

**JUDICIAL REVIEW UNDER INDIAN CONSTITUTION: ITS
REACH AND CONTENTS**

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ABSTRACT

Our Constitution has incorporated the provision of the judicial review into itself. To safeguard the liberty and rights of individuals, the judicial review is recognized as necessary and a basic requirement for construction up of a novel civilization, which is constructed on the perception of community and well-being morals. The powers of judicial review are vested significantly by means of the higher judiciary of states and the Supreme Court of India. The privileges of persons are sure fire in the transcription of the Constitution of India. This research paper analyses the role of Indian Judiciary in the establishment of an orderly and civilised society.

In the actions of a Welfare State, the constitutional mandates occupy predominant position even in administrative matters. It operates in public domain and in appropriate cases constitutes substantive and enforceable right. This work throws light upon the new legal order which has influenced the administrative process greatly. An attempt has been made researcher to analyse the role of judiciary in India in checking the growing abuse of administrative powers and in this process role of judiciary in United Kingdom in developing this doctrine has also been studied. It reflects how reasonable opportunity of being heard is given to the affected parties against administrative action, although it does not create any legal right as such.

Hence Parliament was invested with the power to amend the Constitution. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers, the apex court pronounced that Parliament could not distort, damage or alter the basic features of the Constitution under the pretext of amending it. The phrase 'basic structure' itself cannot be found in the

Constitution. The Supreme Court recognised this concept for the first time in the historic Kesavananda Bharati case in 1973. Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by Parliament. This research paper analyse the emergence of the Basic Structure Concept and its impact on the power of judicial review.

Judicial activism is criticized on the ground that it is nothing but interference in the spheres of the executive and the legislature. However, it may be seen as a tool to fill the vacuum created due to the inability of the legislature and the executive. Thus, judicial activism may also be termed as a necessary evil” which is required when the legislature and the executive are unable to perform their functions properly. The scope of this research work is limited to a brief study of judicial and executive overreach in India and its merits and demerits in the present society. The object of this research paper is to analyse the development of the concept of ‘Judicial Activism’ in India in the light of development of Public Interest Litigations (PIL).

It is found on analyse that the expanded concept of locus standi in connection with PIL, by judicial interpretation from time to time, has expanded the jurisdictional limits of the courts exercising judicial review. It is found that there has be a substantial shift in the Judicial Interpretation in regard to the mandate laid in the Universal Declaration and the Court has substantiated the fact that “Law is an instrument of Social Change.” This research paper highlighted that with this shift, International Human Right Standards have been made available to the Indian Citizens as well.

This research paper analyses how the Supreme Court of India, through its activism and assertiveness, has emerged as arguably the most powerful court among democratic politics. Over the past four and a half decades, the Court dramatically expanded its role in the realm of rights and governance, asserting the power to invalidate constitutional amendments under the basic structure doctrine, govern in the areas of environmental policy, monitoring and investigating government corruption, and promoting electoral transparency and accountability. This paper illustrates how the broader shifts in the Court’s activism and assertiveness reflected a shift from the meta-regime of “social justice” to one of “liberal reform.

Ever-widening horizon of Article 21 is illustrated by the fact that the Apex Court in India, has read into it, inter alia, the right to health, livelihood, free and compulsory education up to the age of 14 years, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and various rights of under-trials, convicts and prisoners. It is important to note that in a majority of cases the judiciary relied upon directive principles of state policy for such extension. The judiciary has also invoked Article 21 to give directions to government on matters affecting lives of general public, or to invalidate state actions, or to grant compensation for violation of fundamental rights.

The judicial inclusion of socio-economic objectives as fundamental rights has been criticized as an unviable textual exercise, which may have no bearing on ground-level conditions though the unenforceability and inability of state agencies to protect such aspirational rights could have an adverse effect on public perceptions about the efficacy and legitimacy of the judiciary. Also, a question arises whether poor enforcement is a sufficient reason to abandon the pursuit of rights whose fulfillment enhances social and economic welfare. At this point, one can recount Roscoe Pound's thesis on law as an agent of social change. This research paper analyses how the express inclusion of legal rights is an effective strategy to counter-act social problems in the long-run. At the level of constitutional protection, such rights have an inherent symbolic value which goes beyond empirical considerations about their actual enforcement.

