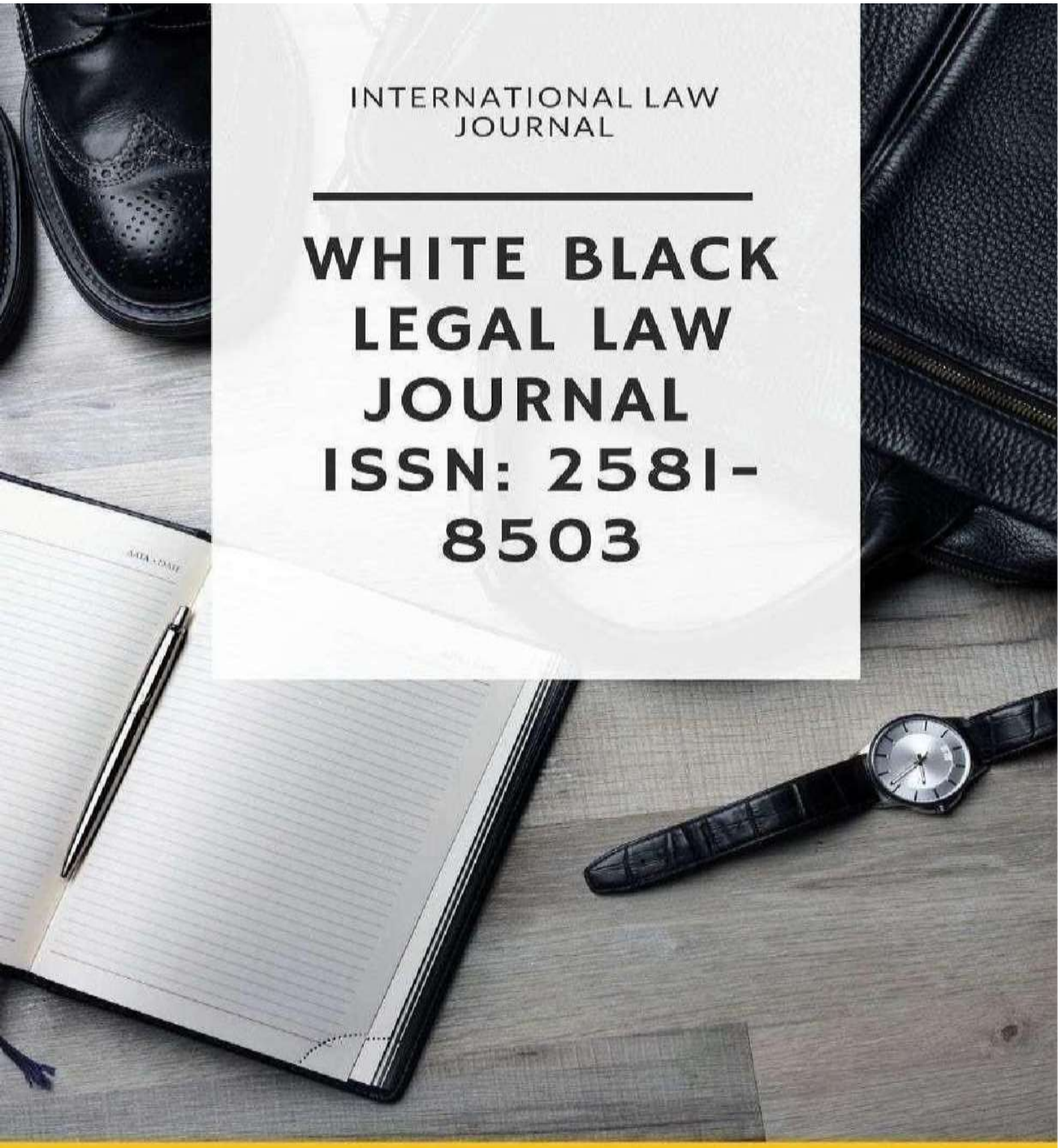

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With this thought, we hereby present to you

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THE DEVELOPMENT OF INDIAN JURISPRUDENCE: A STUDY WITH SPECIAL REFERENCE TO CONSTITUTIONAL MORALITY

AUTHORED BY - MEHAKPREET KAUR[1]

INTRODUCTION

India is a country of diverse people speaking different languages and professing varying religions. Its diversity not only lies in its people but also in its jurisprudence. Indian jurisprudence reflects a mix of different schools of thought of jurisprudence. Having roots in the Natural law theory in ancient time, Indian jurisprudence reflects developmental shift from positivism to sociological and realist approach in the modern era.

