CHAPTER- XII

CONCLUSION & SUGGESTION

This research work is carried out with an objective to study the paradigm shift in the jurisprudential thoughts in judicial pronouncements in India. The study of this nature was felt essential for mapping the silent jurisprudential shifts that occurred in India unknown to the real actors and creators of the makers of such evolution. India has certain interesting features. It has a chequered history of invasions, colonisations and freedom struggle. In each of these phases there were predominant jurisprudential thoughts that became the motivational force. However significantly India did not and does not belong to a predominant jurisprudential school of thought. The researcher in the present research work undertook the mapping of the paradigm shifts and to examine whether the Indian Legal System is influenced by any particular school of thought, his explorative journey has been planned and presented in ten chapters.

The first chapter is an attempt to root the study in the philosophical/ jurisprudential foundation and the researcher has concluded this chapter with findings that Constitutionalism signifies the principles that a Constitution of a country incorporates within it and implements those principles over a period of time. Constitutionalism is necessary to ensure justice, equality fairness and good conscience and the Constitution is the legal document that embodies these principles. The object of this chapter was to highlight the significance of these metaphysical transcendental principles integrated in the Constitution. Halsbury's Laws of India has aptly stated that in the field of Constitutional law there is synthesis of three following factors-

a. Supremacy of metaphysical transcendental principles (there can be said to be the integral aspects of Constitutionalism),
b. Necessity to reduce these principles in written form, and
c. Judiciary to enforce these principles enshrined in the Constitution.[1]

Thus, these can be said to be the *sine qua non* of Constitutional Law. Constitution framers of India before embarking upon the journey of framing of framing of the

[1] HALSBURY'S LAWS OF INDIA, Constitutional Law I, Vol- 34, 9-10 (Lexis Nexis, Butterworth, New Delhi, 2012)

constitution were driven more by the need of self determination than following a particular school of thought.

Validation of authority and the foundation of the infrastructure upon which to build the superstructure of governance requires a foundation of universally accepted legal principles and philosophy. Such universally accepted philosophies and principles are, to say the least, are results of long debates and deliberations that lead to the adoption of principles that are metaphysical and transcendental in nature. These principles ensure fairness, equality and justice to every individual within the geopolitical territory of a State and yet such principles also limit the powers of the sovereign. Therefore, the fundamental principles embodied in the Indian Constitution are:

i. Judicial Review which proves that in India the Constitution is regarded as foundation law and the violation of that fundamental norm can be remedied.

Dieter Grimm[2] has aptly mentioned that in *United Mizrahi Bank Ltd*. v. *Migdal Village HCJ* the Israeli Court has observed that *judicial review is the soul of the Constitution itself. Strip the Constitution of judicial review and you have removed its very life.. It is therefore no wonder that judicial review is now developing. The majority of enlightened democratic states have judicial review..the twentieth century is the century of judicial review.*[3]

ii. Separation of power which keeps the judiciary separated from the interference of the legislature and/ or the executive,

iii. Rule of Law ensuring equal treatment by the law and also restricting any privileged treatment by the law unless provided due to positive discrimination.[4]

The Supreme Court of India in *Skill Lotto Solutions Pvt. Ltd*. v. *Union of India*[5] has held that 'Article 32 is an important and integral part of the basic structure of the

[2] Dieter Grimm is a Professor of Law at Humboldt University of Berlin.

[3] P. IshwaraBhat (ed.) ,Constitutionalism and Constitutional Pluralism, 65, (LexisNexis, Gurgaon, 2013)

[4] Positive discrimination is permitted in India under Article 15 of the Constitution of India. Article 14 of the Constitution of India ensures that everybody shall be treated equally before the law and nobody shall be provided with any privileged treatment by the law. Nevertheless, the government of India is empowered to make any provision or policy favouring a particular gender or caste which faces deprivation for a considerable period of time thus requires upliftment.

Constitution. Article 32 is meant to ensure the observance of rule of law. Article 32 provides for the enforcement of fundamental rights, which is also the most potent weapon.'

In the second chapter the researcher dealt with the evolution of the Indian Legal System and making of the Constitution. The objective of this chapter was to set he backdrop canvas for evaluating the functioning of the various schools of thought that hat has been manifestly seen during the debates in the Constituent Assembly and the judicial pronouncements in the subsequent period. Interestingly the judges have not been consciously aware of using a particular school of thought.

On 13th December, 1946 when India was yet to attain its independence Pandit Jawaharlal Nehru moved the Objective Resolution along with other resolutions as *'This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution'*[6]. However, the legal system evolved in India after the Constituent Assembly Debates. Thus, it cannot be said to be of purely common law in nature although it has predominant common law features. The separation of personal law from the realm of the civil secular laws has added a different dimension as has the predominantly law making role of the parliament. Hence the researcher is of the opinion that the legal system in India is a mixed legal system. The researcher is of further opinion that this mixed nature of the legal system has facilitated the judges to make use of various schools of thought to meet with the demands of time.

