant modifications are mentioned in the backdrop of the fact of Mathura rape case

d. Section 376 C of IPC, 1860 provided punishment for intercourse by superintendent of jail, remand home etc.
e. Section 53 A was inserted in the Indian Evidence Act, 1872 whereby it was stated that the previous sexual relationships of the victim shall not be considered, in some cases, to ascertain the character of the victim,
f. Section 114A of the Indian Evidence Act, 1872 laid down that in cases regarding sexual offence, especially rape, the court shall presume the absence of consent by the victim.

Section 114 A of the Indian Evidence Act, 1872 was indeed a significant step by the legislature to promote justice to the vulnerable section of the society where the Indian Judiciary failed to do the same in Mathura Rape case.

In Mathura Rape case the judiciary interpreted 'beyond the reasonable doubt' principle strictly which indicated the philosophy of analytical positive school of law. However, legislature upheld the principle of social justice, as mentioned in the Preamble of the Constitution of India, by bringing in this amendment of 1983.

Post Maneka Gandhi the focus of the judgment shifted to expanding the horizon of public law and accessibility to justice. Indian population, predominantly the economically weaker section, now had better scope and opportunity to have access to justice. Post Maneka Gandhi, in the emerging trend, a group of judges was to up the cause of the indigent, vulnerable group. Prominent among the vulnerable were the labourer. However, women, children, senior citizens, LGBT were not in immediate focus. This concern for the downtrodden led to expansion of the fundamental rights especially Article 21. Some significant judgments brought some of the Directive Principles of State Policy within the ambit of Fundamental Rights. For example in *M.H. Hoskot* v. *State of Maharashtra*[4] right to free legal aid enshrined under Article 39A of the Directive Principle of State Policy[5] was considered to be a fundamental

[4] *M.H. Hoskot* v. *State of Maharashtra* AIR 1978 SC 1548

[5] Article 39 A of the Constitution of India
The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

right under Article 21, that was restricted in Hussainara Khatoon case and in Khatri case [6].

- **Cases Dealing With Relation Between Fundamental Right And The Directive Principles Of The State Policy**

M.H. Hoskot v. *State of Maharashtra*[7] was presided over by three judges Bench consisting of V.R. Krishna Iyer J., D.A. Desai J., O. Chinnappa Reddy J. Justice V.R. Krishna Iyer in unanimous judgment observed that if a prisoner sentenced to imprisonment is virtually unable to exercise his constitutional and statutory rights of appeal inclusive of special leave to appeal to the Supreme Court for want of legal assistance, there is implicit in the Court, under Article 142 read with Articles 21 and 39A of the Constitution, the power to assign counsel for such imprisoned individual for doing complete justice.

Hussainara Khatoon & others v. *Home Secretary, State of Bihar*[8] raised the issue of lengthy trial of people for petty offences due to their economic disability to have access to legal aid. Hussainara Khatoon case was heard by two judges Bench consisting of P.N. Bhagwati J., and D. A. Desai J. The petitioner filed the suit contending that many undertrials in Bihar deprived of fair, just and reasonable procedure of trial due to economic disability to hire counsel. Free legal aid is a significant element in ensuring fair, just and reasonable procedure. The two judges Bench in this case held that it is the state's responsibility to provide free legal aid to the poor and needy under Article 39A of the Constitution of India. The State can not avoid this responsibility by pleading economic and administrative constraints. The Bench also directed the state government of Bihar to provide counsel to indigent people whose cases were pending before the magistrate or sessions court. In *Khatri & Ors.* v. *State of Bihar & Ors*.[9] The same issue regarding free legal aid arose. In this case two judges Bench consisting of P.N. Bhagwati J., & A.P. Sen J., again held that it is the state's responsibility to provide free legal aid to people in need. Article 39A becomes imperative upon the state to provide free legal aid to indigent persons. In

[6] *Hussainara Khatoon & others* v. *Home Secretary, State of Bihar* AIR 1979 SC 1369. & *Khatri & Ors.* v. *State of Bihar & Ors* 1981 SCR (2) 408.
[7] *M.H. Hoskot* v. *State of Maharashtra* AIR 1978 SC 1548
[8] *Hussainara Khatoon & others* v. *Home Secretary, State of Bihar* AIR 1979 SC 1369.
[9] *Khatri & Ors.* v. *State of Bihar & Ors* 1981 SCR (2) 408

Khatri case the Bench unanimously held that the State is constitutionally bound to provide such aid not only at the stage of trial but also when they are first produced before the magistrate or remanded from time to time and that such a right can not be claimed on the ground of financial constraints or administrative inability or that the accused did not ask for it. Magistrate and Session judges must inform the accused of such rights. The right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. The State is under Constitutional mandate to provide a lawyer. There may, however, be cases involving offences such as economic offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal service need not be provided by the State. Therefore, during post Maneka Gandhi judgment there was expansion of public law domain.

In Hussainara Khatoon and Khatri case the judiciary upheld rights of indigent citizens to free legal aid. However, the judiciary did not specify the process to distinguish person requiring free legal aid service from persons not requiring it. Hence the Legal Services Authorities Act, 1987 was enacted. Section 12 of the Act of 1987 laid down a list of persons qualifying for receiving free legal aid[10].

The series of cases discussed hitherto before expressly show judicial inclination towards social justice. More significantly such a shift towards social justice appears to have been accepted without challenging the shift from strict positivism. The judgments also successfully shift a Directive Principles, namely, Article 39 A from part II to Part III which was, clearly not the intention of the framers of the Constitution. The concept of 'just, fair and reasonable' trial emerges as the foundation of litigation. Such a principle is not expressly evinced in the pre Maneka Gandhi era.

[10] Section 12 of the Legal services Authorities Act, 1987-
(a) a member of a Scheduled Caste or Scheduled Tribe;
(b) a victim of trafficking in human beings or begar as referred to in Article 23 of the Constitution;
(c) a woman or a child;
(d) a mentally ill or otherwise disabled person;
(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
(f) an industrial workman; or
(g) in custody, including custody in a protective home or in a juvenile home
(h) of in a psychiatric hospital or psychiatric nursing home within the meaning of clause
(g) of section 2 of the Mental Health Act, 1987; or
(i) A person whose annual income less than rupees fifty thousand or such other higher amount as may be prescribed by the State Government.

In *Fertilizer Corporation Kamgar Union (Regd.) Sindri Andother* v. *Union of India*[11] is a case where the conflict between fundamental rights and DPSP arose again. This case was heard by five judges Bench consisting of Y.V. Chandrachud C.J., P.N. Bhagwati J., V.R. Krishna Iyer J., Syed Murtaza Fazal Ali J., A.D. Koshal J. In this case the court decided the extent of application of Article 43A[12] of the Constitution of India. Article 43A mandates for the participation of workers in the management of industries. Basing upon this Article the petitioners (workers) filed the petition challenging the sale of plants and equipments of Sindri Fertilizer Company. It was contended by the petitioners that the right to carry any business or occupation guaranteed to the Sindri Fertilizer Company under Article 19 1 (g)[13] is in a clash with Article 43A[14] of the Constitution. The Management of the Sindri Fertilizer Company decided to sell of the company without having any discussion with its workers which violated the provision of Article 43A of the Constitution of India. Justice Chandrachud, Justice Ali and Justice Koshal gave the majority decision while Justice Iyer aned Justice Bhagwati agreed to the majority decision in their concurrent judgment. The majority decision was-

a. It was rejected that the sell or sale proceedings were violative of Article 14. The industry lawfully invited seeking tender for the sale of industry plant and equipment.
b. The petitioner contended that the industry did not accept the highest bid and sold it to someone who paid lesser than the actual market price. It was

[11] *Fertilizer Corporation Kamgar Union (Regd.) Sindri Andother* v. *Union of India* AIR 1981 SC 344.

[12] Article 43A- Participation of workers in management of industries
The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

[13] Article 19 (1) All citizens shall have the right
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) omitted
(g) to practise any profession, or to carry on any occupation, trade or business

[14] Article 43A- Participation of workers in management of industries
The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

observed that the vendors are not necessarily bound to accept the highest bid. What is necessary is that all the required procedures have been satisfied.

c. Petitioner contended that the sale of plant and equipment has violated the right of petitioners to carry on business or occupation guaranteed under Article 19 1 (g). it was observed that Article 19 1 (g) guaranteed everyone the right to carry on any business or occupation, subject to limitation, but the same Article does not guarantee that one individual would stick to one business and/ or occupation.

   The defendants in this case questioned the locus of petitioners to file this writ petition. Justice Iyer and Justice Bhagwati in their concurrent judgment interpreted 'PIL' and widened the concept of '*locus standi*'. They observed that an individual can file a suit seeking to enforce his/her right only when he/she has the right. However, both the judges observed that any person not effected by an incident can not file a public interest litigation unless the incident is effecting the public at large.

In *People's Union for Democratic Rights and Others* v. *Union of India & others*[15] the two judges Bench consisting of P.N. Bhagwati J., and Baharul Islam J., dealt with the issue of forced labour led to violation of fundamental right of an individual. The petitioners filed the suit against the Government of India while the employer was not the government but a private constructing agency. Issues raised in this case were-

a. Whether individual not directly affected by the cause of action can file a PIL?
b. Whether the Government of India has any liability for the private agency employing workers violating labour laws in India?

In this case the Bench widened the purview of PIL. P.N. Bhagwati J., observed

Public interest litigation is a strategic arm of the legal aid movement and is intended to being justice to the poor masses who constitute the low visibility area of humanity. Public Interest Litigation is totally different kind of litigation than the litigation essentially adversary in character. Through Public Interest Litigation enforcement of legal rights and rights guaranteed under the Constitution of India is intended to be

[15] *People's Union for Democratic Rights and Others* v. *Union of India & others* 1983 SCR (1) 456.

promoted. Therefore, any individual can file a PIL to enforce legal rights of people at socially and economically disadvantageous position.

The Government of India contended that the government can never be made liable for an agency employing workers at lesser wage than the minimum wage. However, the Bench held that under Article 43[16] of the Constitution of India it is the responsibility of the government to ensure that all the workers are being provided with minimum wage without violating the provisions of labour laws in India. It was not the government employing workers violating the labour legislation in India. Nevertheless, the government can not escape the liability from it.

Post Maneka Gandhi era (i.e. post 1978) the focus of the conflict shifted to the function of law in society. Functional aspect of law is the inquiry of the sociological school of thought. The school propounded that the function of law was to resolve the conflict of interest in the society. The positive school of thought tried to settle the conflict strictly by the letter of the law commanded by the sovereign but the sociological school traverses beyond the strict letter of the law and more attention is paid to the spirit of the law. Law is started to be used to resolve conflicts between several interests in society. During 1950-1978 the focus while interpreting the law was on the law-making institutions. However, during post 1978 period the focus shifted to the law-applying society i.e. the court. However, this shift did not take place overnight. Through several minority judgments[17] the court endeavored to bring this transformation. Nevertheless, the watershed year marking this transformation is 1978 through the landmark case of Maneka Gandhi v. union of India.

The authority of law was no more rooted in the command of the sovereign but in the fundamental natural law principles. The significant criterion of identifying law with law-making institution is that the law is seemed as a pattern of command and obedience ascertained irrespective of its morality in the command. However, this idea

[16] Article 43- Living wage, etc, for workers The State shall endeavor to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavor to promote cottage industries on an individual or co operative basis in rural areas

[17] Minority judgment of Justice Fazl Ali in *A.K. Gopalan* v. *State of Madras* (1950), Minority judgment in Hidayatullah & Mudholar JJ. in *Sajjan Singh* v. *State of Rajasthan* (1965), Minority judgment of Justice H.R. Khanna in *A.D.M. Jabalpur* v. *Shivkant Shukla* (1976).

of positive law has been criticized in several judgments.[18] What remains of this idea is the concept that the law must originate out of an organized political system. The eight tenets of law pointed out by Bentham remains true to this day.[19] With this idea of law the legislature has been given the authority to make laws and it was no more an institution with the ultimate and absolute power to legislate. The analytical positivism was criticized because of its denial of any tacit cooperation between lawgiver and the citizen. The theory of analytical positivism fails to give any explanation to these shifts took place post 1978.

According to common law theorist H.L.A. Hart judges can and do create new law where the existing law is outdated or inappropriate. Hart was a legal positivist sees the fusion of the primary and secondary rules as being the determinant of what later becomes known as legal system.[20] Dworkin, however, strongly opposed to the law making power of the judges. According to Dworkin law is a seemless web in which there is always a right answer.

In Indian context it is to be kept in mind that the judges in India are restricted by the following:

a. Rules of precedent.
b. Supremacy of the Parliament,
c. Rules of statutory interpretation, and
d. Constitutional boundary.

Yet the modus of creating new law is also interpretation of statute, precedent and prospective overruling. Judges are called upon to make a decision when faced with a situation for which there appears to be no precedent or guiding principle. In these situations the judges create new precedent.[21]

H.L.A. hart believes that common law rules are often ambiguous and/or vague and it becomes inevitable for the judges to create new laws. Hart talks about open texture of law. Open texture of law means areas where the judge can strike a balance between

[18] Name of cases where analytical positivism is criticized

[19] Eight tenets of Law pointed out by Bentham are- Source, Subjects, Object, Extent, Aspects, Force (rewards/ punishment), Expression, Remedial appendage.

[20] William C. Starr, Law and Morality in H.L.A. Hart's Legal Philosophy, 67 *Marq. L. Rev*. 675-677 (1984)

[21] *M.C. Mehta* v. *Union of India* also known as Oleum gas leak case where the Supreme Court developed the concept of Absolute Liability.

competing interests. Such interests may weigh differently in different cases, for example Fertilizer Corporation Kamgar Union case, People's Union for Democratic Rights case.[22]

But according to Dworkin, principles are essential elements in deciding cases. He argues that in all cases a structure of legal principles stand behind and informs the applicable laws. Principles control the interpretation of rules. Laws derive their meaning from principles. Judges through rules of precedent merely discover and declare the existing law and they never make new law. A judge makes decision not according to his own private judgment, but according to known laws and Customs of the land. Not delegated to expound a new law but to maintain and expound the existing law. Dworkin has mainly two objections to judge made law, these are-

a. Elected representatives who are responsible to the people should govern a community and when judges make law it is an encroachment on legislative power,
b. If judge makes law and applies it retrospectively in the case before him, then the losing party will be punished not because he violated some duty he had but rather for violating a new duty created after the event.

Countering Dworkin's opposition Hart defends himself saying that judge's power is exercised only to dispose of the instant case. He can not introduce large scale reforms or male new codes. Moreover, wherever a judge makes a new law is always in accordance with the principles underpinning reasons that are already recognized and have a footing in the existing law. This indeed is the very foundation of constructive interpretation.