The development in Indian jurisprudence is a contribution of Indian Judiciary, which through its activist approach has shaped Indian constitution to suit the diversifying needs of Indians. One of such contributions of Indian Judiciary is the doctrine of constitutional mortality, which has been used by the courts to protect the Fundamental rights of the minority groups. This Doctrine is one of the recent developments made by the Indian Judiciary in the Indian Constitutional Jurisprudence, reflecting the growth of the Realist approach of Jurisprudence in India.

To understand the development of Indian jurisprudence with the concept of constitutional morality, it is first necessary to know about the concept of Constitutional Morality and different schools of thought of jurisprudence.

CONSTITUTIONAL MORALITY

The earliest mention of the term "constitutional morality" can be found in the text of history of Greece written by British historian George Grote. For Grote, constitutional morality mean giving paramount reverence to the forms of the constitution[2]. This meaning given to the term

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[2] George Grote, 1794-1871, *Greece: I. Legendary Greece: II. Grecian History to the Reign of Peisistratus at Athens*, New York: P. F. Collier, 1899, retrieved from <*https://babel.hathitrust.org/cgi/pt?id=hvd.hw20pr&view=1up&seq=7*>, p. 154, visited on 31 May 2021

constitutional morality by George Grote in the 17th century forms the basis of the concept of constitutional morality.

In India this concept became a part of constitutional thinking when Dr. BR Ambedkar used this concept to justify adding administrative details in the constitution. He regarded it as a natural sentiment and stressed on the importance of constitutional morality in a legal system. He said that Indians have yet to learn this sentiment.

This sentiment does not find any direct mention within the constitution but has become a part of our constitutional thinking through the activist approach of the Indian judiciary, which has slowly cultivated this sentiment on Indian soil over a period of time. The ***Kesavananda Bharati case***[3] laid the foundation stone for this doctrine. The doctrine of basic structure laid down in this case restricted the unlimited power of the parliament to amend the constitution. Such idea of restraint on the power was reflective of the commitment to constitution, which is a facet of constitutional morality[4].

After the Keshavananda Bharati case, different cases made indirect reference to the concept of constitutional morality. This concept remained in dormant position for several years with few instances of its mention. However with the decision of the ***Manoj Narula v. Union of India***[5], this concept surfaced as a part of our constitution. In this case Justice Dipak Misra tried to define constitutional morality as-

> "*The principal of constitutional morality basically means to bow down to the norms of the constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner*"[6]

After this case, several judgements were passed in which the judges try to explain the concept of constitutional morality.

In ***Govt. of NCT Delhi v. Union of India,***[7] The CJI observed that constitutional mortality in its strictest sense implies strict and complete adherence to the principles as enshrined in various segments of the constitution.

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3 *Kesavananda Bharati v. State of Kerela*, AIR 1973 SC 1461
4 *Manoj Narula v. Union of India* (2014) 9 SCC 1
5 (2014) 9 SCC 1
6 *Id.*
7 (2018) 8 SCC 501

Further in ***Navtej Singh Johar's case***[8], Justice Chandrachud observed that –

> "*Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the constitution which are based on liberty, equality and fraternity. Constitution morality is thus the guiding spirit to achieve the transformation which above all, the constitution seeks to achieve.*"[9]