The third chapter of the present work deals with the Preamble. Since preamble enshrines the principles on which the Constitution stands, this chapter was considered important. Preamble is the prime part of the Constitution of India. It is neither ceremonial/symbolic nor a substantive source of law in India. It embodies the principles on which the Constitution of India stands. Hence it has a significant role to play while interpreting the ambiguous provisions of the Constitution. In Kesavananda Bharti case it has been held that the Preamble enshrines some principles which are identified as 'Basic Structure' and was declared not to be subject to any change. These principles identified as 'Basic Structure' of the Constitution of India are

---

[5] *Skill Lotto Solutions Pvt. Ltd*. v. *Union of India* WP (Civil) 961 of 2018.

[6] Constituent Assembly Debates, Vol I, 13th December, 1946.

nothing but the principles of Constitutionalism. Thus, the Constitution of India is a posited law that enshrines the principles of constitutionalism like, equality, liberty, justice, fraternity and rule of law which cannot be detached from the Constitution of India.

With the adoption of the Constitution of India arose the question regarding the method of interpreting the same. This inevitably involved the role of judges and the court. Interpretation of the Constitution arises only when the language of the Constitution is ambiguous and/or where the Constitution is silent on any right, privilege, immunity, distribution of power. In India the Supreme Court and the High Courts have been empowered to interpret the Constitution of India in the following occasion-

i. When the Constitutional provision is silent or ambiguous, and
ii. When the executive and/ or the administrative authorities are under judicial scrutiny.

In India the method of Constitutional interpretation has gradually evolved. The fourth chapter of this work explores the relevant Supreme Court cases between 1950 to 1978 and is entitled A Journey from A.K. Gopalan to Maneka Gandhi: A Study from 1950-1978. The exploration in this chapter starts with *A. K. Gopalan* v. *State of Madras* case (1950). The objective of this chapter is to explore how far the Indian court adhered to the strict principles of the classical analytical school of thought in the inception of the adoption of the Constitution of India. It is seen that due to the colonial legacy, the early decisions of the Supreme Court of India were more inclined towards analytical positivism. This is because many judges of that period were also judge during the British era and were trained in English Classical jurisprudential thoughts. The researcher in this chapter finds that the period from 1950 to 1978 was a fluid period of early trend settling in Constitutionalism due to different interpretation to fundamental rights and the proclamation of emergency which was finally settled by the principles laid down in *Maneka Gandhi* v. *Union of India* case (1978).

The first phase i.e. 1950-1978 records a state of fluidity and a paradigm shift from analytical positivist conservatism to inter alia a predominantly sociological school of thought. Twenty Supreme Court cases have been studied for the given period of time i.e. 1950-1978. During this period no enactment or executive policy of significance

was introduced that would mark a shift in jurisprudential school of thought in India. This strengthens the presumption that the aforementioned shift might have been facilitated by the Indian judiciary. In this phase a study of voting behaviour of Supreme Court judges has been on the parameters used by George H. Gadboi Jr. for the first time in India. Gadboi introduced four categories of judges according to their voting behaviour and these are-

i. **Modern Liberal**- one whose voting behaviour reflects an antipathy towards deprivation of civil liberties but approves of regulation of economic liberty of an individual. In other words approves civil liberty and regulation of economic liberty.
ii. **Modern Conservative**- one who condones restriction of civil liberties by the government but oppose to the economic regulation. That approves restriction of civil liberty but does not approve economic restriction.
iii. **Classical Liberal**- one whose voting behaviour corresponds to the belief in freedom of individual's both his personal and property right.
iv. **Classical Conservative**- judges whose voting behaviour suggest predisposition to upholding government's restriction upon both the individual right and property right.

The researcher has added another category of Ambivalent group along with the aforementioned four categories introduced by George H. Gadboi Jr. This category includes Judges whose voting behaviour did not follow a specific pattern that was laid down by Gadboi. In this phase voting behaviour of 44 (forty four) judges have been analysed. From amongst 44 judges, 16 judges (36.36%) are found to belong to Classical Conservative group. 21 judges (47.73%) are found to belong to Classical Liberal group. 2 judges (4.55%) belong to Modern Liberal group while 5 judges (11.36%) belong to Ambivalent group. This phase witnessed a shift of focus from the source of law to the purpose of law. The role of judges become significant with the shift of focus to the purpose of law in society. This raises two issues-

(a) the role of judges i.e. whether it is only to interpret the law or to make laws if the existing legal framework is found to be inadequate, and
(b) the school of thought a judge uses to settle a dispute.

The role of judges as 'law maker' was emphasized in various case laws in form of dissenting judgments for instance dissenting judgments of Justice Fazl Ali in A.K. Gopalan case in 1950. However, it took almost 28 years for the Indian legal system to

accept the law-making role of judges as can be seen as a binding precedent in Maneka Gandhi case in 1978.