It is true that in every legal system some large and important field are left open that are examined by the court and the uncertainties are resolved. These benefit the individual as in they do not have to take recourse to further official directives.

Interestingly, even Austin accepted the utility of legislation by judges. He believed that the society would not progress if judges were not legislating to make up for the gaps and lacuna left by the legislators.

According to realists legal concerns and rules were indeterminate. Law when enacted, inspite of the best effort and the capacity of the legislator all possible situations can

[22] *Fertilizer Corporation Kamgar Union (Regd.) Sindri Andother* v. *Union of India* AIR 1981 SC 344. *People's Union for Democratic Rights and Others* v. *Union of India & others* 1983 SCR (1) 456

not be visualized. New situations develop and law has to be interpreted for the application to them. That is the field of judicial creativity to fill in the gap between the existing law and the law as it ought to be. The judges have to be aware and sensitive to social changes and demands. Norms acceptable to society also keep on changing. While discharging their constitutional duties the judges have to develop laws on those lines. Judicial activism in India encompasses an area of legislative vacuum in the field of human rights, balance of power, social justice that reinforces the strength of democracy.

Issues related to conflict between fundamental rights and directive principles of state policy increased during post 1978 period. Interpretation by the court in these cases upheld the importance of both the fundamental rights and directive principles of state policy. This indicates that the analytical positivism was no more dominating the Indian legal philosophy. Laws were started to be subject to moral scrutiny.

- **Cases Related to Affirmative State Action and the Role of Judiciary**

In *Akhil Bhartiya Soshit Karmchari Sangh* v. *Union of India*[23] again extent of state's power to introduce any policy/ enactment to ensure mandates in DPSP was in question. The Railway authority provided vacancies for scheduled castes and scheduled tribes in both recruitment and later on promotion to Class II, III and IV in the Railway Service. Nevertheless the representation from scheduled castes and scheduled tribe category in railway service was still very low. Therefore, keeping in tune with the policy of Ministry of Home Affairs regarding upliftment of scheduled castes and scheduled tribe the Railway Administration took a policy decision that where the reserved seats were unfulfilled the selection committee would be asked to appoint candidates from reserved category only, with minimum standard of qualification necessary for the maintenance of efficiency in service. It was decided that these candidates would be given additional training and coaching so that they might come up to the standard of other candidates recruited in that category.

The Railway Administration in 1970 also increased the 'carry forward' rule from 2 years to 3 years. That meant that the unfulfilled vacancies for reserved category would

[23] *Akhil Bhartiya Soshit Karmchari Sangh* v. *Union of India* 1981 SC 298

be automatically carried forward to the next year and be added to the number of vacancies for reserved categories. This 'carry forward' rule would be followed for consecutively 3 years and after 3 years the unfulfilled vacancies for reserved category would stop existing.

This 'carry forward' rule was introduced for ensuring more representation from scheduled castes and scheduled tribes. However, the same was questioned because the mandate that state should strive for promotion of educational and economic interests of scheduled castes and scheduled tribe under Article 46 of the Constitution seemed to be in conflict with fundamental rights. The carry forward rule was supposed to increase the number of vacancy for reserved category keeping the total number of vacancy intact. This was supposed to decrease representation from unreserved category.

The same question arose in *T. Devdasan* v. *Union of India and another*[24] in 1964. In this case the five judges Bench consisting of J.R. Mudholkar J., Sudhi Ranjan Das J., K Subba Rao J., Raghubar Dayal J., N. Rajagopala Ayyangar J., held with K. Subba Rao J., dissenting that carry forward rule is unconstitutional if in a particular year the vacancy for reserved category became more than 50% after carrying and adding the previous vacancies to the recent vacancies for reserved category. In T. Devadasn case 'carry forward' rule was struck down as unconstitutional as it was found in this case that observance of such rule resulted in 65% vacancy for reserved category. Therefore, the vacancy for reserved category has to be calculated separately for each year. K. Subba Rao dissented stating that 'carry forward' rule is introduced for the appointment of candidates from scheduled caste and scheduled tribe. Unless it is proved that due to carry forward rule candidates from reserved category have been appointed disproportionately then the carry forward rule must not be struck down as unconstitutional. Lowering of standards due to reservation was apprehended while this policy was introduced, thus, on account of this the reservation policy can not be said to be bad.

In *Akhil Bhartiya Soshit Karmchari Sangh* v. *Union of India*[25] three judges Bench comprising of V.R. Krishna Iyer J., R.S. Pathak J., O Chinappa Reddy decided the

[24] *T. Devdasan* v. *Union of India and another* AIR 1964 SC 179
[25] *Akhil Bhartiya Soshit Karmchari Sangh* v. *Union of India* 1981 SC 298

case where R.S. Pathak gave his concurrent judgment. The three judges Bench held that there is no strict rule that vacancy for reserved category could not be more than 50% for a particular year. However, T. Devadasn case had laid down that for a particular year vacancy for reserved category must not go beyond 50% as that would mean violation of fundamental rights of unreserved category.

R.S. Pathak J. in his concurrent judgment observed that Article 46 of the Constitution of India imposes a mandate upon the state to promote educational and economic interest of scheduled castes and scheduled tribes. However, the areas in question involve administration and service to common people. Thus, in the process of equalization of backward classes the quality of administration can not take a backseat. Justice Pathak observed that Article 335[26] of the Constitution has two aspects two it. The positive one is that it talks about claims of scheduled castes and scheduled tribes to service and posts. However, there is a negative aspect to it as well. The negative part of reserving seats for scheduled castes and scheduled tribes is that the state must maintain efficiency of administration consistently. Thus, Justice Pathak observed that appointment to a post must not always be based on the policy of equalization of backward classes. Rather it should be a balanced approach. Besides reserving posts for backward classes to ensure upliftment the state must consider appointment on the basis of merit as well. The state must embrace the need of all, the national good, and not of a mere section of people.

K.C. Vasanth Kumar v. *state of Karnataka*[27] again resurfaced the question of reservation and the test of backwardness of reserved category. The welfare government owing to its obligation under the Directive Principles of State Policy in the Constitution of India made provision for reservation for backward classes, scheduled castes and scheduled tribes for admission in educational institution and/or for employment in government services. However, this reservation policy of the government has always been criticized for supposedly being discriminatory. K.C.

[26] Article 335- Claims of Scheduled Castes and Scheduled Tribes to services and posts- The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State
Provided that nothing in this article shall prevent in making of any provision in favour of the members of the scheduled castes and scheduled tribes for relaxation in qualifying marks in any examination or lowering the standards

[27] *K.C. Vasanth Kumar* v. *state of Karnataka* AIR 1985 SC 1495

Vasanth Kumar case stirred up the same issue again. This case was heard by five judges Bench comprising of Y.V. Chandrahud J., D.A. desai J., O. Chinnappa Reddy J., A.P. Sen J., and E.S. Venkataramiah J. Justice Chandrachud in judgment (for himself and on behalf of other four Judges) exprssed that the Bench has been invited to express their point of view on reservation. It was expressed that 'means test' to find out the extent of backwardness in order to separate the privileged group within the underprivileged one must be carried out for Scheduled Castes and Scheduled Tribe categories as well. The Bench also observed that the then arrangement of reservation must continue at least for next fifteen years. India would be at a better place to formulate a new reservation policy by the end of these fifteen years as India would also complete fifty years of its Independence. The Bench also observed that the liability of the government was to provide with adequate amount of opportunities, education to people from reserved category so that when they reached a stage of competition they would be able to attain high degree of proficiency.

The assumption made by H.L.A. Hart that common law is often ambiguous, thus judges are often required to create new law holds true for the aforementioned cases. Judges are required to deal with competing interests and strike a balance between conflicting interests. This is what has been done by the Judiciary in the aforementioned cases, for example in T. Devadasan case, Akhil Bhartiya Soshit Karmachari Sangh case, K.C. Vasanth Kumar case.[28]

- **Cases Dealing with Independence of Judiciary**

S.P. Gupta v. *Union of India*[29] is a significant case as it involved important question of independence of judiciary. It was heard by seven judges Bench consisting of A. Gupta J., D. Desai J., E. Venkataramiah J., P.N. Bhagwati J., R.S. Pathak J., S.M. Fazl Ali J., V.D. Tulzapurkar J. S.P. Gupta case was instituted as a result of multiple writ petitions filed before several High Courts regarding transfer of judges. It concerned disclosure of documents regarding appointment and non-appointment of judges in the High Courts and Supreme Court. In several writ petitions demands were made to disclose documents where the government had certain correspondence with the Chief

[28] *Akhil Bhartiya Soshit Karmchari Sangh* v. *Union of India* 1981 SC 298
K.C. Vasanth Kumar v. *state of Karnataka* AIR 1985 SC 1495
T. Devdasan v. *Union of India and another* AIR 1964 SC 179
[29] *S.P. Gupta* v. *Union of India* AIR 1982 SC 149.

Justice of High Courts and Chief Justice of the Supreme Court. The government denied disclosing documents stating that these documents are confidential. In this case the Apex Court identified a clash between two competing aspects of public interest i.e. public access to documents and need for protection of certain confidential documents. The majority observed that disclosure of documents mean accountability of the government in administration. Documents regarding appointment and non-appointment of judges in Courts are significant and availability of these documents on demand is necessary for the government's accountability. In a democratic country like India it is the right of the citizens to decide the way they want to be governed. Therefore, the government must disclose documents unless such disclosure would adversely affect the security and safety of the nation. Thus, it was observed by the majority that disclosure of documents regarding appointment and non-appointment of judges does not constitute confidential documents and can be disclosed. This judgment is significant because the Bench for the first time in this case established a nexus between the right to information and the government's accountability. It was acknowledged that unless citizens have access to proper information they can not make the government accountable. Therefore, right to information is significant aspect of a participatory democracy.

Sub-Committee of Judicial Accountability v. *Union of India*[30] is a Writ Petition filed by advocates under the name of 'Sub-Committee of Judicial Accountability' raising question as to the validity of the action of the Speaker and members of the Parliament under Article 124 (5) of the Constitution[31] and Judges (Inquiry) Act, 1968 to investigate into the allegation of misconduct against a sitting judge of the Supreme Court. This case was presided over by five judges Bench comprising of B.C. Ray J., L.M. Sharma J., M.N. Venkatachaliah J., J.S. Verma J., and S.C. Agrawal J. The Judgment was delivered with the majority of 4:1 with Justice L.M. Sharma dissenting. Justice B.C. ray (for himself and M.N. Venkatachaliah, J.S. Verma, and S.C. Agrawal

[30] *Sub-Committee of Judicial Accountability* v. *Union of India* AIR 1992 SC 320

[31] Article 124 of the Constitution of India

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two - thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

JJ.) observed that the constitutional process of removal of a judge up to the point of admission of the motion, constitution of committee and recording of findings by the Committee are not strictly the proceedings to be undertaken by the Houses of the Parliament. To a certain stage the matter is with the Court once the proceeding reaches that stage the subsequent proceedings are supposed to be exercised by the parliament and the motion for removal of a judge is presented before the President for his ascent. The majority view observed that the Judiciary is empowered to initiate a proceeding for removal of judges while Justice L.M. Sharma dissented on the ground that the final decision is taken at the Houses of the Parliament. Thus, if the decisions of the highest judiciary and the legislative authority contradict then it becomes embarrassing for both the institutions of the government. Justice L.M. Sharma further observed that the Supreme Court of India could not pass an order disallowing the judge sought to be removed to exercise his judicial powers.

In *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee*[32] following question were raised-

a. Why are Rule of Law and Judicial Independence required to be preserved?
b. Why is judicial individualism required to be protected?
c. Primacy of the opinion of the Chief Justice of India regarding appointment of judges.

In this case the Bench comprising of K. Ramaswamy J., and B.L. Hansaria J. said the role of judge is not merely to interpret law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make ideals enshrined in the Constitution a meaningful reality. The society demands active judicial roles which were formerly considered exceptional and are now considered routine.

In *A.K. Roy* v. *Union of India*[33] stirred up an issue related to judicial review of presidential proclamation by the judiciary. A member of Parliament was detained under National Security Ordinance, 1980 which was later on replaced by the National Security Act, 1980. The petitioner challenged some provisions of the National Security Act, 1980. The issues in this case were-

[32] *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee* (1995) 5 SCC 457.
[33] *A.K. Roy* v. *Union of India* (1982) 1 SCC 271

a. Whether an ordinance proclaimed by the President is law?
b. Whether a detenue has a right to consult his lawyer or be assisted by a friend before the Advisory Board?

This case was presided over by five judges Bench comprising of Y.V. Chandrachud J., P.N. Bhagwati J., A.C. Gupta J., V.D. Tulzapurkar J., and D.A. Desai J. On the question whether an Ordinance is law the majority of 4:1 (with Justice A.C. Gupta dissenting) observed that the President's proclamation of Ordinance is a legislative power and not the executive power. The contention that an ordinance did not comply legislative procedure thus could not be called a law was also rejected on the ground that if Ordinance was not treated as law then Ordinance could not be brought under the purview of Article 13 of the Constitution of India.[34] Thus, the majority decision with Justice A.C. Gupta dissenting upheld the validity of National Security Act, 1980. Justice A.C. Gupta observed that violation of rights of an individual by mere proclamation of an emergency set a bad precedent. Justice Gupta also observed that writ of Mandamus should be issued to the Central Government asking it to issue a notification regarding bringing the Act of 1980 into operation. Justice V.D. Tulzapurkar seconded Justice Gupta on the point of issuing of notification by the Central Government before bringing the National security Act, 1980 into operation. The validity of the Ordinance was not decided by the Court on the ground that the Ordinance was substituted by the National security Act, 1980.

A person detained under the national security Act, 1980 was to be presented before the Advisory Board. Under the then existing law the appointment of members of the Advisory Board did not require any recommendations from the Chief Justice of the High Courts. This provision raised an apprehension of arbitrary functioning of the Central Government in appointment of members of Advisory Board. Section 3 of the 44th Amendment of the Constitution of India suggested for judicial intervention and recommendation in appointment of members of Advisory Board.[35] However, the same

[34] Article 13 of the Constitution of India laid down that any law in contradiction with the provisions of the Constitution of India is repugnant to the extent of its contradiction with the Constitution of India.

[35] Section 3 of Constitution (44th Amendment) Act 1979 23 provided for a change in the constitution of Advisory Board, but this has not been brought into force since the required notification has not been issued. The amendment introduces the following changes:
(1) The Constitution of the Advisory Boards has to be in accordance with the recommendations of the Chief Justice of the 'appropriate High Court. .. .
(2): The other members of the Advisory Boards have to be serving or retired judges of any High Court.

was not executed till the institution of the case in 1982. Nevertheless, the Bench left this issue to the government to solve and decided not to interfere with the governance.