PREFACE

Judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered as the basic feature of the Constitution. The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizen's right to life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds, which could be expended on building, hospitals, roads and the like, or overseas aid, or compensating victims of crime.

The active and positive response to the increasing incidents of Human Right violations was a result of the number of writ petitions being filed, the series of PILs directed by civil society activists, for the enforcement of various aspects of the basic human rights and the gross and acute violation of Human Rights in the Bhopal Gas Leak case and all these led to the change in the Judicial reasoning. Though they had no specific relations or linkages to the Universal Declaration, or for such purpose, to any of the International Instruments, but these were some of the basic factors or causes, which prompted the judiciary to change its stand from a mere interpreter to enforcer. The Researcher has made an attempt to study the effect of paradigm shift and expansion of role of judiciary in our country

Broadly speaking, judicial review in India comprises three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action. Herein, the researcher is concerned only with judicial review of legislative action and of administrative action. The judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their function, transgress constitutional limitation. It is equally their duty to oversee that the judicial decisions rendered by those who man the

subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence.

It is the tremendous motivation and encouragement given by Prof.(Dr). Rathin Bandopadhyay, Professor, Department of law, and Head, Department of Management, University of North Bengal, and my Supervisor for this work, which helped me to achieve my dream and bring out this study while pursuing my professional career simultaneously. I must bring on record that but for the confidence that he has instilled and infused in me ceaselessly of my ability to undertake this research work in the midst of my professional duties, I could not have ventured to shoulder this burden. On completion of the study, I have a feeling of proud achievement and a resultant complacency that I could finally do it. My indebtedness to him is not only for going through my draft on every chapter and guiding me through the proper course by intermittent discussions, but for relentlessly persuading me for not giving up the idea in the midst.

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This work took me to some of the best libraries in the country. Hence heartiest thanks are due to each and every Library Staff of the Central Library, University of North Bengal, The West Bengal National University of Juridical Sciences Library, Kolkata, The American Centre Library, Kolkata, The Indian Law Institute Library, New Delhi, The Indian Society for International Law Library, New Delhi, the Indian Institute of Public Administration, New Delhi, the Supreme Court Library, New Delhi, for their institutional support for completion of my research study. I want to thank specially the Librarian, Mr. Sushanta Banerjee, and Library Staff, Mr. Debashish Ghosh of the American Centre Library, Kolkata, for their support and co-operation for completion of my research study.

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The ultimate source of every creative inspiration is one's own parents. My mother, Mrs. Sandhya Mandal, would be proud, as usual, in every small and big achievement of mine, and without her blessings, I am sure that this work could not have been completed. My departed father, Late Shri Dulal Pada Mandal, who gave his children quality education spending even beyond his resources, must have bestowed on me his unseen blessings from the Heavenly abode. To his sweet and cherished memory I submit this humble work of mine.

Dated:

Sangeeta Mandal

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TABLE OF ABBREVIATIONS

CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women, 1979
ECHR	European Court Of Human Rights
ICCPR	International Covenant on Civil and Political Right
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPC	Indian Penal Code
PIL	Public Interest Litigation
UDHR	Universal Declaration on Human Rights
UN	United Nation
ECHR	European Court Of Human Rights
BJP	Bharatiya Janata Party
BSP	Bahujan Samaj Party
MP	Member of Parliament
MLA	Member of Legislative Assembly
K.B.	Law Reports, Kings Bench Division
L.Ed	Lawyer's Edition, United States Supreme Courts Reports, 1754-1956
L.Ed 2 nd	Lawyer's Edition, United States Supreme Courts Reports, Second Series, 1956- current
L.Q.R	Law Quarterly Review
Law & Soc. Rev.	Law and Society Review
Oosgoode Hall L.J.	Oosgoode Hall Law Journal
P & H	Punjab and Haryana (High Court)
SC	Supreme Court (when as AIR SC)
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
SCR	Supreme Court Report
SCW	Supreme Court Weekly
Mad.	Madaras
Cal.	Calcutta