With the acceptance of role of judges as law-maker another question was regarding the factors taken into account by a judge while interpreting the law. According to H.L.A. Hart judges consider their discretion while interpreting law. Ronald Dworkin and Joseph Raz believed that judges while developing law do not give expression to their discretion and belief but simply unravel the spirit of law. Whatever be the factors of consideration, the fact remains that Maneka Gandhi's judgment marks a paradigm shift from analytical positivist conservatism to a social justice oriented jurisprudence that rises above the rigid letter of law and preferring the liberal principle of the spirit of law.

The fifth chapter entitled Post Maneka Gandhi Era: Paradigm Shifts Between 1978 To 1991is important because it includes the period of emergency in India. The socio-political happenings of that period brought about a change in judicial thought in India. In this chapter the researcher has made the following observation

a. The authority to enact law was no longer exclusively upon the legislature only. Judicial pronouncement or precedent emerged as a source of valid law. The transformation was about shifting of focus from law making institution to law applying institution. Analytical positivism, which dominated the Indian legal philosophy during 1950-1978, was no longer enjoying the place of primary influence in 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 thought but the shift was from Austin, Bentham combine school to H.L.A. Hart's thinking combined with Poundian social engineering.
b. Proclamation of emergency in June, 1975 saw the suspension of all fundamental rights, including right to life. Supreme Court had not taken any stand against command of the sovereign. Post Maneka Gandhi focused on providing effective protection to fundamental rights by judicial activism including right to life. 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 paradigm. This model is known as the 'New Commonwealth Model of Constitutionalism'.[7]

c. 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 during this period. However, the significant contribution of this period is recognition of judicial pronouncements as a valid source of law as opposed to command of the sovereign expressed through legislative powers of the Parliament.

It may be worth noting that this judgment came at a time when Janata Dal was on the treasury benches in the Parliament. By laying the Principle of mandatory adherence to the procedure established by law and the paramountcy of the fundamental rights the Supreme court succeeded in limiting the power of the sovereign. The first phase of paradigm shift was complete.

The voting pattern of judges during this period shows an interesting pattern. The pattern and the trends that emerge during this period from the type of judgments delivered based upon the pattern set by George H. Gadboi Jr.[8] It shows in *A.K. Gopalan* v. *State of Madras* (1950) the Supreme Court of India gave a narrow meaning to Article 21 of the Constitution of India and refused to infuse the concept of 'procedure established by law' with the concept of natural justice. This approach of interpretation of the Constitution is known as literal or textualist interpretation[9]. Literal interpretation advocates that focus should be upon the text or language of the provision of law rather than upon what it was intended to mean.[10] This approach of literal interpretation was adopted and followed for some years in India especially during the early phase of the initial twenty five years. This approach reflected the

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

[8]George H. Gadboi Junior, Indian Judicial Behaviour, 5 (3/5) *Economic and Political Weekly*, 149-166 (1970).

[9]Textualist interpretation is an approach of interpretation where the interpretation of the law is based on the ordinary meaning of the legal text. In this approach no consideration is given to non-textual sources for example, intention of the legislature, spirit of the law etc. In India the correspondence term for textualist interpretation is literal interpretation.

[10]Arvind P. Datar, Rahul Unnikrishnan, 'Interpretation of Constitutions', 29 (2), *NLSI REV*. (2017), 136-148.

analytical positivist conservatism in the judicial pronouncements in India. Some of the significant questions of the Constitution were answered through literal interpretation. Post independence in A.K. Gopalan the question was the nature of law in Article 21 of the Constitution of India. The Supreme Court in this case adopted a literal interpretation approach to Article 21 of the Constitution of India and observed that the meaning of "Law" meant "law" as enacted by the Sovereign and disregarded 'procedure established by law'. However, this mode of interpretation was overruled in *Maneka Gandhi* v. *Union of India* (1978) where the Supreme Court observed that the deciding factor for a norm to be law is its adherence to natural justice which is an integral part of 'procedure established by law' or 'rule of law'. This interpretation of 'law' was done in accordance to the purposive interpretation. Purposive interpretation was propounded by Aharon Barak, the President of Supreme Court of Israel. In this mode of interpretation, Barak stated, there was demonstration of sensitivity to the uniqueness of the Constitution and the balance it strikes between the subjective purpose i.e. the intent of the authors of the Constitution and the objective purpose i.e. the intent of the system.[11] On similar line of thought in Maneka Gandhi case the Supreme Court struck a balance between the competing interests of the society thus bringing about a paradigm shift in the jurisprudential thought in India. A notable shift in judicial thinking can be observed from A.K. Gopalan case (1950) to Maneka Gandhi case (1978). In this backdrop this research work assumes that there are several other shifts in the jurisprudential thoughts in Indian legal system and undertakes to locate some of these shifts in the legal system. The present research has also tried to find out the role of the Indian judiciary in facilitating these shifts in the Indian legal system. For the purpose of locating shifts in jurisprudential thoughts and identifying the role of judges the researcher has studied Indian Supreme Court judgments delivered between 1950 to 2020. The time period of seventy years has been divided in three phases. The first phase is from 1950-1978, the second phase starts from 1978-1991 and the third phase is from 1991-2020. The phase of 1991 to 2020 is significant because it marks the onset of globalization. Economic liberalization in India was initiated in 1991 under the leadership of Prime Minister P.V. Narsimha Rao. This period marks another phase of shift in jurisprudential thoughts.