Kehar Singh v. *Union of India*[36] involved the question of justiciability of Pardoning power of the President. The case was filed by Kehar Singh by way of Special Leave Petition against his conviction and sentence of death awarded in connection with assassination of Mrs. Indira Gandhi. This case was heard by five judges Bench comprising of R.S. Pathak J., E.S. Venkataramiah J., N.D. Ojha J., M.N. Venkatachaliah J., and Ranganath Misra J. The Bench dismissed the SLP and observed that-

a. Pardoning power of the President is of executive power,
b. The power to pardon rests on the advice tendered by the executive to the President,
c. The President has power to go through the evidence in the case and come to a conclusion totally different from that of the Court,
d. The condemned person does not have the right of oral hearing before the President,
e. The pardoning power of the president can not be subjected to judicial review on its merits except on strict limitation prescribed by the Constitution of India.

- **Cases Related to Constitutional Validity of Death Penalty.**

This period can also be distinguished as a period of evolution of human rights jurisprudence in India. In *Rajendra Prasad* v. *State of Uttar Pradesh*[37] the constitutional validity of death penalty under section 302 of the Indian Penal Code, 1860 was questioned. This case was heard by three judges Bench consisting of V. R. Krishna Iyer J., D.A. Desai J., A.P. Sen J. The majority judgment was given by Justice Iyer and Desai and the dissenting judgment was given by Justice Sen. Justice Iyer (for himself and Justice Desai) held that there is a poignant gap in 'human rights jurisprudence' within the limit of Indian Penal Code as guaranteed by the Constitution of India. Death penalty in the Indian Penal Code, 1860 still bears the colonial callousness and poses a resistance to interpret the right to life and liberty, in the context of social justice as mentioned in the Preamble, into individual rights, liberty

[36] *Kehar Singh* v. *Union of India* AIR 1989 SC 653
[37] *Rajendra Prasad* v. *State of Uttar Pradesh* AIR 1979 SC 916.

and justice. Therefore, the majority judgment held death penalty as unconstitutional and violative of Article 14, 19 and 21 of the Constitution of India. The majority judgment commuted death sentence of the accused to life imprisonment.

The constitutional validity of death penalty again arose in *Bachan Singh* v. *State of Punjab*[38] case. This case was first heard by two judges Bench in the Supreme Court consisting of R.S. Sarkaria J., Kailasam J. the two judges Bench held that the majority view in Rajendra Prasad was wrong. The Bench held that death penalty was constitutional as it is provided under special circumstances. Bachan Singh's case was transferred to the Constitutional Bench of the Supreme Court since the judgment in Rajendra Prasad and judgment of two judges Bench in Bachan Singh case created following confusion-

a. Whether death penalty is constitutionally valid?
b. What is the extent of discretion of judges under section 354 (3) of Code of Criminal Procedure, 1973[39] in imposing death penalty?

The Constitutional Bench in Bachan Singh case consisted of Y.V. Chandrachud C.J.I., R.S. Sarkaria J., A.C. Gupta J., N.L. Untawali J., & P.N. Bhagwati J. this case with 4:1 ratio decided that death penalty is constitutionally valid. The dissenting judgment was given by Bhagwati J. who held that the Constitution does not have any guideline as to when to impose death penalty. The absence of any guidelines leaves it upon the unguided and untrammeled discretion of judges to decide between death penalty and life imprisonment. Bhagwati J., struck down section 302 of the Indian Penal Code, 1860.

The majority judgment in Bachan Singh case evolved a new principle of 'Rarest of rare case' in imposing death penalty. Section 354(3) of Cr.P.C. 1973 left it upon the discretion of judges to choose between death penalty and life imprisonment. The majority judgment in Rajendra Prasad case and the dissenting judgment of Bhagwati J. in Bachan Singh case criticized such discretionary power of judges and apprehended that power to be unguided and untrammeled. However, the majority

[38] *Bachan Singh* v. *State of Punjab* AIR 1982 SC 1325/ 1983 SCR (1) 145.

[39] Section 354 (3) of the Code of Criminal Procedure, 1973- When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

judgment in Bachan Singh case held that imposition of death penalty is justified when the offender is habitual and of such nature that the existence of him/her poses a threat to the society.

It was further held that the founding fathers recognized State's power to deprive an individual of his/her life and liberty in accordance with fair, just and reasonable procedure established by Law. Reference was made of Article 72, 161 and 134 of the Constitution of India to explain that execution of death penalty imposed under section 302 of the Indian Penal Code, 1860 is not unreasonable, cruel and/ or unusual punishment.[40]

Therefore, imposition of death penalty was held to be constitutional but in rarest of rare cases. Nevertheless, this debate evolved human rights jurisprudence in India to a significant extent.

After 3 years of Bachan Singh's case judgment *Mithu* v. *State of Punjab*[41] stirred up the issue of death penalty prescribed under section 303 of the Indian Penal Code, 1860[42]. Section 303 of IPC, 1860 prescribes for death sentence as punishment for an individual who commits murder being in life imprisonment for another crime. In Bachan Singh's case the court already declared death sentence as constitutional with 4:1 majority. However, in *Mithu* v. *State of Punjab* the issue was different altogether. This case was heard by five judges Bench consisting of Y.V. Chandrachud C.J., Fazal Ali J., V.D. Tulzapurkar J., O. Chinnappa Reddy J., A. Varadarajan J. The then Chief Justice of India Hon'ble Justice Y.V. Chandrachud was also in the Bench of bachan Singh's case. The majority without any dissent and hon'ble Justice O. Chinnappa Reddy concurring observed that the very distinction made in section 303 was unconstitutional and did not conform to the reasonable classification rule under Article 14 of the Constitution of India. There must not be any distinction between an individual committing murder while being under life imprisonment and an individual committing the same crime not being under life imprisonment. Therefore, there is no nexus between the classification so made in section 303 of the IPC, 1860.

[40] *Bachan Singh* v. *State of Punjab* 1983 SCR (1) 145 at 151

[41] *Mithu* v. *State of Punjab* AIR 1983 SC 473

[42] Section 303 of Indian Penal Code, 1860- Punishment for murder by life-convict.—Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.

O. Chinnappa Reddy in his concurrent judgment observed that post R.C. Cooper case (i.e. Bank natioanlisation case) and Maneka Gandhi case there was a change in the legal philosophy. It has been recognized that the law must be fair, just and reasonable. The mandatory prescription of death sentence for an individual, committing murder while being under life imprisonment, is not certainly fair, just and reasonable. Death sentence was declared as constitutional in Bachan Singh's case because section 302 of IPC, 1860 does not make it mandatory to punish an individual committing murder with death sentence. Rather imposition of death sentence was recognized as a discretionary power of the Court in rarest of rare cases. O. Chinnappa Reddy J., made a very strong observation by stating that *any law which denies involvement of judicial mind is not fair, just and reasonable*. The Bench declared section 303 of IPC, 1860 as unconstitutional and struck down the same. However, section 303 finds its place in the Indian Penal Code, 1860 till date. This judgment definitely showed the changing nature of the meaning of law i.e. from Austin's Command to H.L.A. Hart's Rule.

T.V. Vatheeswaran v. *State of Tamil Nadu*[43] was presided over by a Bench comprising of O. Chinnappa Reddy J., and R.B. Mishra J. The Bench observed that in a death penalty case if a person convicted was not executed within two years then the death penalty would automatically stand commuted to life imprisonment. However, in *Sher Singh* v. *State of Punjab*[44] in a three judges Bench comprising of Y.V. Chandrachud J., V.D. Tulzapurkar J., and A. Varadarajan J. overruled the judgment of T.V. Vatheeswaran.

In Hart's theory of legal positivism, in any legal system, the rule of recognition is a master meta-rule (a rule that governs the application of other rules) underlying any legal system that defines common identifying test or legal validity of what counts as law within that system. This establishes a test for validity in the applicable legal system.

According to Austin's analytical positivism law is the command of the sovereign, disobedience to which attracts sanction. According to hart, law in the area of open texture is a guarded prediction of what the courts will do. He says that judges can

[43] *T.V. Vatheeswaran* v. *State of Tamil Nadu* (1983) 2 SCC 68
[44] *Sher Singh* v. *State of Punjab* (1983) 2 SCC 344.

make law even when precedent binds them by distinguishing with previous decision but this is very restricted form of lawmaking subject to two crucial conditions.

There is a popular belief that judges fill in gaps left by rules by using their discretion. Positivist jurisprudence from Austin to Hart placed strong emphasis on the part played by judges in the exercise of their discretion. In such cases where gaps are left by rules, according to Hart the rule making authority must exercise discretion and there is no possibility of treating the question raised by various cases as if there were one uniquely correct answer to be found, as distinct from an answer that is a reasonable compromise between many conflicting interests.

Regarding death sentence the journey from *Rajendra Prasad* v. *state of Uttar Pradesh*[45], to *Bachan Singh* v. *State of Punjab*[46] to *Mithu* v. *State of Punjab*[47] has been a debate over a situation where a lacuna in the rule is that there is no express provision in Indian Penal Code stated when death sentence may be awarded. Hence, the gap was solely for the judges to fill up by their discretion.

A competing view was espoused by the realists who placed absolute emphasis on the discretion of the judges and underplayed the rules. Ronald Dworkin made a determined effort to analyze 'discretion'. Dworkin was not in favour of discretion and opposed Hart in that respect. Dworkin posed a challenge to the positivist account.

According to Raz also courts to develop law by working out implications of internal legal considerations. According to Raz the courts in developing the law do not give expression to their personal views, nor do they reflect external social political forces. They merely unravel the spirit of the law, unfold its hidden force and reveal its meaning.

In C. Ravinchandran case the Bench interpreted that the role of a judge is not of a mere interpreter. In the fast changing society judges are expected to do more than interpreting the Constitution or the Statute. In *S.P. Gupta* v. *President of India*[48] the court observed that interpretation of every statutory provision must keep pace with changing concepts and values. It must suffer adjustments through judicial

[45] *Rajendra Prasad* v. *State of Uttar Pradesh* AIR 1979 SC 916.
[46] *Bachan Singh* v. *State of Punjab* 1983 SCR (1) 145 at 151
[47] *Mithu* v. *State of Punjab* AIR 1983 SC 473
[48] *S.P. Gupta* v. *President of India* AIR 1982 SC 149

interpretation so as to accord with the requirement of a fast changing society which is undergoing rapid social and economic transformation.

- **Cases Related to Right to Property- A Fundamental Right or a Constitutional Right.**

Minerva Mills v. *Union of India*[49] was instituted in the context of nationalization of a textile mill, named Minerva Mills, located near Bangalore. The nationalization of the mill took place in 1970, the case was filed in 1977. In 1978 by virtue of 44th Amendment to the Constitution Janata Dal, owing to one of the pledges in its election manifesto, deleted the 'right to property' guaranteed under Article 31 of the Constitution of India. Deletion of fundamental right to property in 1978 was itself a violation of the basic structure of the Constitution of India.

However, amendment to this extent was made valid through insertion of clause 4 and 5 to Article 368 of the Constitution. These two clauses widened the ambit of power of the Parliament to amend the Constitution. this was in reality the dilution of the basic structure if not total disregard. Therefore, in Minerva Mills case the insertion of two clauses in Article 368 was questioned.

Nani Palkhivala argud in favour of the petitioner i.e. Minerva Mills where he finely formulated his argument in the following way[50]-

Firstly- The donee of a limited power, can not by the exercise of that very powe, convert the limited power into the unlimited one. To do so would allow Parliament, a creature of the Constitution, to become its master. Secondly- the limited amending power was itself a basic feature of the Constitution. Following the court's decision in Kesavananda case, Parliament had no authority to disturb that feature. Thirdly- by stating that no court would have the power to pronounce upon the validity of a constitutional amendment, the amendment damaged the balance of power between judiciary and Parliament.

It also deprived the people the fundamental right to prefer Writs.

[49] *Minerva Mills* v. *Union of India* AIR 1980 SC 1789.
[50] Chintan Chandrachud, *The Cases that India Forgot*, 31 (Juggernaut, New Delhi, 2019).

Article 31 C of the Constitution of India was also questioned in this case. This Article provided immunity to laws enacted in order to give effect to Directive Principles of State Policy mentioned under part IV of the Constitution. It was provided under this Article that any law enacted under Article 31 C shall not be questioned even after the law takes away or abridges rights guaranteed under Article 14 and 19 of the Constitution.

Minerva Mills case was heard by five judges Bench consisting of Hon'ble Chief Justice Y.V. Chandrachud, Bhagwati J., A.C. Gupta J., N.L. Untawalia J., & P.S. Kailasam J. Hon'ble Chief Justice wrote judgment for himself and three other judges while Justice Bhagwati wrote the concurrent judgment.

Article 31C was also in question in Kesavananda Bharti case (1973). In that case the part of Article 31C[51] which gives immunity to any policy/ enactment from being challenged before the court of law because such policy/ enactment has been formulated in order to give effect directive principles set out in Article 39[52] of the Constitution of India. Post Kesavananda Bharti decision there was 42nd Amendment in 1976 (i.e. during emergency) amended in Article 31C that any policy/law formulated in order to give effect to directive principles set out in Part IV (which was only Article 39 previously) of the Constitution of India can not be challenged before the court of law. 42nd Amendment also inserted clause 4 & 5 in Article 368 of the Constitution.[53]

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[51] The struck down portion of article 31C in Kesavananda Bharti case is
'*no law containing a declaration that it is for giving effect to such policy shall be in question in any court on the ground that it does not give effect to such policy*'.

[52] Article 39 of the Constitution of India-

[53] Article 368- Power of Parliament to amend the Constitution and procedure therefor
(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

Minerva Mills case is significant as the debate of fundamental right and directive principles of state policy arose again. Justice Chandrachud struck down Article 31C of the Constitution of India stating this Article disturbed the balance between fundamental right and directive principles of state policy[54]. The majority decision was that any amendment can not be made which violates the fundamental rights.

Justice Bhagwati in his concurrent judgment upheld Article 31C quoting Justice Chandrachud from Kesavananda Bharti case i.e. *fundamental rights and directive principles of state policy both share equally important position in constitutional scheme. Therefore, Article 31A can not be held ultra vires.*

Next question was regarding clause 4 and 5 of Article 368[55] of the Constitution of India. These two Articles were struck down unanimously by five judges Bench in Minerva Mills case. A review petition was filed against judgment of Minerva Mills case by the then government of India. However, the review petition was rejected.

In this context it is to be mentioned that the struck down portion of Article 31C[56] (in Kesavananda Bharti case) and clause 4 & 5 of Article 368 (in Minerva Mills case) have not been removed from the Constitution by any amendment yet.