J& K	Jammu & Kashmir
Raj.	Rajasthan
Punj.	Punjab
T.N.	Tamil Naidu
Art., arts.	for Article, articles
Cl., cls.	Clause, clauses
Ins.	Inserted
P., pp.	Page, pages
Pt.	Part
Rep.	Repealed
Sec., ss.	Section, sections
Sch.	Schedule
Sub.	Substituted
w.e.f.	with effect from
ADRJ	The Administrative Decisions (Judicial Review) Act, 1977
AC	(L.R.) Appeal Cases (since 1891)
All E.R	All England Reports
App. Cas.	(L.R.) Appeal Cases (III) (1857-1890)
Ch.	Cowper (K.B.)
Ch. App.	(L.R.) Chancery Division (since 1891)
Camp.	Campbell's Reports
Ch. D.	Dodswell's Reports
E.R.	Equity Reports
H.L.C.	House of Lords Cases (Clark)
K.B.D. (L.R.)	King's Bench Division
Jur.	Jurist Reports (1855-67)
L.J.	Law Journal
L.R.	Law Reports
Q.B.	Queen's Bench Reports (A. & E.)
Q.B.D.	Law Reports, Queen's Bench Division
W.L.R.	Weekly Law Reports
Fed. Rep.	Federal Reporter (2 nd Series)

L.Ed.	Lawyer's Edition of Supreme Court Reports
Mass.	Massachussets Reports (Supreme Court)
Pet.	Peter's Reports (Supreme Court)
US	United States (Supreme Court)
Wall.	Wallace's Reports (Supreme Court)
ALJ	Australian Law Journal
CLR	Commonwealth Law Reports
AIR	All India Reporter
All.	Allahabad
AP	Andhra Pradesh
Bom.	Bombay
Cal.	Calcutta
Mad.	Madras
H.P.	Himachal Pradesh
Ker.	Kerala
M.P.	Madhya Pradesh
Guj.	Gujarat
Pat.	Patna
Punj.	Punjab
Raj.	Rajasthan
SC	Supreme Court
FCR	Federal Court Reports
IA	Indian Appeals
ILR	Indian Law Reports
MLJ	Madras Law Journal
SCR	Supreme Court Reports (Govt. of India Publication)
SCJ	Supreme Court Journal (Madras)
SCC	Supreme Court Cases (Lucknow)
SCWR	Supreme Court Weekly Reporter (Kerala)
F.B.	Full Bench
P.C.	Privy Council
F.C.	Federal Court

W.B.	West Bengal
I.P.C.	Indian Penal Code
Cr.P.C.	Criminal Procedure Code
H.L.	House of Lords
U.O.I	Union of India
JILI	Journal of Indian Law institute
Journ.	Journal
Wash,int'l.J	Washington International Law Journal
UKHL	House of Lords (United Kingdom)
KLT	Kerala Law Times
BOMLR	Bombay Law Review
ILR	Indian Law Review
B.C. Int'l & Camp.Rev.	Boston College International and Comparative Law Review
PNGLR	Papua New Guinea Law Review
MULR	Melbourne University Law Review
JBCI	Journal of Bar Council of India

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INTRODUCTION

It is the basic postulate under the Indian Constitution the sovereign power has been distributed between the legislatures to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution, one of the distinctive feature of our Constitution is that while legislature or executive cannot supervise or review the decisions of the court, the Apex courts can review the decisions of the executive and test the Constitutional validity of laws passed by the legislature, in exercise of their power of judicial review, the Constitution does not refer to the term judicial review or its limits. Thus an attempt will be made to discuss the meaning of judicial review and find out the parameters of judicial review under our Constitutional provisions.

Article 32 of the Constitution confers power on the Supreme Court for enforcement of any of the rights conferred by Part III of the Constitution beyond the same. That means if there is a violation of fundamental rights in state action, including legislative action, the same can be struck down under Article 32 of the Constitution and the touchstone could only be the Constitution and more specifically Part III of the same propounding the basic structure doctrine as touchstone to the legislative actions has led to a power imbalance between the judiciary and parliament and it raised issue whether Article 32 of the Constitution from where Supreme Court derives power of jurisdiction to enforce fundamental rights gives such power to profound binding doctrines and thereby introduce invisible amendments of the Constitution? An attempt has been made in the present work to find out the solution of problem as how to adjust the legalistic doctrine of judicial review to the needs of the day.