These case laws gave the term constitutional morality its contemporary meaning which is equivalent to the "spirit" or "soul" or "essence" of the constitution. Such spirit or essence or soul of the constitution can be located in the Preamble Part III, IV and IV A of the Indian constitution. The concept of constitution morality or the spirit of Constitution being subjective in nature its contents cannot be listed out exhaustively, however the decisions of the court in various judgements reveal the essential elements of rule of law equality, non-discrimination, good governance, due process, social justice, individual liberty etc., as a part of doctrine of constitutional morality.[10]

SCHOOLS OF JURISPRUDENCE

Jurisprudence is the philosophy of law. It seeks to explain what law is all about in the most general way. Different jurists view the concept of law differently and their different approaches have been classified in the form of different schools of thought. These schools reflect the development of law at different stages. The most popular division of the different schools of thought is as follows[11]:

1) Philosophical or Natural Law Theory
2) Analytical School
3) Historical School
4) Sociological School
5) Realist School

1. Natural Law Theory

In jurisprudence, the term 'Natural Law' means those rules and principles which are considered to have emanated from some supreme source (other than any political or worldly authority).

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[8] *Navtej Singh Johar v. Union of India,* (2018) 10 SCC 1

[9] *Id.*

[10] Upendra Baxi, "A Dangerous Precedent?" available at <*www.indialegallive.com/viewpoint/ a-dnagerous-precedent-58450*>, visited on 24 May 2021.

[11] S.R. Myneni, JURISPRUDENCE (LEGAL THEORY) 403 (2020)

Various theories have been propounded about the source, authority and relation of these rules (natural law) with law (positive law). Some say that these rules have come from God; some find their source in nature; others say that they are the product of 'reason'. Therefore, these rules have been given different names by different jurists (on the basis of their source) such as 'Divine Law', 'Moral Law', 'Law of Nature' or 'Natural Law', 'Universal Law', 'Law of God', 'Unwritten Law' and so on.[12]

2. ***Analytical School***

The Analytical school of jurisprudence was established in the beginning of the nineteenth century. Jeremy Bentham is the founder of the analytical school of law. This school originated as a reaction against Natural Law school. They treat law as a command or imperative emanating from the state. For this reason this school is also known as Imperative school. The exponents of this theory do not deal with the past of the law or with the future of it, but they confine themselves to the study of law as it actually exists. This is the only reason that this school is termed as the Positive School of Jurisprudence.[13]

3. ***Historical School***

The historical school emerged as a reaction to legal theories propounded by analytical positivists and natural law philosophers. The aim of historical school is to deal with the general principles governing the origin and development of the law with the influences that affect the law. The historical outlook comprises inquiries into the past and evolution generally with the object of elucidating the position today. The major factors for the emergence of the historical school of jurisprudence are: The French Revolution and consequent upheavals, and Darwin's Theory of evolution.[14]

4. ***Sociological School***

Sociological School of jurisprudence is of recent origin. It was a reaction against the formal and barren approach of analytical jurists and the pessimistic approach of historical jurists. Montesquieu, a French philosopher, paved the way of the sociological school of jurisprudence. He was of the view that the legal process is somehow influenced by the social condition of society. He explained the importance of studying the history of society before formulating the

12 B.N.Mani Tripathi, JURISPRUDENCE (LEGAL THEORY) 97 (2014)
13 S.R. Myneni, JURISPRUDENCE (LEGAL THEORY) 458 (2020)
14 S.R. Myneni, JURISPRUDENCE (LEGAL THEORY) 499-500 (2020)

law for that society. The exponents of this school are mainly concerned with the relationship of law to other contemporary social institutions.[15]

5. Realist School

Realist School is a branch of sociological approach. Sometimes it is also called 'left wing of the functional school'. This school concentrates on scientific observation of law in its making and working. This school gives maximum importance to courts. The jurists of this school believe that certainty of law is a myth. The realists contend that law has emanated from judges therefore law is what courts do and what they say. For them, Judges are real lawmakers. The realists are of the view that judicial decisions are not based on abstract formal law but the human aspects of the judges and the lawyers also have an impact on the court's decision. [16]