(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

[54] Justice Chandrachud in his concurrent judgment in Kesavananda Bharti case stated that fundamental rights and DPSP both share equally important position in the Constitution.

[55] 368. Power of Parliament to amend the Constitution and procedure therefore

(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.

[56] The struck down portion of article 31C in Kesavananda Bharti case is

Immediately after Minerva Mills case another significant case arose regarding right to property which resurfaced the debate between importance of fundamental rights and DPSP. *Waman Rao* v. *Union of India*[57] was a review petition to review the judgment of Dattatreya Govind v. State of Maharashtra.[58] In Dattatreya case enactments imposing ceiling limit on land holding of an individual were challenged contending that these enactments infringed the fundamental right to hold property guaranteed under Article 19 (1) (f)[59]. Bombay High Court upheld the constitutional validity of enactments that fixed the upper limit of land holding for an individual.

The 40th amendment to the Constitution of India in 1976 was also questioned in Waman Rao case. This amendment inserted 64 entries in the ninth schedule making them immune from judicial scrutiny. This amendment was in question because it was done during the emergency period by extending the life of Parliament as the Parliament was not in session at that point of time. The 44th Constitutional Amendment in 1978 removed the right to property guaranteed under Article 19 1 (f) of the Constitution of India.

In Waman Rao case validity of Article 31A, 31B and 31C was challenged. This case was heard by five judges Bench consisting of Chandrachud J., A. Sen J., V. Tulzapurkar J., V.K. Iyer J., P.N. Bhagwati j. The year before in 1980 same Bench heard a similar issue in *Ambika Prasad Mishra* v. *State of Uttar Pradesh*[60] where laws acquiring lands for agrarian reform by virtue of Article 31A were challenged.

In Ambika Prasad Mishra case the whole Bench unanimously applied stare decisis rule and upheld constitutional validity of Article 31A because the majority judgment in Kesavananda Bharti declared the same as constitutional. The reason for following the doctrine of stare decisis in this case, according to Justice V. R. Krishna Iyer (he wrote the judgment in Ambika Prasad Mishra case) was that insertion of Article 31A was to escalate agrarian reform by restricting land holding per individual. This was done to ensure social justice as guaranteed in the Preamble of the Constitution. The

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'*no law containing a declaration that it is for giving effect to such policy shall be in question in any court on the ground that it does not give effect to such policy*'.

[57] *Waman Rao* v. *Union of India* (1981) 2 SCC 362.

[58] *Dattatreya Govind* v. *State of Maharashtra (*1977) 2 SCR 790.

[59] In Dattatreya Govind case enactments like Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1962 were challenged.

[60] *Ambika Prasad Mishra* v. *State of Uttar Pradesh* AIR 1980 SC 1762.

constitutional validity of Article 31A has been questioned and settled from Golaknath case to Kesavananda Bharti case. The intention of legislators in inserting Article 31A was to immunize laws enacted for agrarian reform.

Therefore, the judiciary, ideally, should not have entertained any more cases challenging such laws as it would have contributed to the confusion. Therefore, the Bench, to bring in stability, unanimously followed the doctrine of *stare decisis* and upheld the constitutional upheld of Article 31A in Ambika Prasad Mishra case.

In Waman Rao case (immediately after one year of Ambika Prasad Mishra judgment) the five judges Bench was devided in 4:1 ratio while declaring judgment. Justice P.N. Bhagwati wrote the minority judgment. The majority judgment in Waman Rao case upheld the constitutional validity of Article 31A. However, the reason for upholding the same was totally different from that of Ambika Prasad Mishra case. The majority judgment held that Article 31A immunizes laws enacted to bring about agrarian reform. Laws dealing with delimiting land holding per individual are protected under Article 31A and any other law dealing with anything beyond the above matters is still under the scope of judicial review.

This is where Justice P.N. Bhagwati gave another opinion. He also upheld constitutional validity of Article 31A on the simple doctrine of *stare decisis*. He pointed out that the reason behind upholding constitutional validity of Article 31A by the majority judgment in Waman Rao is different from the reason held by the same Bench in Ambika Prasad Mishra case. The majority judgment in Waman Rao case expressly held that the doctrine of stare decisis would not be proper reason for upholding the constitutionality of Article 31A of the Constitution.

Article 31B provides immunity to all the acts and regulation inserted to ninth schedule. This is where the majority judgment thought to make a distinction between the scope of Article 31A and Article 31B. The majority judgment in this issue observed that keeping in mind the concept of distributive justice as advocated by the then government, laws dealing with agrarian reform shall receive immunity under Article 31A and 31B. Laws not dealing with agrarian reforms shall be open for

judicial review even after being inserted in ninth schedule.[61] The very reason of insertion of Article 31B and immunization of enactment by including them in Ninth Schedule by virtue of 1st amendment to the Constitution in 1951 was to bring about agrarian reform in India. Therefore, the insertions in the Ninth Schedule can be challenged if it does not deal with agrarian reform.

In case of constitutional validity of Article 31C of the Constitution the majority view conformed to the doctrine of stare decisis of Kesavananda Bharti case which upheld a part of Article 31C which striking down some other parts of the Article[62]. The reason behind upholding a part of Article 31C is that it gives protection to laws enacted to give effect to clause (b) and (c) of Article 39 of the Constitution of India.[63]

Minerva Mills case (1980), Ambika Prasad Mishra case (1980), Waman Rao case (1980) were significant as these cases clarified the relationship between fundamental rights and directive principles of state policy. After Waman Rao judgment it was clear that laws imposing ceiling on land holding do not violate rights guaranteed under Article 14 and 19. These laws are enacted to ensure social justice and to escalate

[61] Laws in the Ninth Schedule were not inserted at the same time. Items 1 to 13 were put in ninth schedule by the 1st Amendment in 1951. Items 14 to 20 by 4th Amendment Act in 1955. Items 21-64 were inserted in the Ninth Schedule by 17th Amendment Act of 1964. Items 65 and 66 were inserted by 29th Amendment in 1972. Items 67 to 86 were inserted through 34th Amendment act in 1974. Items 88 to 124 were inserted by 39th Amendment Act of 1975. Items 125 to 188 were inserted by 40th Amendment Act, 1976. Amongst all the entries entry nos 1 to 13 only deal with laws regarding agrarian reform. The Bihar Land Reforms Act, 1950, which is item no 1 in the Ninth Schedule, was the Act which led to the insertion of article 31A and to some an extent article 31B in the Constitution of India.

[62] The struck down portion of article 31C in Kesavananda Bharti case is
'*no law containing a declaration that it is for giving effect to such policy shall be in question in any court on the ground that it does not give effect to such policy*'.

[63] 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

agrarian reform which is an imperative direction for the state under Directive Principles of State Policy. Nevertheless, the clarity and position regarding applicability of the doctrine of *stare decisis* resurfaced due to Waman Rao case.

- **Cases Related to Women Right issues**

According to Hart law and morality are not necessarily related. Law is continuously under moral scrutiny. Perhaps the Criminal Law (Amendment) Act, 1983 after Mathura Rape case judgment is reflective of this. The amendment was brought in order to do away with the error made in Mathura rape case because the existing law was not made subject to moral scrutiny.

Significant changes were brought in the criminal laws through Criminal Law (Amendment) Act, 1973. Nevertheless, many more steps were to be taken in the area of gender justice. Attempt to equalize the status of Muslim divorced women was made in several cases until the Shah Bano Begum judgment was pronounced. In *Mohd. Ahmad Khan* v. *Shah Bano Begum & Ors*[64] the question regarding liability of Muslim husband to maintain his divorced wife beyond the iddat period arose. In this case the respondent was divorced by irrevocable pronouncement of tripple talaq by the appellant husband. The respondent filed a suit before the judicial magistrate of Indore praying before the court to order for payment of maintenance at the rate of Rs. 500/- per month. The appellant husband, a practicing advocate at the Supreme Court of India, contended that he was no longer liable to pay any maintenance to the respondent as she ceased to be his wife and her dower had been paid. Under the customary Muslim law the appellant had already paid mehr amount at the rate of 200/- per month for 2 years. As already mentioned the appellant was a lawyer and earned Rs. 60000/- per year. The Judicial Magistrate of Indore ordered in favour of the wife asking the husband to pay maintenance of Rs. 25/- per month. The High Court of Madhya Pradesh increased the amount of maintenance from Rs. 25/- per month to Rs. 179.20/- per month. The appellant then filed an appeal before the Supreme Court of India through Special Leave Petition.

Shah Bano case was heard by five judges Bench even though no question as to interpretation of Constitutional provision was involved. The Bench consisted of the

[64] *Mohd. Ahmad Khan* v. *Shah Bano Begum & Ors* AIR 1985 SC 945.

then Chief Justice of India Y.V. Chandrachud, Ranganath Misra J., D.A. Desai J., O. Chinnappa Reddy J., E.S. Venkataramiah J.

Similar issues were already raised in *Bai Tahira A.* v. *Ali Hussain Fissalli Chothia & anr*[65] and *Fuzlunbi* v. *Khader Vali & anr*[66]. Bai Tahira case was heard by three judges Bench consisting of V.R. Krishna Iyer J., V.D. Tulzapurkar J., R.S. pathak J. The Fuzlunbi case was heard by three judges Bench V.R. Krishna Iyer J., A. Sen J., O. Chinnappa Reddy J. both the judgments were written by V.R. Krishna Iyer and were decided unanimously by three judges respectively.

In the aforementioned two cases section 125 of Cr. P.C, 1973[67] and section 127 of Cr. P.C. 1973[68] were involved. Section 127 of Code of Criminal Procedure provides

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[65] *Bai Tahira A.* v. *Ali Hussain Fissalli Chothia & anr* AIR 1979 SC 362.

[66] *Fuzlunbi* v. *Khader Vali & anr* AIR 1980 SC 1730.

[67] Section 125 of Cr.P.C. 1973- Order for maintenance of wives, children and parents. 125.Order for maintenance of wives, children and parents. (1) If any person having sufficient means neglects or refuses to maintain- (a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct :
Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.-For the purposes of this Chapter,-
(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;
(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.
(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.
(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:
Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due : Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such
Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.-

provision for alteration of allowance which is ordered to be paid as maintenance under section 125 of the Code of Criminal Procedure, 1973. In both the cases it was observed that amount of mehr or maintenance should be one to assist divorced woman in destitute. There is a human obligation upon the court to charge an amount as maintenance which will help the divorced woman to sustain until she gets married again. Sections 125 and 127 of Code of Criminal Procedure, 1973 will apply to any individual irrespective of his/her religion as these sections are parts of criminal law.

Despite these two judgments the issue of maintenance of divorced Muslim wife was raised in Shah Bano Begum case in 1985. Thus, it became necessary for the Apex Court to decide the matter and pronounce a judgment which would be a binding authority and will lay the issue to the rest. Five judges Bench heard and decided the case even though no question of interpretation of constitutional provision was

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If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

[68] Section 127 Cr.P.C 1973- Alteration in allowance.

(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as case may be, the Magistrate may make such alteration in the allowance he thinks fit : Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that- (a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,- (i) in the case where, such sum was paid before such order, from the date on Which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband by the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

involved in the case. Justice Y.V. Chandrachud wrote the judgment and the case was decided unanimously by five judges Bench. It was held that the previous observation in Bai Tahira case and Fuzlunbi case was correct except and to the extent that 'payment of mehr money, as a customary discharge is within the cognizance of the provision of section 127 of Cr.P.C. 1973. It was held again that a Muslim husband can not deny his liability to maintain his divorced wife until she gets re-married. Therefore, in absence of payment of maintenance a Muslim wife can always file a suit for maintenance under section 125 of Cr.P.C. Alteration of allowance under section 127 of Cr.P.C. will be allowed by the Court only when the Muslim husband can prove that he has already paid enough money as maintenance or is paying some amount as maintenance. It was specifically mentioned that 'mehr' does not constitute 'maintenance' and can never be regarded as maintenance as the amount of 'mehr' is so less that it can never assist a divorced Muslim wife to sustain. This judgment fortified the previous judgments pronounced in Bai Tahira case and Fuzlunbi case.

This judgment was undoubtedly a significant step in ameliorating the conditions of divorced Muslim wife. Unfortunately this judgment became the victim of political concern. Mrs. Indira Gandhi had been assassinated in October 1984. The assassination was followed by worst ever communal riots against the Sikh community. Late Rajiv Gandhi (the then Prime Minister) then took up the reigns of the nation during this disturbed and uncertain time. The Muslim community encashed upon this situation and strongly opposed the judgment. Amidst this chaos the Congress government passed the Muslim woman (Protection of Rights on Divorce) Act, 1986.

The enactment of the Muslim women (Protection of Rights on Divorce) Act, 1986 altered the effect of the Shah Bano case judgment. In this case it has been specifically stated that 'mehr' shall be paid by the husband for the duration of iddat period[69]. The properties given to the woman during marriage shall also be returned to the woman on being divorced. Payment only for iddat period was opposed by the judiciary. However, it was altered by the enactment. If the former husband does not pay 'mehr' or return the property to the wife during the divorce then the wife has the right to file an application. However, the Act of 1986 laid down that the magistrate on receiving

[69] Section 3 (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986
a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband

such application shall order the former husband to pay, for once, an amount decided by the magistrate.[70]

The Act of 1986 went further in absolving Muslim men from their liability to maintain divorced wives by laying down that if the divorced wife does not get re-married then the following persons shall have the liability to maintain her[71]

a. Children will have the liability in case they are capable enough to maintain,
b. In occasion of children not being capable, the magistrate shall order her parents to maintain her,
c. In occasion of her parents being incapable, her relatives who will inherit her property shall have the liability to maintain her,
d. In case all these aforementioned persons are incapable then the magistrate may direct the State Wakf Board established under the Wakf Act, 1954 to maintain the divorced wife.

However, the Wakf Act, 1954 does not have any provision to allow the Wakf fund to be used for the payment of maintenance to a divorced, destitute woman. Hence what was done by the Judiciary was undone in politics.

Political response to a judicial pronouncement is not alien to Indian legal system. Amendment to Article 368 of the Constitution to India in response to Kesavananda Bharti judgment is another example. Removal of fundamental right to property i.e. Article 19 1 (f) from the Constitution of India by way of 44th Constitutional Amendment was also a reaction to several suits challenging Government's action of acquiring lands. Thus, Indian legal system has often witnessed Constitutional amendments or enactments of legislation indirectly nullifying Supreme Court and/or High Court's decision striking down legislation *ultra vires* to the philosophies embedded in the Constitution of India.

In *Daniel Latifi* v. *Union of India*[72] the validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was challenged. This case was presided over by five

[70] Section 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 laid down provision empowering the Magistrate to order for payment of Mahr.