[11]Arvind P. Datar, RahulUnnikrishnan, 'Interpretation of Constitutions', 29 (2), *NLSI REV*. (2017), 143-148.

After the initial phases of change, 1978-1991 ushers in another phase. The second phase of paradigm shift in India is from 1978 to 1991. In this phase voting behaviour in 38 (thirty eight) cases which involves 36 judges have been studied. Of 36 (thirty six) judges in this phase, 11.11% judges belong to Modern Liberal group, 5.56% judges belong to Modern Conservative. A decline is found in the percentage of Classical Conservative group which is 19.44% in the second phase compared to the 36.36% of the first phase, almost reduced by half. Judges in Classical Liberal group increased till 63.89% compared to 47.73% of the first phase showing 16.16% of increase. The second phase of paradigm shift in India is significant because it witnessed cases involving various issues such as women rights, human rights, property rights, right to environment, labour rights etc., all paving the way for subaltern jurisprudence, critical legal thought and feminism. The environmental jurisprudence developed in the second phase by virtue of the Supreme Court judgment in Oleum Gas Leak case (1987). The Supreme Court judgment in this case introduced a new principle of Absolute Liability principle in the area of environmental pollution. Therefore, cases in the second phase reflect that the judgments have been delivered to bring about social justice which is a significant subject matter of Sociological school of thought. The Supreme Court of India assumed the role of a rule maker (Oleum Gas Leak case, Bachan Singh case, Shah Bano case, Daniel Latifi case etc.) as vast area of legal issues were not adequately addressed by the legislature. Therefore, in the second phase there is a predominant shift towards Sociological school of thought, Realist school of law and Hart's Positivism. During this phase the judiciary becomes active in settling the conflict of interests in law and society. Thus, the approach of interpreting the law transformed from literal to benevolent harmonious construction where the judiciary did not only consider the text of the law but also the spirit of the law. According to common law positivist theorist H.L.A. Hart judges can and do create new law where the existing law is outdated or inappropriate. In Indian context judges are restricted by rules of precedent, supremacy of the parliament, rules of statutory interpretation, and constitutional boundary while creating a law. Yet the modus for creating new law is also interpretation of statute, precedent and prospective overruling. The law making role of judges can be found in judgment delivered in *Bachan Singh* v. *State of Punjab* (1982). The majority judgment in Bachan Singh's case overruled the judgment of *Rajendra Prasd* v. *State of Uttar Pradesh* (1979) and declared death penalty as constitutionally valid. Another noteworthy development of

post 1978 in India is the wave of feminist and labour movement which is another expression of social justice. The judgment in Maneka Gandhi case (1978) acknowledged the significance of morals in law. The interpretation in 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. It is also noteworthy to mention that India witnessed feminist movement in this phase and the Indian Supreme Court received its first Female Judge only in 1989. The first female judge of the Supreme Court of India was Justice Fathima Beevi appointed on 6th October, 1989. It is clear from the preceding chapters and phases of studies that the Supreme Court, almost from its inception, and especially post 1978 has been engaged in the delicate balancing act between social practices and personal rights. Perhaps the first case to bring women's issue to the forefront (apart from rape cases) was the Shah Bano case[12]. Appointment of Justice Fathima Beevi to the Supreme Court in 1989 can also be considered of a great significance. This phase can be termed as coming of age of the Supreme Court when it could deal openly with sex, sexuality and women's rights.

The third phase of paradigm study is from 1991 to 2020 and is discussed in chapter VI entitled 'Legal Philosophy in Globalisation Era: A Study from 1991 to 2020'. The phase of 1991-2020 is significant because it marks the imminence of globalization. Economic liberalization in India was already initiated in 1991 under the leadership of Prime Minister P.V. Narsimha Rao. This new economic policy of India i.e. privatization and market driven economy met with globalization which was the new economic order of the time for rest of the world. Chapter VI is dedicated to the study of role of Indian judiciary in bringing social justice and to find out changing role of the Indian judiciary post 1991. The researcher in this chapter has set the stage for discussing the impact of globalisation on the judicial decisions handed out during this period on one hand how judiciary combated globalization that may have impacted negatively. Therefore, for the abovementioned purpose voting behaviour of 82 (eighty two) judges have been studied in 47 (forty seven) cases (judgment delivered by the Supreme Court of India). During this phase. The Classical Liberal group occupies