INDIAN JURISPRUDENCE

Ancient Trends

The roots of Indian jurisprudence can be traced in the Hindu legal system which is perhaps the most ancient legal system of the world. Much earlier to Greeks and Romans, the early Hindu thinkers developed a very logical and comprehensive body of laws. A sense of 'justice' pervades the whole body of law. According to Hindu views, law owes its existence to God. Law as given in '*Shruti*' and '*Smriti*' text gave importance to reason and justice.[17]

The concept of' '*Dharma*' which was equivalent to law. The word '*Dharma*' connotes right conduct, observance of which was considered necessary for the welfare of individuals and society. The King in ancient India was the symbol of *Dharma-rule* of law and was described as protector of the people, defender of faith and moral values. In short, in ancient India the king was bound by *Rajyadharma* which enshrined duties and obligations of the king for the promotion of welfare of his subjects.[18]

Like the Hindus, the Muslims never regarded the king as the fountain of law. The Mughal kings observed the principles of natural justice, heard the parties in open court (darbar), gave fair and

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15 *Id.,* at pp.517-522
16 B.N.Mani Tripathi, JURISPRUDENCE (LEGAL THEORY) 57 (2014)
17 *Id.,* at p.412
18 S.N. Dhyani, *Jurisprudence and Indian Legal Theory*, Central Law Agency, Allahabad, 2013, pp.25-26

open hearing and pronounced judgment in open court.[19]

British Rule in India and Jurisprudence

It was only in the wake of British rule in India that alien colonial rulers arbitrarily imposed their laws, political system and language on India by rejecting and ridiculing the traditional laws, institutions and values of Indians. During British imperialism, no theory of law could fit in so eminently as Austin's Analytical positivism which meant despotism, status quo, police state, anti people government and alien laws and judicial system-all rolled into one known as Austinian positivism. The laws were in the nature of commands imposed on India to meet the needs of British rule and British interest.[20]

In the making of laws, the people of India had no share or participation or involvement. The Law Commission established by the British Government with men like Macaulay as its President set the trail of incorporating English law in Indian Codes and Statutes. The perception of the English to import English law into India through the device of 'equity, justice and good conscience' was another form to impose English law in an area which was not hitherto covered by statutory law. The Indian Penal Code 1860, the Indian Contract Act, 1872, the Indian Evidence Act, 1872, etc. introduced alien jurisprudence to fill the legal vacuum without bothering for moral sensibilities and values of the Indians and their legal culture. [21]

Jurisprudence in Post Independence Era

For understanding Indian jurisprudence in the post-independence era it can be divided into three periods; from making of Constitution in 1950 to end of the Emergency in 1977; from post emergency era of 1978 to 2000; from 2000 till the present date.

- ***From 1950-1977***

During the nineteenth century, the principles of natural law were implanted in Indian legal theory from along with its positivistic law imposed on this country. The introduction of the English doctrine of equity, justice and good conscience, the concept of rule of law, and the principles of processual justice form the main plank of new western natural law in India. The

[19] B.M.Gandhi, *V.D. Kulshreshtha's landmarks in Indian Legal and Constitutional History,* Eastern Book Co., Lucknow, 2012, p. 519

[20] S.N. Dhyani, JURISPRUDENCE AND INDIAN LEGAL THEORY Central Law Agency, 2013, pp.25-26

[21] *Id.* at p.27

most important of it is the processual justice (natural law) with its three chief components-(a) no one shall be a judge in his own cause (*Nemo debet esse judex in propria sua causa*), (b) justice should not only be done but seem to be done, and (c) no one should be condemned unheard (*Audi Alteram Partem).* In the post-Independence era India has rejected the English statutory based on English conscience but the English processual system has become an integral part of Indian jurisprudence. India has now evolved its own natural law conditioned by its indigenous needs and ethos.[22]