[71] Section 4 of the Act of 1986 absolves Muslim husband from maintaining his divorced wife on providing proof of such inability to the Magistrate. Under section 4 (2) of this Act, the Magistrate is empowered to order the relatives of divorced Muslim wife to maintain the divorced woman.

judges Bench comprising of G.B. Pattanaik J., S. Rajendra Babu J., D.P. Mohapatra J., Doraiswamy Raju J., Sivaraj V. Patil J. In this case the Bench unanimously upheld the validity of the impugned Act. The Bench further stated that the liability of Muslim wife arising out of section 3 (1) (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986[73] was not confined to iddat period only. Besides the provisions in section 3 (1) (a) of the Act of 1986 the husband was required to maintain his divorced beyond iddat period with reasonable and fair amount as maintenance.

The Bench also observed that A divorced Muslim lady who has not remarried and who can't keep up herself after iddat period can continue as gave under Section 4 of the Act against her family members who are at risk to keep up her with respect to the properties which they acquire on her passing as per Muslim law from such separated from lady including her kids and guardians. In the event that any of the family members being not able to pay support, the Magistrate may coordinate the State Wakf Board set up under the Act to pay such upkeep.[74]

Immediately after independence and adoption of the Constitution there was not much scope of judicial review despite the Constitution of India having provision for the same. Judicial Review started entering Indian legal system with the judgment in Golaknath Case[75]. Post Maneka Gandhi period can also be marked as a period with increasing judicial review. With this increase judicial activism also increased. Political reaction to judicial review of legislation and striking it down consequently also became a common feature in the legal system.

- **Cases Related to Freedom of Speech and Expression.**

Right to freedom of speech and expression is always debatable in India and has been evolved through judicial pronouncements. In *Indian Express Newspaper (Bombay)*

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[72] *Daniel Latifi* v. *Union of India* (2001) 7 SCC 740.

[73] Section 3. Muslim Women (Protection of Rights on Divorce) Act, 1986
Mahr or other properties of Muslim woman to be given to her at the time of divorce.—(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to— (a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

[74] Section 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 laid down that the Magistrate can order for payment of maintenance to a person who would inherit on the death of the divorced Muslim wife. In case of absence of any such person the order of maintenance could be to the Wakf Board.

[75] *I.C. Golaknath & Ors.* v. *State of Punjab* AIR 1967 SC 1643.

pvt. Ltd. & Ors. v. *Union of India*[76] levying of taxes upon the newspaper was to restrict wide circulation of the paper as the imposition of tax hiked the price of paper thereby causing reducing its sale.

In Bennett Coleman's case A.N. Ray C.J. on behalf of the majority observed that *the faith of citizen is that political wisdom and virtue will sustain themselves in the free market of ideas, so long as the channels of communication are left open. The faith in the popular government rests on the old dictum 'let the people have truth and the freedom to discuss it and all will go well'. The liberty of the press remains an 'Ask of the Covenant' in very democracy……. The newspaper give ideas… The newspaper 'give the people the freedom to find out what ideas are correct'.*[77]

In Bennett Coleman case Mathew J., observed *the constitutional guarantee of freedom of speech is not so much for the benefit of the press as it is for the benefit of the public. The freedom of speech includes within its compass the right of all citizens to read and be informed.*[78]

The Indian Express Newspaper case was heard by three judges Bench consisting of Venkataramaiah J., O. Chinnappa Reddy J., A.P. Sen J. The majority view was that the newspaper enjoys right to freedom of speech and expression under Article 19 1 (a) and right to freedom of carrying on any business, occupation under Article 19 1 (f) of the Constitution of India. The right to freedom of speech and expression is free from taxes. However, the right to carry on occupation is subject to taxes to be imposed by the government. However, such tax must not be such to hinder the running of such business. Therefore, the majority upheld the imposition of tax and asked the petitioner i.e. the Indian Express Newspaper to pay the taxes in full and final. In this case the necessity for authentic information to public for getting the administration accountable was acknowledged again. In *S.P. Gupta* v. *Union of India*[79] the right to information was recognized as one of the fundamental rights of citizen by the Apex court. The movement demanding legislation in the area of right to information started in 1987 which led to the enactment of the Right to Information Act, 2005. However,

[76] *Indian Express Newspaper (Bombay) Pvt. Ltd. & Ors*. v. *Union of India* AIR 1986 SC 515
[77] *Bennett Coleman & Co. & Ors*. v. *Union of India* AIR 1973 SC 109 at 796
[78] *Bennett Coleman & Co. & Ors*. v. *Union of India* AIR 1973 SC 109 at 818
[79] *S.P. Gupta* v. *Union of India* AIR 1982 SC 149

the ground was prepared much before this movement through judicial pronouncements.

Sheela Barse v. *State of Maharshtra*[80] arose due to withdrawal of permission, previously given to a journalist Sheela Barse, from interviewing prisoners and tape-recording the same. The petitioner, a journalist, filed this Writ petition on the ground that citizens have the right to know under Article 19 (1) (a) and Article 21 of the Constitution of India whether the government was administering prisons in compliance with the law. The petitioner also contended that it was the responsibility of press to educate people about the present condition of prisons in India. The Inspector General of Prison contended that the permission was cancelled because it was found that the permission was granted in violation of Maharashtra Prison Manual and Rules. It was also contended that the journalist, Sheela Barse, was not employed by any responsible newspaper and was a freelance journalist, thus, could not be granted any more permission to interview prisoners. This case was heard by Division Bench of the Supreme Court comprising of Ranganath Misra J., and M.M. Dutt J. The Bench unanimously observed that 'life' under Article 21 of the Constitution of India meant and included 'living conditions' within jail. Citizens have right to know about the living conditions of prisons in India. However, such information should not be published without being cross checked by the authority. In the garb of information citizens must not receive misinformation about administration of prisons in India. Rights of prisoners were recognized by the Bench with some restrictions. The petitioner was also allowed to put a fresh application to the authority regarding interview of prisoners and the authority would allow the same in compliance with the law.

The above discussion emphasizes the paradigm shift from the strict positivist conservatism to a clear distinct transaction towards social justice and rising above the rigid principles of the letter of the law, the more liberal principle of the spirit of the law and demands of the social justice.

[80] *Sheela Barse* v. *State of Maharshtra* AIR 1987 SC 1514.

In *M.C. Mehta* v. *Union of India* (Oleum gas leak case)[81] the Court observed that with the development of a fast changing society, law can not remain static and law must develop and law must develop its own principles.

The post 1978 (*Maneka Gandhi* v. *Union of India*[82]) was also a period of restructuring of balance of power between the legislature, executive and the judiciary. It also involved structural changes and economic reforms.

With the shift in legal philosophy in post Maneka Gandhi judgment the Indian judiciary emphasizes on evolving concept of human rights in India. Incidentally Hon'ble Justice Y.V. Chandrachud was a part of the Bench in most of the cases involving human rights issue. His name deserves a special mention in this backdrop because he was a part of the Bench in A.D.M. Jabalpur case[83] that had decided that liberty meant 'limited freedom' during emergency.

- **Cases Related to Human Rights Issues**

Charles Sobraj v. *Superintendent, Central Jail, Tihar*[84] instigated the issue of prison justice and rights of prisoners in jail. The petitioner served two sentences of long imprisonment and recorded one escape and one attempt to commit suicide. The petitioner contended that due to barbaric and inhumane treatment by prison authority he sought to be shifted to a ward with relaxed rule and with finer foreign prisoners. This case was presided over by three judges Bench comprising of V.R. Krishna Iyer J., D.A. Desai J. and O. Chinnappa Reddy J. The Bench unanimously dismissed the petition on the ground that the petitioner could not prove any legal injury of his rights. However, the Bench acknowledged that prisoners are entitled to basic human rights and rights guaranteed under part III of the Constitution of India but with some restrictions. The Bench observed that prisoners enjoyed all the rights like other citizens except those rights lost due to confinement. The Court decided not to interfere with the authority regarding prison administration. It was thought to be best to leave the matter of classification between dangerous prisoner and ordinary prisoner to the prison authority and Court decided to keep itself out of it.

[81] *M.C. Mehta* v. *Union of India* AIR 1987 SC 965 is also known as Oleum gas leak case. This case is discussed in detail under the broad head of 'Cases related to Environmental Issues' in this chapter.
[82] *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.
[83] *Additional District Magistrate, Jabalpur* v. *S.S. Shukla* AIR 1976 SC 1207.
[84] *Charles Sobraj* v. *Superintendent, Central Jail, Tihar* AIR 1978 SC 1514.

Sunil Batra v. *Delhi Administration*[85] recognized the urgent need of prison reform in India. This case was instituted through a letter sent by the petitioner, a convict under death sentence. The letter disclosed inhuman torture upon under-trial prisoners. This letter was later on converted to habeas corpus proceeding under Article 32 of the Constitution of India. This case was presided over by three judges Bench consisting of V.R. Krishna Iyer J., O. Chinnappa Reddy J., R.S. Pathak J. Justice Krishna Iyer (for himself and on behalf Justice O. Chinnappa Reddy) with Justice R.S. Pathak concurring observed that physical violence and torture of under-trial and convicted prisoners implored the Court to intervene. In such a circumstance the Superintendent of the prison became liable even though there was no involvement on his behalf. The rights of prisoners to be treated humanely within the prison was recognized in this case.

Gopalanachari v. *State of Kerala*[86] case arose out of a letter sent by a prisoner to Justice V.R. Krishna Iyer regarding his illegal detention under section 110 of the Code of Criminal Procedure, 1973[87]. In response to the Court's notice Superintendent of jail informed that the detenue was detained during night patrolling when he tried to hide in verandah of a shop. In his reply the detenue informed the Court that he was 71 year old and was unable to see properly. Moreover, after his detention he was not presented before the Magistrate for 10 days and was also introduced as 'habitual prisoner'. This case was presided over by three judges Bench comprising of V.R. Krishna Iyer J., O. Chinnappa Reddy J., and R.S. Pathak J. The Bench in this case unanimously observed that section 110 of Cr.P.C., 1973 could not be invoked to detain have nots and/or homeless. Constitutional survival of section 110 of Cr.P.C., 1973 is subjected to its compliance to provision of Article 21 of the Constitution of India. The Bench observed that the provision of section 11o could be invoked only when the presence of the habitual offender in the society became too dangerous. Therefore, calling a person dangerous without having a valid reason amounted to stigmatization of the person and was held inhumane by the Court in this case.

[85] *Sunil Batra* v. *Delhi Administration* AIR 1980 SC 1579.

[86] *Gopalanachari* v. *State of Kerala* AIR 1981 SC 674.

[87] Section 110 of the Code of Criminal Procedure, 1973 empowers the Magistrate to take any action in respect of a habitual offender after receiving any information as to commission or attempt to commit any offence by such habitual offender.

In *Francis Coralie Mullin* v. *The Administrator, Union Territory, Delhi*[88] the Division Bench of the Supreme Court, comprising of P.N. Bhagwati J. and S.M. Fazl ali j., distinguished between preventive detention and punitive detention. It was observed by the Bench that 'punitive detention' was inflected to punish a person who is found through judicial process to have committed an offence. 'Preventive detention' was inflicted to pre-empt a person from committing an offence. Preventive detention is not allowed in many countries because it allows the executive to detain an individual without any judicial process. However, the Constitution of India allows preventive detention. This issue arose because a detenue was restricted from having an interview with counsel of his choice. The Bench observed that restricting a detenue from interviewing his counsel was violative of Article 14 and Article 21 of the Constitution of India. It was also observed that rights of a detenue in punitive detention is wider than the rights of detenue of preventive detention. However, a detenue of preventive detention also has a right and can not be denied basic rights as permitted under the Constitution of India.

Olga Tellis v. *Bombay Municipal Corporation & Ors*.[89] is another significant case widening the scope of human right jurisprudence in India. By virtue of section 314 of the Bombay Municipal Corporation Act, 1888 the State of Maharashtra and the Bombay Municipal Corporation 1981 took a decision to evict all the pavement dwellers and slum dwellers and to deport them to their actual place or locate them outside the city. Following such order the Bombay Municipal Corporation demolished some of the huts of pavement dwellers against which there was a suit before the High Court of Bombay. In that suit the petitioners representing pavement dwellers conceded before the High Court that they could not claim any right to put up huts on the pavement and also undertook that the pavement would be vacated on or before 15th October, 1981. However, another writ petition was filed before the Supreme Court of India under Article 32 of the Constitution of India as Olga Tellis v. Bombay Municipal Corporation and Ors. The petitioner representing pavement dwellers contended that-

[88] *Francis Coralie Mullin* v. *The Administrator, Union Territory, Delhi* AIR 1981 SC 746.
[89] *Olga Tellis* v. *Bombay Municipal Corporation & Ors* AIR 1986 SC 180.

a. The procedure under section 314 of the Bombay Municipal Corporation Act, 1888 regarding eviction of pavement and slum dwellers were arbitrary as it did not give any prior notice for such eviction,
b. Evicting a pavement dweller from his habitat amounts to depriving him of his right to livelihood, which is comprehended in the right guaranteed by Article 21 of the Constitution that no person shall be deprived of his life except according to procedure established by law,
c. Eviction of pavement and slum dwellers by the State of Maharashtra and the Bombay Municipal Corporation amounted to violation of rights guaranteed under Article 19 1 (g) of the Constitution of India.

The Respondent contended that the petitioner must be estopped from claiming any right for the pavement and slum dwellers as the pavement and slum dwellers conceded before the High Court of Bombay that they would not claim any right and undertook to vacate the same. The respondent also contended that the pavement and highways are public property, therefore, can not be used for private purposes.

Olga Tellis case was heard by five judges Bench consisting of Y.V. Chandrachud C.J., Fazl Ali J., V. D. Tulzapurkar, O. Chinnappa Reddy J., A. Varadarajan J. This Bench observed that there can not be any estoppels against the rights guaranteed under the Constitution of India. Therefore, the pavement and slum dwellers still had rights protected under part III of the Constitution even though they forwent their rights and undertook to vacate the place in question.

A wider interpretation was given to right to life and liberty guaranteed under Article 21 of the Constitution of India. The Bench pointed out State's responsibility to provide adequate means of livelihood to its citizens required under Article 39 (a)[90] and provision of public assistance in certain cases by the state under Article 41 of the Constitution of India[91]. The Directive Principles of State Policy was interpreted in the

[90] Article 39 of the Constitution of India- 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 adequate means of livelihood.

[91] Article 41 of the Constitution of India- 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

light of Article 21 and it was observed by the Bench that right to life and liberty means adequate means of livelihood which led to dignified way of living. The Bench considered the fact that property for public purpose can not be used for private purposes. Therefore, the pavement and slum dwellers committed tort by encroaching the pavements which was created for public use. Therefore, from that point of view these dwellers have committed tort. However, the law of tort requires that for a tort like trespassing the force to evict the trespasser must not be more that what is required and reasonable in that situation. Therefore, the Court asked the Bombay Municipal Corporation to give dwellers time and prior notice for eviction. The State government was also asked to arrange resettlement of evicted dwellers according to 1976 census data.