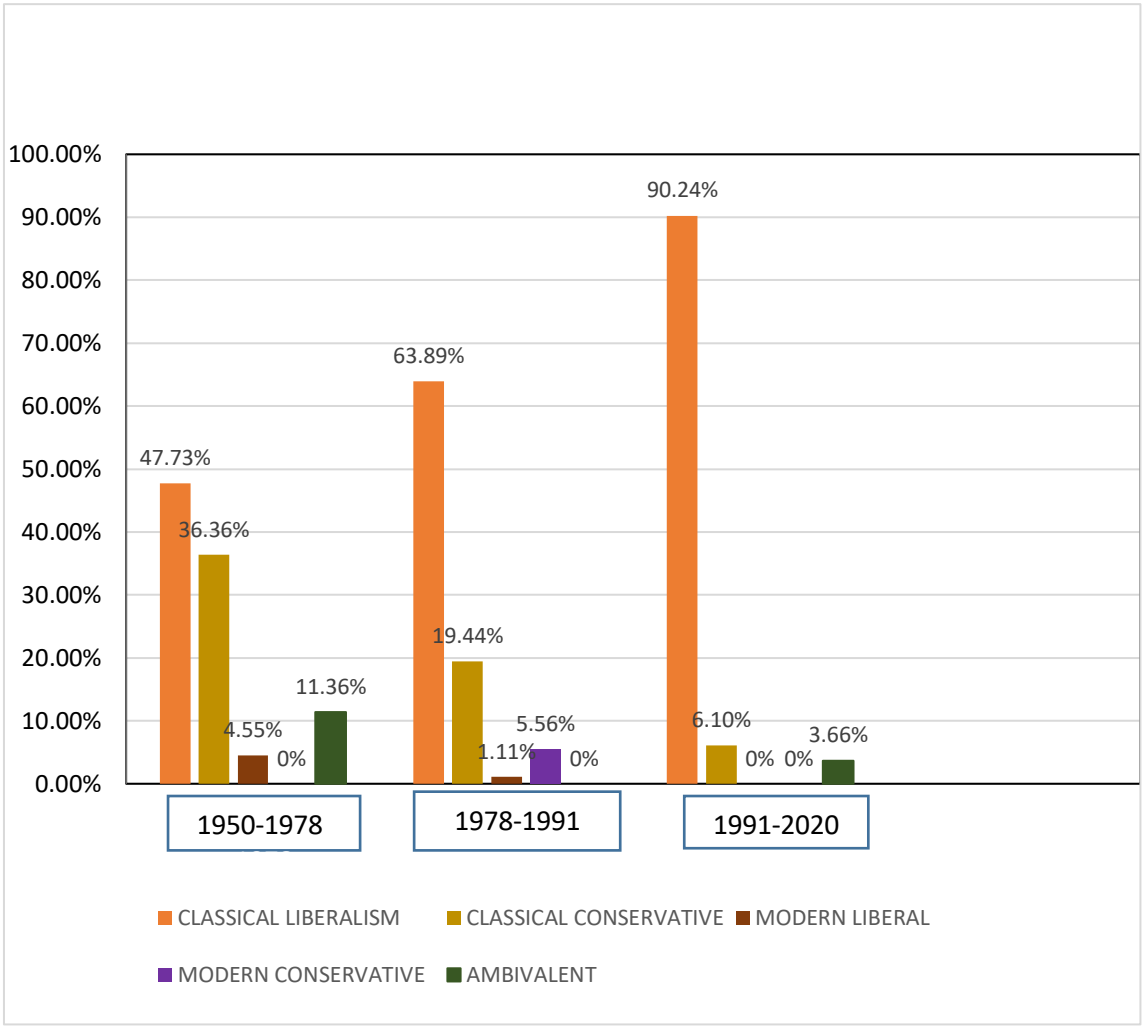
[12] *Shah Bano Begum* v. *Mohd. Ahmad Khan* AIR 1985 SC 945.

90.24% while Classical Conservative group occupies 6.10%. 3.66% judges have been found to belong to Ambivalent group while no judge is found neither from Modern Liberal nor from Modern Conservative group. This chapter shows a complete shift in judicial thought process. In this phase the judgments reflect a leaning towards Sociological school of thought and Realist School of Law as dominant Jurisprudential tool for bringing about the change. The third phase also witnessed judicial overreach. Judicial overreach took place when the Supreme Court of India overstepped the limit of activism in breach of constitutional boundary. In T.N. Godavarman case (1993) the judgment of the Supreme Court of India was criticized because it has provided National and Local Forest Management Policy. This Forest Management Policy was criticized as the same were supposed to be issued by the executive, especially Ministry of Environment and Forest (MoEF). Even though it is a case of judicial overreach, it is very significant that the court established not only social justice but also ushered in environmental jurisprudence when the executive and legislature were failing. The judgment in *Supreme Court advocates-on-Record Association* v. *Union of India*[13] declaring ninety ninth amendment to the Constitution unconstitutional was criticized. The ninety ninth amendment to the Constitution of India proposed to substitute the collegium system for appointment of judges to higher judiciary with National Judicial Appointments Commission (NJAC). The move of the Supreme Court in this case is criticized not because its declaration of NJAC unconstitutional but its subsequent rejection of government's plea to transfer the case to larger Bench. The Supreme Court also simultaneously invited suggestions to improve the collegiums system for appointment of judges in higher judiciary. This move by the Supreme Court of India is overturned in judicial overreach. This move of the judiciary is in contrast to the Godevarman case and an indication of reluctance to apply change within its own *sanctum sanctorium*.