The making of Indian Constitution by our founding fathers was the first step towards the creation of new Indian jurisprudence, which was a mix of natural law and sociological principles. The values of Freedom, Liberty, equality and social justice reflected in the Preamble to the Indian Constitution give new dimensions to the Indian legal notions and legal theory. Part III confers on individuals basic human rights and Part IV obligates the State to promote a social order in which justice-shall inform all the institutions of national life. The Directives embody the substantive content, the Rights reflect the ethos of freedom, liberty and equality and Articles 226, 227, 136 and 32 make these human rights a living reality and a liberating force against tyranny, discrimination and exploitation.[23]

The Higher Judiciary came across many cases related to enforcement of fundamental rights. In cases like ***Kameshwar Singh v. State of Bihar***[24], ***Ramesh Thaper v. State of Madras***[25]**, *State of Madras v. Champakam Dorairajan*,**[26] the court adopted an ideal, moral or natural law approach in order to invalidate the various legislative measures under the canopy of fundamental rights.

However the interpretation given by the Indian judges in ***A.K Gopalan v. State of Madras***[27], led to the revival of Austinianism. In this case the expression "*procedure established by law*" came for interpretation before the Supreme Court. The Court took a rigid and strict view of this term and held that the term '*law*' in Article 21 could not be understood as principles of natural justice. In its normal connotation the expression procedure *'established by law'* means

22 *Id.* at p.45
23 *Ibid.*
24 AIR 1951 Pat 91
25 AIR 1950 SC 124
26 AIR 1951 SC 226
27 AIR 1950 SC 27

enacted law or State made law and not the American concept of *'procedural due process''.* It rejected natural law as the criteria for determining the law. [28]

A similar kind of positivistic approach was adopted by Supreme Court in ***Golak Nath v. State of Punjab***[29], on the question of what the 'law' is. The question whether the word 'law' in Article 13(2) includes 'constitutional amendment' came for consideration for the first time before the Supreme Court in ***Shankari Prasad v. Union of India***[30] in which it was held that law does not include a constitutional amendment. Law under Article 13(2) means a law made in exercise of legislative power and not constitutional amendment which is made in exercise of the constituent power of the Parliament. This view was reiterated and followed again in ***Sajjan Singh v. State of Rajasthan***[31]**.**

However, it was in Golak Nath's case[32] that the Supreme Court reversed the earlier decisions and adopted the Austinian positivism posture in determining what Parliament can do and what it cannot do by arrogating to itself the supra-legislative power. It was held by majority that Article 13(2) does not exclude a constitutional amendment. The court ruled that the parliament has no power to amend the constitution so as to take away or abridge fundamental Rights.

There was strong reaction against this decision of the Court. The parliament passed the 25th Amendment of the Constitution in 1971 to establish supremacy of the Directive principles contained in clause (b) and (c) of Article 39 over Fundamental Rights as specified in Article 14, 19 and 31. The validity of the 24th and 25th Amendments was challenged before the Supreme Court in ***Kesavananda Bharati v. State of Kerala***[33].

In Kesavananda Bharati[34] case, the Court reversed its decision in the Golak Nath and upheld the right of the parliament to amend any part of the constitution except the basic structure of the constitution. The court held that the amending power was not to be exercised in such a manner as to destroy the basic features of the Constitution. Some of these basic features which have been regarded unamendable are (1) Supremacy of the Constitution, (2) Republican and

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28 S.N. Dhyani, *Jurisprudence and Indian Legal Theory*, Central Law Agency, Allahabad, 2013, p.66
29 AIR 1967 SC 613
30 AIR 1951 SC 458
31 AIR 1965 SC 845
32 *Golak Nath v. State of Punjab* AIR 1967 SC 613
33 AIR 1973 SC 1461
34 *Ibid.*

democratic form of government, (3) Secular character of the Constitution (4) Separation of powers between legislature, executive and judiciary and (5) Federal character of the Constitution.

Also in the case of ***Re Kerala Education Bill,***[35] the Apex Court declined to look beyond the letter of the fundamental rights and did not think it necessary to consider sociological imperatives which impelled the legislature to pass such a law. The ***Habeas Corpus Case***[36] in which fundamental rights during emergency were suspended by the State and the Apex Court upheld the arbitrary powers of the State during emergency, the influence of Positivism can be seen.