The responsibilities which a court carries in a country with a written Constitution are very onerous much more onerous than the responsibilities of a court without written Constitution. The courts in a country like Britain interpret the laws but not the Constitution, whereas the courts in a country like India, having a written Constitution, interpret the provisions of the Constitution and thus give meaning to its cold letters. In doing so, the courts act the supreme interpreter, protector

and the guardian of the supremacy of the Constitution. This being so, it can rightly be argued that in the capacity of the ultimate interpreter of the Constitution, the Supreme Court inevitably becomes a sole judge of its own powers, which in turn, places the judiciary at a considerable position guarding the Constitution. This, in fact, is a power which ex-hypothesis is denied to every other organ functioning under the Constitution. In reality, such dicta when analysed are formulations for judicial primacy over all other organs under the Constitution.

The identification of the features which constitute the basic structure of our Constitution has been the subject-matter of great debate in India Constitutional law. In *Keshavananda Bharati v. State of Kerala*¹, it has been held by the court that judicial review is the “basic feature” majority are not ever unanimously agreed on this aspect, and thus an issue has been often raise whether the power of judicial review vested in the High Court’s and in the Supreme Court under Article 226 and 32 is part of the basic structure? An attempt has been made in the present work to mention elaborately the aspect of Judicial Review on this issue.

In any democratic political framework what is necessary for the smooth functioning of the state is that every organ of the state works in harmony with the other without actually interfering in the province of the other organ. However one of the biggest problems that arise is of lack of any rigid formula that guides the executive, legislature or judiciary in their respective area of functioning.

It is in this context that the term judicial review connotes the check maintained by the judiciary upon the functioning of the executive and the legislature within the normative framework of the Constitution.

The doctrine of ‘judicial review’, in the modern world is said to have born in 1804 when Chief justice Marshall, decided *Marbury v. Madison*² case. He held that a law repugnant to the Constitution is void that the instrument of constitution

¹AIR 1973 SC 1361

² 5 U.S. 137 1 Cranch 137

binds the courts as well as other departments. It was also held that if there was conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. Twin concepts of judicial review and judicial activism were thus born mentioned case only traced the source of judicial review as being implied in a written constitution. But the concept of judicial review existed in America even before the ruling in the *Madison case*³.

By asserting the fact that the Supreme Court has the power to invalidate acts of Congress that are contrary to the Constitution, though this power is not expressly mentioned in the constitution, Chief justice Marshall, created a controversy. The critics argued that it amounted to usurpation of power by an unelected court and may serve to censor legislation enacted by an elected legislature.

Unlike the United States Constitution, the Indian Constitution expressly provides for judicial review in Article 13 Clause (2) of the article says that the states shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, the extent of the contravention, be void as such doesn't poses ay problems in India as it is envisaged by the constitution itself.

After independence, zamindari abolition and land egalitarian efforts of social engineering faced several problems the land legislations were challenged in the courts. To ensure that agrarian reform legislation did not run into heavy weather, the legislature amended the Constitution in the year 1951 which inserted Ninth Schedule Article 31-B was inserted by the First Constitutional (Amendment) Act 1951 ensured that any law in the Ninth Schedule could not be challenged in courts. In other words laws under Ninth Schedule are beyond the purview of judicial review even though they violate fund.

Judicial review is an example of the separation of powers in a modern governmental system where the judiciary is one of three branches of government. The principle of Judicial Review is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of

³*Supra* n.2.

governmental norms. As a result the procedure and scope of judicial review differs from country to country and state to state. Thus an attempt will be made to discuss the scope of judicial review in India.

But by propounding the basic structure doctrine as touchstone to the legislative actions has led to a power imbalance between the judiciary and parliament in respect of Constitution where Supreme Court derives power and jurisdiction to enforce fundamental rights gives such power to profound binding doctrines and thereby introduce invisible amendments to the Constitution? An attempt will be made in the present work to find out the solution of problem as how to adjust the legalistic doctrine of judicial review to the needs of the day.

Judicial review is generally defined as institutionalised process that provides for the strengthening and creative evolution of democracy and democratic process. Opponents of judicial review of legislation regard it as anti-democratic in nature. According to them in a democratic country, the people make the laws through their legislature. Thus, is not function of the court to supervise and to correct the laws passed by the legislature as an overriding authority? An attempt has been made in the present work to discuss the significance of judicial review in a democratic country.