[13]*Supreme Court advocates-on-Record Association* v. *Union of India* (2016) 4 SCC 1

It is important to mention that these shifts in the Indian legal system have not always been introduced by the legislature or the executive. These shifts are the result of the change in the voting behaviour of Indian judges and the collective judicial thinking. The trends of judicial thought process during three phases are explained in the following chart.

VOTING BEHAVIOUR OF JUDGES FROM 1950-2020



The aforementioned chart shows a constant rise in the Classical Liberal group of judges and a constant decrease in the Classical Conservative group of judges. This chart manifests how the voting behaviour of judges have brought about the paradigm shift in the Indian legal system. However, this paradigm shift is only in the voting

behaviour of judges i.e. from interpreting the laws strictly according to its letters (literal interpretation) to considering the spirit of laws (harmonious construction). India after independence was in the continuous process of development politically, socially and economically. The aforementioned paradigm shifts shows that the social development in India was predominantly brought about by the Indian judiciary through its judgments. However, it is noteworthy to mention that simultaneously there were political and economic developments in India.

The phase 1991 to 2020 witnesses another layer of change in the economic front. There is a spill over effect of this phase on Chapter VII. Chapter VII is entitled 'From Industrialization to Economic Liberalisation: Impact of the Shift of Legal Philosophy Followed by India'. In this chapter the journey from Industrialisation to Economic Liberalisation is charted and how far these developments in economic policy has impacted the philosophy followed by the Indian legal system is examined. It is also observed that immediately after independence, Indian government adopted controlled industrialization policy. Controlled industrialization allowed private entity in the market but with the license from the Indian government. Nevertheless, this controlled industrialization policy had to be withdrawn by the Indian government after it was found to end in corruptions and scams. Consequent upon this the Indian government decided to nationalise the industries. The R.C. Cooper case (1970), Minerva Mills case (1973) were instituted against the nationalization policy of the government of India. However, in these cases the Supreme Court of India supported the nationalization policy of the Indian government and observed that the Indian judiciary would not interfere with the executive decisions of the Indian government. Towards the 1990s nationalization policy of Indian government was found to fail to boost the economy of the country. Thus, the decision of privatization was taken. T.M.A. Pai case, Narmada Bachao Andolan case, Balco Employee's Association case, CPIL (privatization of BPCL and HPCL) were instituted against the privatization policy of the Indian government. Again the stand of the Supreme Court was very clear that was of non-interference with the executive decision of the Indian government. Therefore, in judgments of the aforementioned cases the Supreme Court of India supported the privatization policy of the Indian government.

Therefore, the shift in the economic policy and a change into liberalised market driven economy was not ushered in by judicial decisions rather it was a combination of

legislative and executive policy. Moreover, the judiciary commendably upheld the change brought about by the compulsion of the time. This may be cited as an example of legal formalism.

In Chapter VIII an empirical study has been conducted to record the responses of practising advocates regarding the shifts in Indian legal system. The discussion so far discloses that the Indian legal system has undergone several shifts since 1950. Most of these shifts were facilitated by the two significant stakeholders of law enforcement i.e. lawyers and judges. This Chapter is entitled 'An Empirical Study Relating To The Extent Of Awareness Of Practicing Advocates Of Calcutta High Court And Siliguri Subdidvisional Court Regarding Use Of Jurisprudential Schools Of Thought In Their Arguments'. In the empirical study it was found that most of the practising advocates think that the Indian judiciary adheres to a jurisprudential school of thought while delivering judgments. However, views of advocates varied regarding which school of thought is followed by the Indian Judiciary in particular.[14]

Chapter IX is titled 'Paradigm Shifts in Dispute Resolution in India: A Journey From Adversarial System to Alternative Dispute Resolution'. The British rulers introduced the present structure of courts as judicial system in India which was based on litigation. The judicial system in ancient India had several tiers for dispute resolution and the last resort was the King's Court. So out of Court settlement has been prevalent in India much before the modern world thought of Alternative Dispute Resolution.[15] This research work also undertakes to find out if there is any shift from litigation to alternative dispute resolution in India. Despite several opportunities alternative dispute resolution could not be popularised as it was intended. In India alternative dispute resolution could have been adopted as a primary method for dispute resolution in the area of environmental pollution, personal law disputes etc. The case of *Mohd. Ahmad Khan* v. *Shah Bano Begum*[16] dealt with the issue of maintenance to divorced Muslim wife by her husband. Post the judgment there was a protest and consequently the Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted to alter the judgment of the Supreme Court of India in this case. This Act of the legislature

[14] This empirical study was proposed to be done with judges. However, the empirical study was done with the practicing advocates as the permission to interview judges could not be obtained.
[15] The Indian Judicial System: A Historical Survey by Mr. Justice S.S. Dhavan, High Court, Allahabad.
[16] *Mohd. Ahmad Khan* v. *Shah Bano Begum* AIR 1985 SC 945.