Thus, the role of the judiciary in the beginning of the post-independence era was very conservative. It interpreted the fundamental rights and the Constitution in a static and traditional colonial manner and ignored the directive principles. Pandit Jawaharlal Nehru was dismayed by such a conservative role of the Supreme Court. Up to 1960, this position continued. The judiciary, like two other organs of the government, was at the verge of falling in line with Indira Gandhi's concept of "committed judiciary" but H.R. Khanna J's minority judgment in ***ADM Jabalpur v. Shivakant Shukla***[37], saved it. The suppression of H.R. Khanna J further nurtured the concept of judicial activism. Thus, the Emergency era was the first important phase of judicial activism or Realism, which led to further development of the Indian jurisprudence. [38]

- ***From 1978-2000***

In the post-emergency era of 1978, the Indian judges came out of their mental 'ivory tower' and bristled with sympathy for the little Indian, who till recently had been the object of exploitation, discrimination and injustice. The Indian designers of jurisprudence have interwoven law-morality and justice to make law for little Indians.[39] The Supreme Court of India delivered many “landmark judgments" concerning personal liberty, extending the frontiers of Article 21.

35 AIR 1958 SC 956
36 *A.D.M. Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521
37 (1976) 2 SCC 521
38 B.M. Gandhi, *V.D. Kulshreshtha's landmarks in Indian Legal and Constitutional History,* Eastern Book Co., Lucknow, 2012, p. 524
39 S.N. Dhyani, *Jurisprudence and Indian Legal Theory*, Central Law Agency, Allahabad, 2013, p.28

One of such landmark judgment was given in the case of ***Maneka Gandhi v. Union of India***[40]. In this case, they envisaged that every law must contain and fulfil the moral as well as procedural criteria within it otherwise it would not be regarded as law. It held that the mere prescription of some kind of procedure is not enough to comply with the mandate of Article 21. The procedure prescribed by law has to be *fair, just and reasonable* and not fanciful, oppressive or arbitrary; otherwise it should not be a procedure at all. The dynamic interpretation of Article 21 has infused new values having revolutionary potential of making a new jurisprudence loaded with content of social justice.

In this era, the Supreme Court of India has given new dimension to law, liberty and justice by leaving a home-spun jurisprudence harmonising, reconciling and furthering the needs of the people in the spirit of social service and as *Nyayadarshaka* to society. The prominent example of this is the harmonisation of Fundamental Rights and Directive principles is the case of ***Minerva Mills Ltd. V. Union of India***[41]. The court in this case observed that there is no conflict between Fundamental Rights and Directive principles. Both are complementary to each other. Both embody the philosophy of our constitution, the philosophy of justice- social, economic and political. This case is a reflection of the new natural law and sociological jurisprudence in India which seeks to balance individual interests and the interests of society.

The emergence of public interest litigation (PIL) has opened the doors of higher judiciary to the poor, the neglected and the deprived sections of Indian society. Through the concept of PIL, the courts have liberalised the traditional rule of *locus standi*. This traditional rule allowed the person whose legal right has been violated, to appear and to be heard before a court. The Supreme Court and High Courts treated letters from citizens as writs and tried to give speedy justice. Some landmark cases of PIL are ***Mumbai Kamgar Sabha case***[42]***, Bandhu Mukti Morcha case***[43]***, S. P. Gupta (Judges' Transfer case)***[44]***, Sunil Batra v. Delhi Administration***[45]***, Hussainara Khatoon case***[46]***, Asiad case***[47]***, Slum Dwellers case***[48]***, Municipal Corporation***

40 AIR 1978 SC 597
41 AIR 1980 SC 1789
42 *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai* (1976) 3 SCC 832
43 (1984) 3 SCC 161
44 (1981) SUPP SCC 87, 219
45 (1980) 3 SCC 488
46 *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 98
47 *PUDR v. UOI* (1982) 3 SCC 235
48 *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors*.(1985) 3 SCC 545

Ratlam v.Vardhichand[49]***, ABSKS v. UOI***[50]***, Charan Lal Sahu v. UOI***[51]etc. This concept is a beautiful example of development of natural justice and realism in India. For instance, in case of ***Vishakha v. State of Rajasthan***[52]the court gave directions for protection of women from sexual harassment.