The power of judicial review is an essential feature of our federal system. The scope and extent of judicial review under Constitution is not clear and thus while exercising the power of judicial review, judiciary must act with caution and proper restraint and base their decisions on recognised doctrine or principles of law. This power is an essential feature of our federal system. It is the duty of the Court to uphold the Constitution, thus expansion of judicial review power must be constitutionally justified.

- Q1. What is the scope of Judicial Review under Indian Constitution and the reason behind expansion of scope of judicial review?
- Q2. Whether the judiciary has exceeded its power of review by propounding the 'Basic Structure Doctrine' as touchstone to test the legislative action.

- Q3. Is judiciary proving a road block to social and economic progress of our country by propounding various doctrines or theories while exercising the power of judicial review?
- Q4. Is it encroaching upon the legislative fields of parliament or state legislature by using the Power of judicial review?
- Q5. Whether 'the people' operating through a representative parliament are helpless to determine the structure and quality of governance & whether a small often divided set of appointed judges can replace democratic judgment on 'basic features'?
- Q7. Can the activist nature of the judiciary be reconciled in the context of its detrimental effects on the rule of law?
- Q8. What is the limit of the power of Judicial Review?
- Q9. How far can the judiciary claim power under the given constitutional scheme?
- Q10. Can the amending process bypass the role given by the Constitution to the federating states in amending the Constitution?
- Q11. Is the Supreme Court's power to strike down a constitutional amendment drawn only from the Constitution or can it be drawn from the other sources too?

These are certain questions that the present chapter undertakes and attempts to investigate.

A number of studies have been made over the last two decades relating to the power of Judicial Review of judiciary and analysing the judicial decisions. That has been systematically analysed in the present research work methodology of the present research work is mainly doctrinaire where the researcher has followed the historical and analytical approach. It involves three dimensional areas viz. the study of relevant constitutional provisions, the study of relevant judicial review decisions and the study of academics opinions gathered from the books and article published in the referred journals.

The researcher has analysis acceptance of judicial review in various constitutional systems historically, with emphasis upon 21st century developments. Case-law study has been made with considerations of social value, social policy and social utility of decisions. Theories relating to judicial review and as to its practice under various modern constitutions has been analysed. Mainly secondary sources such as articles, books and electronic resources will be studied and analysed in order to evolve the conspectus of the whole study. The present study has mainly concentrate in relation to the Indian position. However a brief reference to important constitutional and judicial decisions of other relevant countries which have attracted the attention of the Indian judiciary has been referred to.

The scope and extent of judicial review under Constitution is not clear and thus while exercising the power of judicial review, judiciary must act with caution and proper restraint and base their decisions on recognised doctrine or principles of law. This power is an essential feature of our federal system. It is the duty of the Court to uphold the Constitution, thus expansion of judicial review power must be constitutionally justified.

The Constitution of India is a written Constitution and though it has adopted many of the principles of the English Parliamentary system, it has not accepted the English doctrine of absolute supremacy of Parliament in matters of legislation. In this respect it has followed the American constitution.

The question whether privileges of legislature are above the fundamental rights, we have already noted that the Supreme Court has held that privileges “until so defined shall be those of the House of Commons of the Parliament of the United Kingdom.” Thus it has been held that freedom of speech and expression of Press are all subservient to the privilege of legislature. Let us examine whether it is necessary that a member of a legislature should be protected from libelous criticism, so that he may discharge his duties in the legislature without fear.

A member should be given full freedom of speech in a legislature and he should also be protected from danger of any legal action for anything said, even if it is defamatory of any one. All these immunities and rights are necessary to enable a member to discharge his duties in the legislature without fear or harassment or obstruction from any one. But is it also necessary for this purpose, that he should

be above criticism even strong libelous criticism for which he has, like any other citizen, a remedy under the ordinary law of the land.

The study of judicial review is illuminating and invigorative. It fosters constitutional insight, moderates political vision, evolves legislative balance, tones up judicial mind, alerts to avoid constitutional lapses, harmonises mutual governmental relationship, enlarges knowledge of constitutional jurisprudence, helps in practice application of the Constitution to life, creates confidence and self-restraint, promotes liberty and freedom, brings about socio- economic uplifts and cherishes democracy. Thus, the study of judicial review is unavoidable in a modern democracy where the concept of popular sovereignty predominates.