The meaning of life under Article 21 of the Constitution of India was interpreted as 'dignified' way of life by the three judges Bench (consisting of P.N. Bhagwati J., R.S. Pathak J., and A.N. Sen J.) of the Supreme Court in *Bandhua Mukti Morcha* v. *Union of India & Ors*.[92] The Bench observed that the right guaranteed under Article 21 of the Constitution of India derives its rationale from Article 39 (e), 39 (f), 41 and 42[93] of the Constitution of India. In post 1978 the Indian Judiciary took a stand that the DPSP must go hand in hand with the fundamental rights in order to promote social, economic and political welfare of people as stated in Article 38 of the Constitution of India. This period is undoubtedly a period of evolution of human rights jurisprudence in India.

- **Cases Dealing with Environmental issues**

The first initiative to protect environment and to spread the awareness regarding environment protection was taken for the first time in 1972. United Nations Conference on Human Environment, also known as Stockholm Conference, was the first global environment conference that dealt with issues like how to address the challenge of preserving and enhancing human environment. The Stockholm Declaration espoused broad environmental policy goal to protect and preserve human

[92] *Bandhua Mukti Morcha* v. *Union of India & Ors*. AIR 1984 SC 802.

[93] Article 42 of the Constitution of India- Provision for just and humane conditions of work and maternity relief

The State shall make provision for securing just and humane conditions of work and for maternity relief

environment. India was one of the signatories of Stockholm Conference. However, in India the Stockholm Declaration did not get implemented automatically unless the Indian Parliament enacts a law owing to its obligation as signatory of the same. Article 253 of the Constitution of India empowers the Parliament to enact law giving effect to any international treaty, convention or agreement.[94]

The first Indian legislation dealing with environment was the Water (Prevention and Control of Pollution) Act, 1974. In 1976 the then Prime Minister of India, Mrs. Indira Gandhi, inserted article 48 A and article 51 A (g) through the 42nd Amendment to the Constitution of India. These articles deal with following issues respectively-

Article 48 A of the Constitution of India makes it obligatory for the government to protect forest areas and preserve wild life. The government must strive to improve the condition of the environment.

Article 51 A (g) of the Constitution of India makes it the fundamental duty of every Indian citizen to protect and improve the natural environment including forests, lakes, rivers, wild lives and to have compassion for the same.

The environmental law jurisprudence in India developed to a remarkable extent during 1980s. Post Stockholm Conference (i.e. post 1972) India tried to implement principles of international conventions regarding environmental protection through national enactments. However, Indian judiciary has its own share of contribution in evolving the environmental law in India. It was after Bhopal gas leak disaster that the Indian legal system felt that conventional methods would no longer be enough to protect the environment when the society was scientifically and technologically developed. All these provisions were there either in the Constitution of India or in the Bare Act. India faced its first environmental disaster on 2nd December, 1984. On the brink of this disaster the Indian legal system stood unprepared and without a proper legal framework to deal with the determining liability for such disaster and the victims of the disaster.

[94] Article 253 of the Constitution of India
Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

The Union Carbide (India) Ltd. (UCIL) was a sister concern of Union Carbide corporation (UCC, a corporation based in U.S.A.) owned and based in Bhopal. On 2nd December, 1984 at night MIC gas (Methyl Isocyanate), considered to be the most toxic gas, escaped from the tanks where it was stored. The wind blew the fumes into hutments near the plant and affected residents of the entire city. About 4000 people lost their lives and about ten thousand people were affected to various degrees of seriousness. The entire country including the Indian judiciary was without any clue as to how to determine the liability of the corporation. At that point of time the only principle determining the liability for any such accident was 'Strict Liability'. However, any individual can be made liable under strict liability only when injury or death caused due to the non-natural use of land. This strict liability came with following exceptions-

a. Act of god,
b. Wrongful act of a third party,
c. Plaintiff's own fault.

In several suits filed against the corporation it was contended by the corporation that it could not be made liable as the escape of lethal gas was an act of god. Thus, in such situation the Indian legal system was left with only one option to deal with it was to compensate the victims. The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was enacted (in 29th March, 1985) in order to compensate the victims of Bhopal gas tragedy case. On 4th December, 1985 similar incident like Bhopal gas leak happened in one of the units of Shriram Foods and Fertilizers in Delhi. Following this incident M.C. Mehta, an environmental activist and a lawyer, filed a P.I.L. before the Supreme Court of India under Article 32 of the Constitution of India. This case is known as Oleum gas leak case.

M.C. Mehta v. *Union of India*[95] or Oleum Gas Leak case shaped the environmental law jurisprudence in India to a large extent. In this case M.C. Mehta filed the PIL seeking a direction from the court for closure of various units of Shriram Food and Fertilizers on the ground that they involved hazardous substances and posed a threat to the community. Oleum gas leak case was heard by five judges Bench consisting of P.N. Bhagwati C.J., Rangnath Mishra J., G.L. Oza J., M.M. Dutt J., K.N. Singh J.

[95] *M.C. Mehta* v. *Union of India* AIR 1987 SC 1086.

This case was crucial to the Bench to decide as a similar incident, probably with more serious consequences, was left undecided. The respondent pleaded that there was no liability of the respondent following the 'act of god' exception of strict liability. Strict Liability rule was evolved in Rylands v. Fletcher case by the English legal system.

The Hon'ble Chief Justice of India Justice P.N. Bhagwati on behalf of the Bench observed that situation faced by Indian legal system was unique and required a different response. Strict liability principle was evolved in 1868 by the English legal system when the technology was not this much developed and industrial units did not involve this much of technology. Thus, in 20th century an industrial enterprise, involving all the technologically advanced machinery, causes any injury or death due to the hazardous substances handled by the enterprise then the enterprise poses absolute and non-delegable duty to the community to compensate. This absolute liability principle made the enterprise liable irrespective of the fact that the enterprise took all the reasonable care and the harm occurred without any negligence on the part of the enterprise. The Absolute Liability Principle was undoubtedly an unique development in the area of environmental law.

By virtue of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 the Indian government filed a suit on behalf of the victims before the U.S. District Court against the Union Carbide Corporation holding it liable for the Bhopal gas leak disaster claiming compensation for the same. However, the U.S. Court transferred the case to the Indian Court on the plea of forum-non-conveniens by the UCC. The case was transferred to Bhopal District Court which ordered the UCC and UCIL for the payment of Rs. 350 crores as compensation to the victims. The UCC filed an appeal before the High Court of Madhya Pradesh which reduced the compensation amount to Rs. 250 crores. Both Union of India and the UCC preferred an appeal before the Supreme Court of India through S.L.P. challenging the decision of the High Court of Madhya Pradesh in 1989. The SLP was granted and *Union Carbide Corporation* v. *Union of India & Ors*.[96] was heard by five judges Bench consisting of R. Pathak J., E. Venkatramiah J., M. Venkatachaliah. J., N. Ojha J., R. Mishra J. On 14th February, 1989 the Bench ordered for overall settlement of the claims in the suit for 470 million

[96] *Union Carbide Corporation* v. *Union of India & Ors* 1989 3 SCR 128.

U.S. Dollar and consequently terminated all the civil and criminal charges against UCC and UCIL.

Meanwhile *Charan Lal Sahu* v. *Union of India*[97] questioned the validity of Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. Charan Lal Sahu case was heard by five judges Bench consisting of S. Mukherji C.J., K.N. Singh J., S. Ranganathan J., A.M. Ahmadi J., K.N. Saikia J.

Section 3(1) of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 empowered the Central Government acting as *parens patriae*[98] to represent victims of Bhopal gas tragedy in any suit having this cause of action. It was argued by the petitioner this provision takes away individual right of victim to sue the multinational corporation liable for this accident. The court observed that empowering the Union of India to represent all the victims of Bhopal gas tragedy is constitutional unless there is any explicit provision in the Constitution of India prohibiting the same. Ranganathan J. (for himself and A.M. Ahmadi j. concurring) observed that most of the victims were either illiterate, or financially incapable of continuing the suit. Therefore, substitution of victims with the Union of India did not amount to deprivation. It was shouldering of the responsibility by the Central government.

It was pleaded by the petitioners that the Act of 1985 does not have provision of interim relief. Therefore, victims have to wait till the pronouncement of the final judgment. On this point Mukherji C.J. observed for himself and Saikia J., while K.N. Singh J., concurred that the Central Government must have provision for sustenance and maintenance of victims till the final execution of the case. Since most of the victims are poor and impoverished the Central government is under obligation to pay interim amount for their sustaining. Section 9 and 10 of the Act of 1985 were referred by these three judges in order to show that the Act itself does not include anything to negate the idea of interim payment by the Central Government[99]. It was observed that

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[97] *Charan Lal Sahu* v. *Union of India* AIR 1990 SC 1480.

[98] *Parens patriae* means the principle that political authority carries with it the responsibility for such protection.

[99] 9. Power to frame a Scheme.—(1) The Central Government shall, for carrying into effect the purposes of this Act, frame by notification in the Official Gazette a Scheme as soon as may be after the commencement of this Act. (2) In particular and without prejudice to the generality of the provisions of sub-section (1), a Scheme may provide for all or any of the following matters, namely:— (a) the registration of the claims under the Scheme and all matters connected with such registration; (b) the

the Act of 1985 does not say anything against liberal interpretation of aforementioned two sections. This can legitimately be termed as 'constructive intuition'. Ranganathan J., and Ahmadi J., dissented to this view and held that it is true that victims require immediately compensation, but making Central Government liable to pay interim compensation till the final execution of the suit will put the government in uncertain circumstances. It will be unnecessary burden upon the government to make it distribute interim compensation to the victims without knowing what will be the outcome of the suit. The Bhopal Gas Leak Disaster case was reopened in the Supreme Court contending that it did not have jurisdiction to withdraw criminal charges against UCC and UCIL. *Union Carbide Corporation etc. etc*. v. *Union of India*[100] reopened the case in 1991.[101]

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processing of the claims for securing their enforcement and matters connected therewith; (c) the maintenance of records and registers in respect of the claims; (d) the creation of a fund for meeting expenses in connection with the administration of the Scheme and of the provisions of this Act; (e) the amounts which the Central Government may, after due appropriation made by Parliament by law in that behalf, credit to the fund referred to in clause (d) and any other amounts which may be credited to such fund; (f) the utilisation, by way of disbursal (including apportionment) or otherwise, of any amounts received in satisfaction of the claims; (g) the officer (being a judicial officer of a rank not lower than that of a District Judge) who may make such disbursal or apportionment in the event of a dispute; (h) the maintenance and audit of accounts with respect to the amounts referred to in clauses (e) and (f); (i) the functions of the Commissioner and other officers and employees appointed under section 6. (3) Every Scheme framed under sub-section (1) shall be laid, as soon as may be after it is framed, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the Scheme or both Houses agree that the Scheme should not be framed, the Scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that Scheme.

10. Removal of doubts.—For the removal of doubts, it is hereby declared that— (a) any sums paid by the Government to a claimant otherwise than by way of disbursal of the compensation or damages received as a result of the adjudication or settlement of his claim by a court or other authority, shall be deemed to be without prejudice to the adjudication or settlement by such court or other authority of his claim to receive compensation or damages in satisfaction of his claim and shall not be taken into account by such court or other authority in determining the amount of compensation or damages to which he may be entitled in satisfaction of his claim; (b) in disbursing under the Scheme the amount received by way of compensation or damages in satisfaction of a claim as a result of the adjudication or settlement of the claim by a court or other authority, deduction shall be made from such amount of the sums, if any, paid to the claimant by the Government before the disbursal of such amount.

[100] *Union Carbide Corporation etc. etc*. v. *Union of India* AIR 1992 SC 248.

[101] *Union Carbide Corporation etc. etc*. v. *Union of India* AIR 1992 SC 248 was combination of several review petitions under article 137 seeking review of the settlement agreement arising out of Bhopal gas leak case in 1989 and a writ petition under article 32 of the Constitution of India.

The Bhopal Gas Leak Disaster case 1992 was heard by five judges Bench consisting of Ranganath Mishra C.J., K.N. Singh J., M.N. Venkatachaliah J., A.M. Ahmadi J., & N.D. Ojha J. This case was instituted to deal with the following issues-

a. Whether withdrawing of criminal proceeding against UCC and UCIL was illegal?
b. Whether the Union of India on behalf of the victims of Bhopal gas tragedy can settle the issue with UCC and UCIL and determine the quantum of compensation?
c. Whether it was under the jurisdiction of the Supreme Court of India to terminate any criminal proceeding against a party?
d. Whether the settlement is vitiated for want of 'fairness-hearing'?
e. Whether the Union of India shall be made liable to bear the shortfall in the compensation to be paid by the UCC?

The Bench unanimously decided that the Supreme Court had the jurisdiction to decide the matter through settlement and to quash all the criminal proceedings against the accused. Venkatachaliah J., in his concurrent judgment explained that under Article 142 (1) of the Constitution of India the Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. Such order or decree so passed shall be enforceable through out the territory of India.

To the question whether the Union of India can settle the case and fix the quantum of the compensation on behalf of the victims the Bench unanimously decided that the Union of India can do that. Venkatchaliah J. further stated that Union of India was *dominus litis* in this case. Therefore, the Union of India had the right to compromise and fix the quantum of compensation on behalf of the victims of Bhopal gas tragedy.

Criminal case was instituted before the Chief Judicial Magistrate, Bhopal in 1987. Charges against UCC and UCIL were framed under section 304A, 336, 337 and 338 of the Indian Penal Code, 1860[102]. Offence under section 304A of IPC, 1860 is

[102] Section 304A of IPC, 1860 Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

bailable. Offences under section 337 and 338 of IPC, 1860 are compoundable. These charges were quashed by the Supreme Court in Bhopal gas tragedy case of 1989. In the Bhopal gas tragedy case of 1992 the court unanimously decided that charges against UCC and UCIL were compoundable in nature therefore it could be settled as was done by the Apex Court in 1989. Since the Union of India is *dominus litis* the Indian government can expedite the compromise. The settlement was not vitiated for 'fairness-hearing' either.

On the question regarding liability of the Indian government to bear the shortfall in the amount of compensation Ahmadi J. dissented with Venkatachaliah J. Venkatachaliah J., observed that the amount of compensation has been decided after taking due care. However, the Indian government can not escape its liability. He ordered the government to introduce insurance scheme covering injuries to occur with eight years from the date of this judgment in order to provide benefit to the future generation. The number of persons to be covered under this insurance benefit shall be about one lakh person. The premia shall be paid out of settlement fund. Ahmadi J., dissented to this view stating that there was no justification to make the Union of India liable for negligence done by the UCC and/or UCIL.