defying the judgment of the Supreme Court of India has definitely set a bad precedent. This could have been avoided if the issue had been resolved through mediation. Another example is T.N. Godavarman case which is also considered to be an example of judicial overreach. This case continued for a long period of time which may have been avoided if the Supreme Court of India transferred it for resolving through mediation. The Ayodhya dispute was referred by the Supreme Court to mediation panel since it could not be settled through mediation, it was referred back to the Court. Therefore, the shift from adversarial litigation to alternative dispute resolution did not happen in India. India still heavily relies on adversarial litigation as method of dispute resolution. The researcher finds that the alternative dispute resolution system in India has yet to find credence with the litigating parties, despite the fact that there are several matters that are and can be settled through arbitration, mediation and conciliation. Indian people are inclined to adhere more to the adversarial system than alternative dispute resolution. Rate of settlement through alternative dispute resolution (ADR) is lesser than conventional litigation. The researcher is of the opinion that had alternative dispute resolution (ADR) been more popular with the litigants, the backlog of cases in the Supreme Court of India and High Courts would be considerably reduced.

Chapter X deals with Constitutional Transformation in English Legal System. This chapter is important because the present geopolitical State of India is born out of the British Colonial rule. This chapter examines whether similar shifts have taken place in Britain during the same period. English legal system is accumulated to be a common law system and the present system in India bears a legacy of the English legal system. Thus, an assumption may be made that the developments in both these legal systems might be similar and also may coincide. In English legal system the Law of Torts on Negligence and Damages have been developed through several case laws which is not the case in India. In India such individual focus has not been seen. The rule of *locus standi* was relaxed by Lord Parker and Lord Denning in *R.* v. *Thames Magistrate's Court* case in 1957. The relaxation of *locus standi* rule was later on followed in India by Justice P.N. Bhagwati and Justice Krishna Iyer in the second phase of paradigm shift that is 1976 onwards in *Mumbai Kamagar Sabha* v. *M/S Abdullah Bhai Faizulla Bhai* and the case was decided by Justice V.R. Krishna Iyer.[17] The paradigm shift in

[17] *Mumbai Kamagar Sabha* v. *M/S Abdullah Bhai Faizulla Bhai* 1976 (3) SCC 832.

the area of public interest litigation took place in 1957 in English legal system but in India it took place after 1976 onwards. In India this paved the way for the judiciary to implement social justice and give importance to sociological school of thought.

Another area of shift in legal system is judicial review of administrative action. The expansion of judicial review of administrative action is the harbinger of natural justice and rule of law that are founded in Natural law and serves as the *sina qua non* in foundation of every administrative/ executive action and statute law. In India *A.K. Kraipak* v. *Union of India* in 1970 marks a significant shift in the administrative law when the Supreme Court of India brought the administrative action under the purview of judicial review. Lord Justice Parker and Lord Justice Diplock of the High Court of Justice (England and Wales) in *R.* v. *Criminal Injuries Compensation Board Ex. p. Lain* in 1967 laid down the similar principle that brought the administrative action under the purview of judicial review. Therefore, the expansion of judicial review of administrative action in Indian law and English law was at the same time. The doctrine of judicial review was first propounded in America in *Marbury* v. *Madison*[18] by Chief Justice Marshall. Both the systems seem to have realised the importance of the principle of natural justice, rooted in natural law. Although judicial review has been in existence in India, more specifically, under the Government of India Act, 1935 and reiterated as basic structure in Kesavananda Bharti case in 1973 and several times thereafter, it became firmly established in Maneka Gandhi's case (1978). This principle of judicial review became the binding precedent and accepted by the apex court of the United Kingdom i.e. the House of Lords in *Council of Civil Service Union* v. *Minister of the Civil Service* in 1985. Similarly the principle of judicial review has been made binding in India.

English legal system encountered a shift with the passage of the Human Rights Act, 1998. This Act enables the domestic courts of the English legal system to entertain cases of human rights violation. Prior to the enactment of the Human Rights Act, 1998 all the human rights violation issues within the United Kingdom had to be referred to the European Court of Human Rights for final resolution. Post enactment of the Human Rights Act, 1998 the House of Lords and then the Supreme Court of

[18] *Marbury* v. *Madison* [2 L.E.D. 60].

United Kingdom[19] has been vested with the jurisdiction for final resolution of human rights violation issues within the United Kingdom. The passage of the Human Rights Act, 1998 enhanced the power of the Court to entertain cases of human rights violation and thus be more social justice oriented. In India the Human Rights Act was passed in 1993. The Courts in India were dealing with cases of human rights violation even before 1993, to name a few, Shah Bano case (1985), Anti Sikh Riot case (1984), Hashimpura massacre (1986), Demolition of Babri Masjid (1992). Unlike Britain the 1993 Act neither augmented nor mitigated the powers of the Court. The judgments of European Court of Human Rights were always in tune with the human rights law of the European Union and the United Kingdom had to acknowledge the judgment being the member of the European Union. There are also instances where the domestic court of the United Kingdom wanted to pronounce a different judgment but could not do so because the same was not permitted under the UK law. Prior to the Act of 1998 there was no law in the United Kingdom allowing vast judicial review of administrative actions. The Human Rights Act, 1998 widened the scope of the judicial review of administrative action and also right-violating legislation. Therefore, 1998 marks a paradigm shift in the human rights jurisprudence in the United Kingdom.