Thus, this era of liberalisation, privatisation and globalisation has seen the expansion of the concept of judicial review in India, which has resulted in development of Realism in India.

- *From 2000 onwards*

The beginning of this new century has seen new developments in the field of science and technology. There has also been a rise in the concerns for human rights and fundamental rights violations, transparency and accountability in the working of government, corruption, privacy issues, gender inequality issues, social media regulations, etc. The failure of the efforts of the other two organs of the government i.e. the executive and the legislature has shifted the burden on the judiciary to address these issues. The Judiciary has played a very active role in addressing all these issues. This active role played by judiciary shows the growth of the realistic approach of jurisprudence where the judges are seen as the fountain of justice and law is related with what the judges do. A number of judgments have passed by the judiciary for protection of the interests of the individual and society. Some of the important case laws reflecting the active role of judiciary have been discussed hereunder:

In ***Lily Thomas v. Union of India***[53] the Supreme Court held that the second marriage of a Hindu man without divorcing the first wife, even if the man had converted to Islam, is void unless the first marriage had been dissolved according to the Hindu Marriage Act.

In ***Aruna Shanbaug v. Union of India***[54]**,** The SC ruled that individuals had a right to die with dignity, allowing passive euthanasia with guidelines.

People's Union for civil liberties v. Union of India[55]**,** introduced the NOTA (None-Of-The-Above) option for Indian voters.

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49 (1980) 4 SCC 162
50 (1981) 1 SCC 246
51 (1990) 1 SCC 613
52 (1997) SC 3011
53 (2000) 6 SCC 224
54 (2011) SC 1290
55 (2013) 10 SCC 1

National Legal Services Authority v. Union of India[56]**,** resulted in the recognition of transgender persons as a third gender. The SC also instructed the government to treat them as minorities and expand the reservations in education, jobs, education, etc.

In ***Shreya Singhal v. Union of India***[57], in this case, the Supreme Court struck down section 66A as unconstitutional, as it violated the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution.

In ***K.S. Puttaswamy v. Union of India***[58]**,** the Supreme Court unanimously held Right to Privacy as a Fundamental rights as per part III of Constitution of India. This SC judgement protects individual rights against the invasion of one's privacy.

In ***Independent Thought v. Union of India***[59]**,** the court held that sexual intercourse by a man with his wife, who is below 18 years of age is rape.

In ***Shayara Bano v. Union of India & Others***[60]**,** the Court has declared that triple talaq in any form is illegal, instant triple talaq was declared unconstitutional by the apex court in its judgment dated 17 August 2017 with up to three years jail for the husband.

In ***Navtej Singh Johar v. Union of India***[61]**,** the Apex Court has decriminalized same-sex relations between consenting adults. The Court upheld provisions in Section 377 that criminalize non-consensual acts or sexual acts performed on animals.

In ***Joseph Shine v. Union of India***[62]**,** the Apex Court decriminalized adultery. Now, it is no longer a crime but still considered unethical in society. Adultery is only considered as a civil wrong. The remedy for the act of adultery is the only divorce.

In ***Shafin Jahan v. Asokan KM***[63](Love Jihad Case) the court recognised the right of a girl to

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56 2014 SC 1863
57 2015 SC 1523
58 (2017) 10 SCC 1
59 (2017) 10 SCC 800
60 (2017) 9 SCC 1
61 (2018) 10 SCC 1
62 2018 SCC Online SC 1676
63 (2018) 16 SCC 368

marry a person of her own choice.

In ***Swapnil Tripathi v. Supreme Court of India***[64]**,** Live Streaming or Video Recording of Court Proceeding in cases of Public Interest was allowed by court.