Rural Entitlement Litigation Kendra v. *Union of India*[103] *(*Doon Valley case) is a writ petition in which lime stone quarries in Dehradun mining area was questioned. During the pendency of the writ petition the court appointed a Committee under the head of D.N. Bhargava to submit the report regarding the then status of lime stone quarry in the mining area. This case was heard by three judges Bench consisting of P.N.

Section 336 of IPC, 1860. Act endangering life or personal safety of others.—Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

Section 337 of IPC, 1860. Causing hurt by act endangering life or personal safety of others.—Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Section 338 of IPC 1860. Causing grievous hurt by act endangering life or personal safety of others.—Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

[103] *Rural Entitlement Litigation Kendra* v. *Union of India* AIR 1985 SC 652.

Bhagwati J., A.N. Sen J., and Rangnath Misra J. The judgment was written by Justice Bhagwati for himself and on behalf of other two judges.

The Committee divided lime stone quarry on the basis of its effect of ecological balances. Category 'A' comprises of those quarries which did comparatively less damage. Category 'B' comprises of quarries which did more harm. Category 'C' quarries were asked to be closed down.

On receiving the Bhargava Committee Report the Bench unanimously decided to close down quarries listed under category 'C'. Category 'B' quarries were decided to not be reopened until the submission of report headed by D. Bandyopadhyay, Secretary, Department of Rural Development, Ministry of Agriculture, Government of India, which the court set up. It was also ordered that priority would be given while granting of lease for any limestone or dolomite quarry by the Central government or U.P. State government to those lessees who were effected because of closing down of limestone quarry. Closed down quarries must be reclaimed by the government and afforestation and soil conservation program will have to be taken up.

M.C. Mehta v. *Union of India*[104] also known as Kanpur tanneries case was filed by M.C. Mehta a public spirited person highlighting Ganga water pollution due to tannery industries along the bank of Ganga river in Kanpur. This case was heard by the Division Bench of the Supreme Court consisting of E.S. Venkataramiah J., and K.N. Singh J. The Bench issues some directions for municipal bodies of Kanpur and industries responsible for water pollution. The Bench allowed the petition contending that even though the petitioner, M.C. Mehta, is not the riparian owner but he is interested in protecting and preserving water for those who make use of the water flowing through the effected area. The Bench pointed out that no substantial action is taken to reduce water pollution even though the legislature imposed this duty upon the government. Quantity of sewage water discharged into Ganga river from tanneries located in and around Kanpur was the highest in whole of State of Uttar Pradesh. The Nagar Mahapalika of Kanpur was ordered by the Court to take responsibility to deal with the water pollution in Kanpur. The Nagar Mahapalika was also asked to take action under the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959, increase the size of sewers and to build urinals for labourers. The High Court was directed not to quash

[104] *M.C. Mehta* v. *Union of India* AIR 1988 SC 1115.

any criminal charge against any industrialist if that charge was imposed by a Board constituted under the water (Prevention and Control of Pollution) Act, 1974. It was also directed by the Supreme Court that no further industrial license would be granted if the minimum requirements for environmental protection are not abided by. The Bench also ordered for closing down of tanneries that did not set up treatment plant for treating its harmful effluents before discharging it into the water.

The period from 1978 to 1991 is a period of many transformations and evolution of new principles in Indian legal system. This period has witnessed growing importance for individual rights. Indian judiciary became active to provide protection of fundamental rights guaranteed to individual under the Constitution of India. It is because of judicial activism that 'absolute liability' principle has evolved. Nevertheless, political reaction and responses from legislature to judicial pronouncements remains the same during this period. Enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was a response from the legislature to the Shah Bano judgment. With the increase in judicial activism the ongoing debate of the day is on the question regarding who has the authority to provide the valid law. Whether judges make the law or declare the law. The other important shift was that focus of law shifted from the letter of the law (command) to the spirit of the law. The functional aspect of law came into focus. The combination of the spirit of the law and the function of the law made space for judicial activism.

The authority to enact law was no longer upon the legislature only. Judicial pronouncement or precedent is also regarded as a source of valid law. The transformation is all about shifting of focus from law making institution to law applying institution. Analytical positivism, which dominated the Indian legal philosophy during 1950-1978, is no longer influenced the judicial pronouncement. Legal positivism of H.L.A. Hart becomes dominant in the Indian legal philosophy. Therefore, the researcher is of the opinion that India continued to be influenced by the Positivist school of law but the shift was from Austin, Bentham combine school to H.L.A. Hart's thinking combined with Poundian social engineering.

This period focused on providing effective protection to fundamental rights by judicial activism. Through judicial activism the judiciary has shown that in order to maintain balance between competing interests in the society the fundamental rights

and directive principles of state policy must go hand in hand. India, in this phase, neither follows legislative supremacy nor judicial supremacy. It has embraced a different model of right protection. This model is known as the 'new commonwealth model of constitutionalism'.[105]

The judiciary expanded the scope of judicial review to give wider connotation to fundamental rights. Nevertheless, political reaction and/ or reaction from the Parliament to judicial pronouncements were also visible in this period. However, the significant contribution of this period is recognition of judiciary by the Indian legal system as a valid source of law.

[105] Chintan Chandrachud, *Balanced Constitutionalism*, 1-30, (OUP, New Delhi, 1st Edition, 2017)

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
1.	*M.H. Hoskot* v. *State of Maharashtra (1978)*	V.R. KRISHNA IYER D.A. DESAI O. CHINNAPPA REDDY			
2.	*Charles Sobraj* v. *Superintendent, Central Jail, Tihar (1978)*	V.R. KRISHNA IYER D.A. DESAI O. CHINNAPPA REDDY			
3.	*Tukaram* v. *State of Maharashtra (1979)*			A.D. KOSHAL JASWANT SINGH P.S. KAILASAM	
4.	*Hussainara Khatoon & Ors.* v. *Home Secretary, State of Bihar (1979)*	P.N. BHAGWATI D.A. DESAI			
5.	*Rajendra Prasad* v. *State Of Uttar Pradesh (1979)*	V.R. KRISHNA IYER D.A. DESAI		A.P. SEN	
6.	*Bai Tahira* v. *Ali Hussain Fissalli Chothia & Ors. (*1979)	V.R. K. IYER V.D. TULZAPURKAR R.S. PATHAK			

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7.	*Fuznubi* v. *Khader Vali (1980)*	V.R.K. IYER O.C. REDDY A.P. SEN			
8.	*Sunil Batra* v. *Delhi Administration (1980)*	V.R. KRISHNA IYER R.S. PATHAK O. CHINNAPPA REDDY			
9.	*Bachan Singh* v. *State Of Punjab (1980)*	P.N. BHAGWATI (MEMBER OF CONSTITUTIONAL BENCH)		R.S. SARKARIA P.S. KAILASAM (DIVISION BENCH OF SUPREME COURT) P.S. KAILASAM Y.V. CHANDRACHUD A.C. GUPTA N.L. UNTAWALIA (CONSTITUTIONAL BENCH)	
10	*Minerva Mills* v. *Union Of India (1980)*	Y.V. CHANDRACHUD P.N. BHAGWATI A.C. GUPTA N.L. UNTAWALIA P.S. KAILASAM			Y.V.CHANDRACHUD P.N. BHAGWATI A.C. GUPTA N.L. UNTAWALIA P.S. KAILASAM

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11	*Ambika Prasad* v. *State Of Uttar Pradesh (1980)*				Y.V.CHANDRACHUD A.SEN V. TULZAPURKAR V.K. IYER P.N. BHAGWATI
12	*Gopalanachari* v. *State of Kerala (1981)*	V.R. KRISHNA IYER R.S. PATHAK O. CHINNAPPA REDDY			
13	*Francis Coralie Mullin* v. *The Administrator, Union Territory, Delhi (1981)*	P.N. BHAGWATI S.M. FAZL ALI			
14	*Khatri & Ors.* v. *State Of Bihar (1981)*	P.N. BHAGWATI A.P. SEN			
15	*Waman Rao* v. *Union Of India (1981)*				Y.V.CHANDRACHUD A.SEN V. TULZAPURKAR V.K. IYER P.N. BHAGWATI

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
16	*Akhil Bhartiya Soshit Karmchari Sangh* v. *Union Of India (1981)*	V.R. K. IYER R.S. PATHAK O.C. REDDY (PARTIAL)		V.R. K. IYER R.S. PATHAK O.C. REDDY (PARTIAL)	
17	*Fertilizer Coporation Kamgar Union* v. *Union Of India (1981)*		Y.V. CHANDRACHUD S.M. FAZL ALI A.D. KOSHAL V.R.K. IYER P.N. BHAGWATI		
18	*S.P. Gupta* v. *Union Of India (1982)*	A. GUPTA D.A. DESAI E. VENKATARAMIAH P.N. BHAGWATI R.S. PATHAK S.M. FAZL ALI V.D. TULZAPURKAR			
19	*A.K. Roy* v. *Union of India (1982)*	A.C. GUPTA		Y.V. CHANDRACHUD P.N. BHAGWATI V.D. TULZAPURKAR D.A. DESAI	
20	*Mithu* v. *State Of Punjab (1983)*			Y.V. CHANDRACHUD S. M. FAZL ALI V.D. TULZAPURKAR	

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
				O.C. REDDY A. VARADARAJAN	
21	*T.V. Vatheeswaran* v. *State of Tamil Nadu* (1983)	O. CHINNAPPA REDDY RANGANATH MISRA			
22	*Sher Singh* v. *State of Punjab (1983)*			Y.V. CHANDRACHUD V.D. TULZAPURKAR A. VARADARAJAN	
23	*People's Union For Democratic Rights & Ors.* v. *Union Of India (1983)*	P.N. BHAGWATI BAHARUL ISLAM			
24	*Bandhua Mukti Morcha* v. *Union Of India (1984)*	P.N. BHAGWATI R.S. PATHAK A.N. SEN			
25	*Mohd. Ahmad Khan* v. *Shah Bano (1985)*	Y.V. CHANDRACHUD RANGANATH MISHRA D.A. DESAI O.C. REDDY E.S. VENKATARAMIAH			

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SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
26	*Rural Entitlement Litigation Kendra* v. *U.O.I. (1985)*	P.N. BHAGWATI A.N. SEN RANGANATH MISRA			
27	*K.C. Vasanth Kumar* v. *state of Karnataka (1985)*	Y.V. CHANDRACHUD A.P. SEN D.A. DESAI O.C. REDDY E.S. VENKATARAMIAH			
28	*Indian Express Newspaper (Bombay) Pvt. Ltd.* v. *Union Of India (1986)*	E. S. VENKATARAMIAH O.C. REDDY A.P. SEN			
29	*Olga Tellis* v. *Bombay Municipal Corporation & Ors. (1986)*	Y.V.CHANDRACHUD S.M. FAZL ALI V.D. TULZAPURKAR O.C. REDDY S. VARADARAJAN			
30	*M.C. Mehta* v. *Union Of India (Oleum Gas Leak Case) (1987)*	P.N. BHAGWATI RANGANATH MISRA G.L. OZA M.M. DUTT K.N. SINGH			

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
31	*Sheela Barse* v. *State of Maharshtra (1987)*	RANGANATH MISRA M.M. DUTT			
32	*Kehar Singh* v. *Union of India (1989)*			R.S. PATHAK E.S. VENKATARAMIAH M.N. VENKATACHALIAH N. D. OJHA RANGANATH MISRA	
33	*Union Carbide Corporation* v. *Union Of India (Bhopal Gas Leak Case) (1989)*			R.S. PATHAK E. S.VENKATARAMIAH M.N. VENKATACHALIAH N. D. OJHA RANGANATH MISRA	
34	*Charanlal Sahu* v. *Union Of India (1990)*	S. MUKHERJI K.N. SAIKIA K.N. SINGH		S. RANGANATHAN A.M. AHMADI	
35	*Union Carbide Corporation* v. *Union Of India (Challenging S.C. Decision Of*			RANGANATH MISRA K.N. SINGH M.N. VENKATACHALIAH	

STAND TAKEN BY SUPREME COURT JUDGES IN CASES DEALT WITH IN THIS CHAPTER

SL NO	NAME OF CASES	APPROVES OF CIVIL LIBERTY	APPROVES OF ECONOMIC LIBERTY OF PERSON	DISAPPROVES CIVIL LIBERTY	DISAPPROVES ECONOMIC LIBERTY OF PERSON
	Quashing Criminal And Civil Charge Against Ucc) (1992)			A.M. AHMADI N.D. OJHA	
36	*Sub Committee Of Judicial Accountability* v. *Union Of India (1992)*	B.C. RAY M.N. VENKATACHALIAH S.C. AGRAWAL J.S. VERMA		L.M. SHARMA	
37	*C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee*	K. RAMASWAMY B.L. HANSARIA			
38	*Daniel Latifi* v. *Union of India (2001)*	G.B. PATTANAIK S. RAJENDRA BABU D.P. MOHAPATRA DORAISWAMY RAJU SIVARAJ V. PATIL			

JUDGES CLASSIFIED ACCORDING TO GADBOI Jr. CLASSIFICATION IN THIS CHAPTER

CLASSICAL CONSERVATIVE	MODERN CONSERVATIVE	CLASSICAL LIBERAL	MODERN LIBERAL	AMBIVALENT
P.S. KAILASAM	A. VARADARAJAN	P.N. BHAGWATI	V. D. TULZAPURKAR	NOT FOUND ANY
M. VENKATACHALIAH	A.D. KOSHAL	Y.V. CHANDRACHUD	N. D. OJHA	
JASWANT SINGH		D.A. DESAI	A. AHMADI	
A.P. SEN		S.M. FAZL ALI	S. RANGANATHAN	
A.C. GUPTA		O.C. REDDY		
N.L. UNTAWALIA		V.R. KRISHNA IYER		
L. M. SHARMA		R.S. PATHAK		
		BAHARUL ISLAM		
		RANGANATH MISHRA		
		E.S. VENKATARAMIAH		
		A.N. SEN		
		K.N. SINGH		
		G.L. OZA		
		M.M. DUTT		
		S. MUKHERJEE		
		K.N. SAIKIA		
		M.H. KANIA		
		B.C. RAY		

		KULDIP SINGH		
		S.C. AGARWAL		
		J.S. VERMA		
		B.L. HANSARIA		
		K. RAMASWAMY		

It may be recalled that the present chapter deals with a period from 1978 to 1991. In this chapter the researcher has inter alia studied and analyzed voting behavior of thirty five judges in thirty six Supreme Court cases. Like George H. Gadboi Junior the researcher also tried to correlate the voting pattern of the Supreme Court judges and the philosophy that the pattern seems to indicate. However, the criteria chosen by the researcher for the work differs from the criterion mentioned by George H. Gadboi in his article *Indian Judicial Behaviour*[106]. The criterion chosen by Gadboi jr. in economic category is individual property right but in this chapter the researcher has taken into account economic power, policy and property/ economic right of persons (both legal person and natural person) has been considered. The researcher has created a separate category called 'Ambivalent Group' where the stand taken by the judge is not clear and consistent. It appears that he is sitting on the fence.