The English legal system witnessed another shift with its decision of exit from the European Union. With the exit from European Union the EU law ceased to be operative in the United Kingdom. The United Kingdom decided to exit from European Union by introducing the European Union (Withdrawal) Bill on 13th July, 2017. This bill is also known as the Great Repeal Bill and is finally enacted as the European Union (Withdrawal) Act, 2018.Brexit ensures that EU law will no longer be supreme than the domestic law of the United Kingdom. However, the concern was regarding status judgments delivered by the Court of Justice of European Union (CJEU) within the United Kingdom. Whether the domestic courts of the United Kingdom would be bound by the judgments of CJEU. The position of the UK government on this issue was that with the exit from EU the jurisdiction of CJEU would also come to an end. Nonetheless, there would be EU derived laws operative in UK even post exit. Therefore, the UK judiciary has been expected to follow a method interpretation of EU-derived laws which would bring certainty to the UK laws and the

[19]The House of Lords has been replaced by the Supreme Court of United Kingdom as the Apex court of the United Kingdom post 2009.

UK court would be sole authority to interpret EU-derived laws. Thus, the UK judiciary attained its full liberty only with the Brexit which is not the case with the Indian courts. Immediately after independence the Supreme Court of India becomes the Apex court of India and the foreign judgments have only persuasive value in India.

Chapter XI deals with Constitutional Transformations in SAARC Countries with focus on Pakistan, Bangladesh, Nepal and Bhutan. This chapter is important because Pakistan and Bangladesh are countries carved out of India on the basis of religion and Nepal and Bhutan are two land locked countries not only contiguous to India but both the countries share their border with China. Any jurisprudential and political shifts in these countries is likely to strongly impact upon India. Interestingly it is found that the period of the seventies is a period of turmoil in Pakistan and Bangladesh. Nepal and Bhutan too underwent changes. While in Nepal the change occurred through political turmoil the transition in Bhutan was peaceful and initiated by the sovereign. Seventies is a period when both Pakistan and Bangladesh were under the Military Rule while Nepal and Bhutan were under Monarchy. The countries of Bangladesh and Pakistan have declared Islam as their State religion. Thus there are marked differences with India, India being a secular nation. Bhutan is predominantly a Buddhist and Nepal is "Secular" as declared by its Constitution (2015). The latter has undergone violent struggle for transition. While Pakistan, Bangladesh and Nepal marked a shift from strict positivist school of thought to sociological school of thought, Bhutan has shown a difference. It has almost without litigation upheld the principle of liberty, justice and tranquillity and to enhance the Unity, happiness and wellbeing of people for all time. Bhutan is thus rooted in principles of natural law coupled with the growth as *volkgeist*. The transformation from monarchy to democracy in Bhutan was not due to any violent struggle but was gifted by the then Monarch and showed the true spirit of people. Therefore, the historical school of jurisprudence is manifested in the paradigm shift in the legal system of Bhutan. Another significant observation in the development of legal systems in these four SAARC countries is that though the judiciary of respective countries delivered judgments favouring rule of law but the shifts in these countries were not due to these judicial pronouncements. In India judicial pronouncements acted as catalyst in bringing the shifts in Indian legal system

while in SAARC countries it is either the violent protest or the spirit of the Monarch which brings out the change.

In conclusion the researcher finds that there has been paradigm shift in the legal philosophical/jurisprudential thinking in India. Much of the shifts occurred in unplanned manner where the judges were not conscious of the changes that they were ushering it. The realist school apparently played a predominant role to trigger changes, but it cannot be said that India embraced any single school of thought. However significantly Maneka Gandhi's case laid the foundation for the morals of 'fair' judicial process and irrevocable principle of procedure established by law. In India the paradigm shift is definitely from strict positivism, but it can aptly be said that India does not embrace any single school of thought in its philosophical/jurisprudential thinking. The foundation can be said to be rooted in natural justice, the powerful influence of realism and the end result of social justice rooted in the sociological school of thought are present significant features of the Indian judiciary.

Thus, it can be seen that India is not influenced by any single school of thought. Statutory law is still the repository of all laws i.e. 'law as it is'. To this extent India still follows the positivist school of thought but is influenced by the principles of natural law, more specifically natural justice. The emphasis of social justice that is an integral part of school of thought is brought about by strong arguments of lawyers and judges that are in the realm of realist school. This changes are brought about by the judiciary predominantly albeit unconsciously. This shift is, then, reflected in the legislations and executive actions. This is transformation of transcendental and metaphysical nature. A research of exploratory jurisprudential nature does not entail suggestion. However, the researcher humbly suggests that the flexibility of legal system is very important because it helps a legal system to grow and change according to the demands of the time.