In ***Shakti Vahini v. Union of India*** [65,] (Honour Killing Case), the Right to choose life partner was recognised as a constitutional right by the court.

In ***Indian Young Lawyers' Association v. the State of Kerala***[66]**,** the court ruled that everyone has a right to worship and exclusion of women in Sabarimala violated their fundamental rights and Rule 3(b) of the Public Worship Rules was unconstitutional.

In ***Anuradha Bhasin v. Union of India***[67]**,** the right to the internet was recognised by the court.

In all these cases the courts giving up their traditional conservative standard have adopted activistic approach while interpreting Fundamental rights. This creative role of the judges is reflects a mix of Realism, Natural justice and Sociological jurisprudence as current jurisprudential trend in India

REALISM AND CONSTITUTIONAL MORALITY

As discussed above, the Realist School of Jurisprudence regards law, primarily as emanating from the judges. Legal realism as a movement in thought of law or a concept of law, rejects the notion of natural law because it does not believe in immutable principles of justice, it also rejects imperative models of the law because for the realists, the meaning of legal terms does not come from the legislator but from an observation of law in action. It concentrates on the actual working and effects of law and is therefore, called the realist school. The Realists avoid dogmatic formulations and concentrate on the decisions given by the courts.

Legal Realism from the Indian standpoint can be seen through the eye of the power of Judicial Review vested in the Supreme Court of India by the Constitution of India. The rich position the Supreme Court of India (as the custodian of the Constitution of India) has earned for itself

64 (2018) 10 SCC 628
65 (2018) 7 SCC 192
66 (2019) 11 SCC 1
67 (2020) SCC Online SC 25

over time, amidst the failure of the two other wings of the State i.e. the legislature and the executive and the increasing trend of Judicial activism and Public Interest litigation clearly shows the development of Realistic thought process in India.

It is pertinent over here to take note of the view expressed by S.B. Sinha, J. in the case of ***State of U.P. v. Jeet S. Bisht*** [68]:

> "*Each organ of the State in terms of the constitutional scheme performs one or the other functions which have been assigned to the other organ. Although drafting of legislation and its implementation by and large are functions of the legislature and the executive respectively, it is too late in the day to say that the constitutional court's role in that behalf is non-existent. The judge- made law is now well recognised throughout the world. If one is to put the doctrine of separation of powers to such a rigidity it would not have been possible for any superior court of any country, whether developed or developing, to create new rights through interpretative process."*

The doctrine of Constitutional Morality like the basic structure doctrine is a judicial innovation. No doubt Constitutional Morality has its roots in Constitutional assembly debates but the development of this concept as a tool for interpretation of the Constitution has been made by Judiciary. Such development of the concept of constitutional morality in India by Judiciary is reflective of the development of the realist approach of Jurisprudence in India.

For Realists, law is what the judges do. They study law in action. Therefore, the progressive steps taken by the Supreme Court in the above cases to transform the conservative thought process of Indian society using the doctrine of Constitutional Morality is nothing but realism.

CONCLUSION

India overtime has witnessed a change in judicial attitude from the positivist approach to the realist approach. Though Indian Jurisprudence refuses to accept that judge-made law is the only real law, it does accept the important role of judges and lawyers in the formulation of laws.

Indian jurisprudence does not reflect the follow up of any particular jurisprudential approach. It has devised its own jurisprudence which is a mix of natural law, sociological and realist thought process. Even the rise of legal Realism in India in the form of Judicial Activism and

[68] (2007) 6 SCC 586, Para 77

Judicial Creativity is to be witnessed in the light of the fact that the Constitution of India is a living document and the Judiciary at all times must protect the Constitution of India, not only in matter but also in spirit.

Realism in India is exercised by the Courts not to establish their respective supremacy but to establish the supremacy of the Constitution of India, for the promotion of the constitutional thoughts and the doctrine of constitutional morality clearly exemplifies how the realist approach has been used by courts for promotion of constitutional spirit. Such development of Indian Jurisprudence through the concept of constitutional morality is a progressive step towards the achievement of the goals of the Indian Constitution.