Voting behavior of judges have been observed basing upon the following factors-

a. Disapproving civil liberty,
b. Approving civil liberty,
c. Disapproving economic liberty,
d. Approving economic liberty.

In this backdrop it is important to mention that a judge showing his approval or disapproval for economic liberty does not necessarily manifest his views towards socialistic economy of India. Nevertheless, economic liberty vis-à-vis economic policy of the Indian government has been studied at length for this work.

Judges of the Supreme Court have been positioned under the following categories on the basis of their manifestation of voting behavior in abovementioned twenty three cases. These categories are-

i. Classical Liberal,
ii. Classical Conservative,
iii. Modern Liberal,
iv. Modern Conservative,
v. Ambivalent.

[106]George H. Gadboi Jr., Indian Judicial Behaviour, 5 (3/5) *Economic and Political weekly* 149-166 (1970)

The appendix to this chapter shows the table of such detailing.

Classical liberal are those judges who have manifested approval for both the civil and economic liberty. Judges under this category are- P.N. Bhagwati, D.A. Desai, S.M. Faizal Ali, O. C. Reddy, V.R. Krishna Iyer, R.S. Pathak, Baharul Islam, R. Mishra, Venkataramiah, A.N. Sen, K.N. Singh, G.L. Oza, M.M. Dutt, S. Mukherji, K.N. Saikia, B.C. Ray, Kuldip Singh, M.H. Kania, S.C. Agrawal, J.S. Verma, B.L. Hansaria, K. Ramaswamy and Y.V. Chandrachud JJ. Out of thirty six judges twenty three judges were under the category of Classical Liberal.

During 1978-1991 from amongst thirty six judges twenty three judges i.e. 63.8% belong to Classical Liberal group compared to 47.73% judges in this group during 1950-1978.

Post 1978 justice P.N. Bhagwati showed his approval for civil and economic liberty. However, deviation to this trend occurred in cases like Minerva Mills, Waman Rao and Ambika Prasad case. All these three cases involved acquisition of land by the Government. In Fertilizer Corporation Kamgar Union (Regd.) Justice Bhagwati approved economic liberty of the company i.e. the legal person. Therefore, from the voting behavior of Justice Bhagwati in cases related to economic liberty shows Justice Bhagwati's approval of government restriction of property right to uphold the socialist economy in India. Justice V.R. Krishna Iyer has been put in classical liberal group. However, his voting behavior changed in Waman Rao and Ambika Prasad case. The change in voting behavior also shows Justice Iyer's approval of government restriction upon property right. Y.V. Chandrachud has been positioned in classical liberal. However, in Bachan Singh and Mithu v. State of Punjab he disapproved civil liberty upholding constitutional validity of the death penalty. These judges were therefore pro-poor. The activism approved of civil liberty within socialist framework.

Voting behaviour of Justice Y.V. Chandrachud shows that post 1978 Justice Chandrachud became liberal in his approach. However, in cases related to death penalty Justice Chandrachud shows conservative approach because he supported death penalty in rarest of rare cases. In A.K. Roy case (1982) Justice Chandrachud (along with P.N. Bhagwati, V.D. Tulzapurkar, D.A. Desai) observed that fundamental rights of citizens could be violated through Presidential declaration of Ordinance.

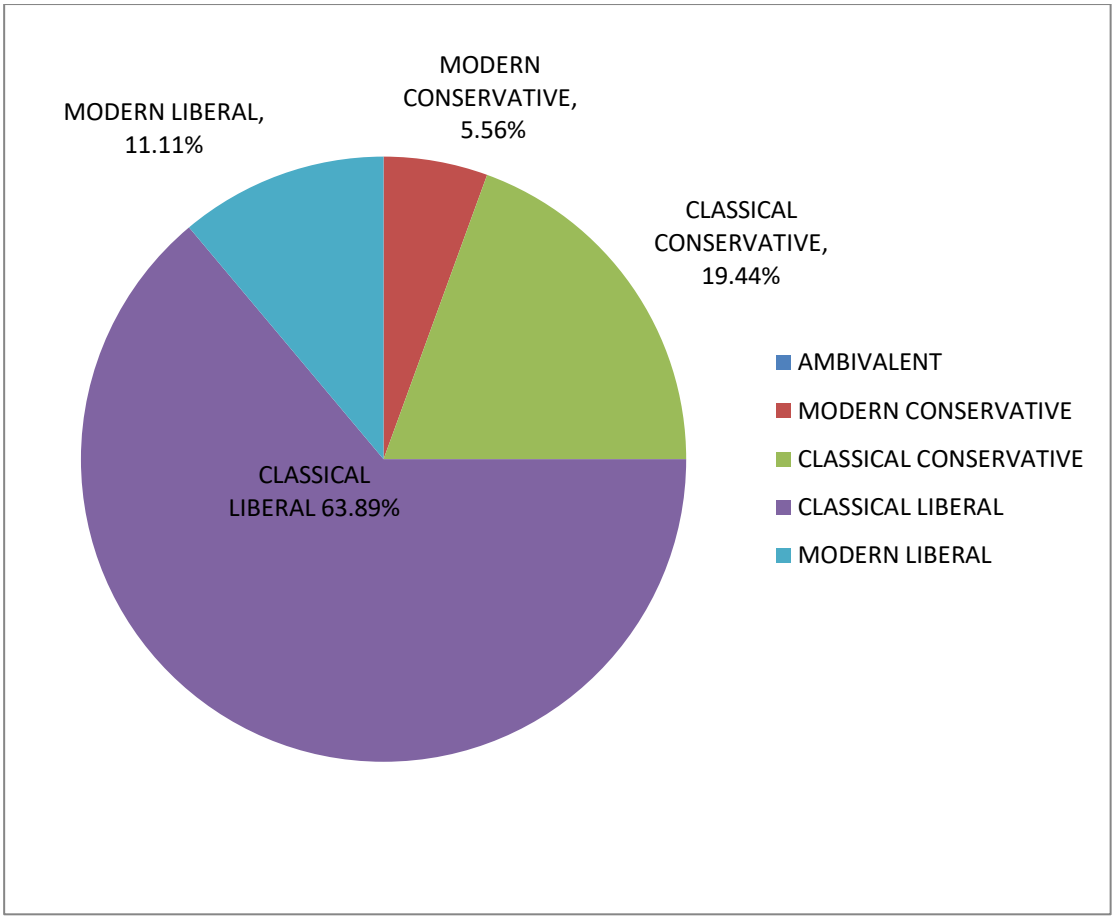
S.M. Fazl Ali and O. C. Reddy have been put into classical liberal group. However, both of them approved death penalty in Mithu v. State of Punjab which in turn puts restriction upon civil liberty. R.S. Rathak and R. Mishra JJ. both have approved civil and economic liberty. However, in UCC v. U.O.I (1989 3 SCR 128) both the judges terminated all the criminal and civil charges against the Union Carbide Corporation (UCC). Though the Bench ordered for overall settlement of the claim of victims of Bhopal gas tragedy the termination of criminal and civil charge against UCC amounted to disapproval of civil liberty of victims of Bhopal gas tragedy. There was an element of truth in that the destitute illiterate people living in slum area would not be able to fight their claims against financial giants like the UCC. But those who could fight for their claim also lost that opportunity because of the judgment. Justice K.N. Singh was in Bench of Shriram Foods and Fertiliser case (Oleum gas leak case). This Bench in this case formulated the principle of 'absolute liability' of the owner in cases of environmental disaster. Justice K.N. Singh in Charanlal Sahu (1990) case ordered the Central Government for the payment of relief for maintenance and sustenance of victims of Bhopal gas leak case till the final disposition of the issue. However, Justice K.N. Singh upheld Supreme Court's decision of termination of criminal and civil charges against UCC in the case of UCC v. U.O.I. in 1992. Therefore, there is a sharp contrast in the voting behavior of Justice K.N. Singh in Oleum gas leak case in 1987 and *UCC* v. *U.O.I.* in 1992.

Classical conservative are those judges who disapproved both the civil and economic liberty. Judges positioned under this category are P.S. Kailasam, Jaswant Singh, A.P. Sen, A.C. Gupta, N.L. Untawalia and M. Venkatachaliah JJ. Justice P.S. Kailasam has been positioned in classical conservative group. That is about 19.44% (seven judges out of thirty six judges) of the total judges as against 36.36% during the period 1950-1978. Clearly a shift in the attitude of judges is seen here. However, he showed a different voting behavior in Minerva Mills case. In this case the Bench struck down clause 4 and 5 of article 368 of the Constitution of India which conferred unlimited power upon the Parliament to amend the Constitution. Justice Jaswant Singh's voting behavior is found only in Tukaram case. A.C. Gupta and N.L. Untawalia JJ. also belong to classical conservative group. However both the judges in Minerva Mills case upheld civil liberty by restricting Parliament's power to amend the Constitution. Justice M. Venkatachaliah is positioned under classical conservative because of his

judgment in both the cases involving Bhopal gas tragedy in 1989 and 1992. In both these cases the Bench of the Supreme Court of which M. Venkatachaliah was a member terminated criminal and civil charge against Union Carbide Corporation.

Modern liberal judges are those who have approved civil liberty but disapproved economic freedom. Judges under this category are V. Tulzapurkar, N. Ojha, A. Ahmadi j. and S. Ranganathan JJ. However, Justice Tulzapurkar manifested a deviation in voting behavior in Mithu v. State of Punjab where he upheld the Constitutional validity of death penalty. Judges in Modern Liberal category during the period under consideration was 11.11% (i.e. four judges out of thirty six judges studied under the period 1978-1991) as against 4.55% during the period 1950-1978.

Modern conservative are those judges who disapproved civil liberty but approved economic liberty. As against no judges under this category in 1950-1978 5.56% (i.e. two judges out of thirty six judges) were under this category during period 1978-1991. Varadarajan and A.D. Koshal JJ. have been put under this category. Justice Varadarajan is found in Mithu v. state of Punjab where he upheld the constitutional validity of death penalty. Justice A.D. Koshal disapproved civil liberty in Tukaram case and upheld economic liberty in Fertilizers Coporation Kamgar Union case. In this chapter no judges is found with inconsistent voting behavior. However, Justice N.L. untawalia deserves a special mention because in chapter IV he was positioned under classical liberal group because of his judgment in Maneka Gandhi v. Union of India. However, in the present chapter his voting behavior manifested disapproval of civil liberty. It is only in Minerva Mills case where the Bench of which Justice Untawalia was a member restricted Parliament's power to amend the Constitution of India.



VOTING BEHAVIOUR OF JUDGES FROM 1978-1991

Abhinav Chandrachud in 'Supreme Whispers' mentioned that Justice A.P. Sen did not approve of Justice Bhagwati's importing of due process concept of the American Constitution in the Constitution of India. Justice Sen went on to describing himself misfit in the Supreme Court of India in 1980s. In an Interview Justice A.P. Sen mentioned to Gadboi that he dissented with his colleagues Justice Iyer and Justice Desai in Rajendra Prasad case (regarding constitutional validity of death penalty) because he thought that the humanistic approach of a judge must not obscure a judge from the sense of reality. Justice Sen often thought of not coping up with his activist brethren. He believed that judges are interpreters of law and not the makers of law. Justice Sen was also critical of Bhagwati for introducing his theory of Public Interest Litigation in the India legal system which, according to Justice Sen, operated as parallel government in India[107]. Justice Bhagwati was criticized for introducing Public

[107] Abhinav Chandrachud, Supreme Whispers, 34 (Penguin, Haryana, First edition, 2018).

Interest Litigation in India by many judges like Justice A.N. Grover and Justice S.K. Das. Some of the judges even called Public Interest Litigation the 'Publicity Interest Litigation'. Justice Bhagwati was criticized for making PIL cases for himself by converting letters he received as the head of the Legal Aid Committee. Justice P.S. Kailasam was also critical of activist judges. Justice Varadarajan agreed that he viewed things differently from that of his activist colleagues.

K.C. Vasanth Kumar case (1989) has been criticized by Justice D.A. Desai on the ground of non-representation of backward class in the Bench deciding the case. Justice Desai observed that even though the fact that the decision was in favour of reservation benefit of backward class, scheduled caste and scheduled tribe but the fact was that the case was heard by five Brahmin judges.[108]

The judgment in Maneka Gandhi case (1978) acknowledged the significance of morals in law. The interpretation in the Maneka Gandhi's case by the Supreme Court showed that it read 'natural rights' and 'natural justice' in law, probably for the first time post independence. It was impossible for the Supreme Court to decide what is 'fair' and 'just' without referring to some 'moral standards'. thus, post Maneka Gandhi's case (1978) morality became the foundation principle for all the laws in India.

Feminist movement influenced India in this phase from 1978 to 1991. However, no female judge was appointed until 1989. The first female judge of the Supreme Court of India was Justice Fathima Beevi appointed on 6th October, 1989. The first woman to be appointed a High Court judge in India was Justice Anna Chandy by the Kerala High Court in 1959. However, it took almost thirty years for the judges of the Apex Court of India to recommend a female judge for appointment. The first female Chief Justice of any High Court in India was Chief Justice Leila Seth, the Chief Justice of High Court of Himachal Pradesh. Since independence India has got eight female judges in the Supreme Court, and they are Justice Fathima Beevi (1989), Justice Sujata Manohar (1994), Justice Ruma Pal (2004), Justice Gyan Sudha Misra (2010), Justice Ranjana Desai (2011), Justice R. Banumathi (2014), Justice Indu Malhotra (2018), Justice Indira Banerjee (2018). From amongst eight judges three sitting judges are R. Banumathi, Indu Malhotra, Indira Banerjee JJ. Justice Indu Malhotra is

[108] Abhinav Chandrachud, Supreme Whispers, 184 ((Penguin, Haryana, First edition, 2018).)

the only judge to be elevated as a judge to the Supreme Court from the Bar Association of the Supreme Court of India. India has got some outstanding female lawyers and activists like Meenakshi Arora, Indira Jaising, Flavia Agnes, Zia Mody, Vrinda Grover etc. but was never recommended for appointment as Judge in the Supreme Court of India. Thus it seems, despite liberal approach and epoch making activism women were paid very little attention in the process of judicial appointment in the Supreme Court of India. Therefore, the fact that all the communities and genders were not adequately represented in the Apex Court of India remained same even during the period 1978-1991.