Judicial review has its roots long back and it is a highly complex and developing subject. There have been a good number of cases before the American Supreme Court in respect of judicial review of legislative and executive action. The Constitution makers of India incorporated the provisions of judicial review in the Constitution itself, to maintain the balance of federalism to protect the fundamental rights, granted to the citizens and to afford a useful weapon for equality, liberty and freedom.

In India also, as in America, practical rules, procedures and various cautionary measures concerning Judicial Review, have evolved through constitutional decisions. India has not adopted the British doctrine of the supremacy of parliament and rights of Parliament are restricted by clear Constitutional mandates and the courts are competent to test the validity of legislative as well as other governmental actions. The function of judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the Constitution and make a declaration accordingly. A good number of academic works in the form of articles and books has been done in this area, to mention few of them as follows:

E.C.S. Wade, *Dicey: Introduction to the Study of the Constitution*, 10th edition, London, Macmillan, 1959; Prof. Dicey had the thought that Englishmen are ruled by the law and by the law alone a man may be

punished for a breach of law but he can be punished for nothing else no man's punishable or can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. Further Dicey writes, "It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. Dicey continues that, "Not only that with us no man is above the law but (what is a different thing) that here everyman. Whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. This Book the author had represented the view of Dicey regarding need of the Rule of law in administering justice.

Jain and Jain, *Principles of Administrative Law*, N.M. Tripathi, Bombay, 3rd Edition, 1979; There has been an outstanding development of administrative law in the current century. The credit for this development goes largely to the judiciary at least in the common law world. In India, in more recent years, the apex court has been responsible for the multi-dimensional growth of administrative law. The subject though ever growing, has come of age and is of abiding interest. The book is a brilliant, comprehensive and an authoritative work on administrative law. Though the authors have mainly confined themselves to Indian administrative law, they have incorporated, at relevant places, elements of the subject as developed in England, United States and in other countries. The reasons for this are not far to seek. Law persons in India have been trained to refer to English, U.S. and other foreign authorities while searching for solutions to Indian legal problems. Thus a work on Indian administrative law has to be comparative at places.

Mauro Cappelletti, *Judicial Review in the Contemporary World*, Princeton University Press, London, 1996; Professor Cappelletti's lucid and scholarly summary of judicial review in the western world is an excellent introduction to the subject. His use of the comparatist approach is an excellent illustration of the merits of this methodology, since it is replete with insights into contemporary judicial review which we would otherwise lack. The development of legal institutions, perhaps even more

than juridical concepts, can valuably be studied through a comparison of their evolution and development in other legal systems. The major part of *Judicial Review in the Contemporary World* is devoted to a straightforward comparative and historical analysis of judicial review. The author does, however, advance certain propositions which raise jurisprudential questions. The persuasiveness or non-persuasiveness of these propositions does not detract from the general validity and importance of the comparatist law aspects which comprise the major part of the book. At the same time, however, the jurisprudential propositions asserted are quite important in their own right and merit comment, subject of course to the recognition that Professor Cappelletti has offered in *Judicial Review* only a brief outline of these assertions without a full exposition of his thoughts.

B. N. Kripal, Ashok H. Desai, Gopal Subramaniam, Rajeev Dhavan & Raju Ramachandran (Ed.) , *Supreme but not Infallible*, Oxford University Press, 2000.

The essays in this volume are concerned with the work of the Court in areas relating to public law and the Constitution. Appreciative in their tone and, often, powerfully unsparing in their criticism, these essays, hopefully, constitute the beginning of a process to evaluate the on-going work of the Court in all areas of its many jurisdiction. It is through such efforts that the Court learns about itself. The title of the volume ‘Supreme but not Infallible’ – is taken from an oft quoted self-reflection of an American judge: ‘We are not final because we are infallible; we are infallible only because we are final.’ We would like to believe that the Supreme Court has gone about its task less conscious of its supremacy and more warily with the intuition that the Court, though final, is fallible. These essays are a reminder of what the Court is a does.

N.R.Madhava Menon, *Rule of Law in a Free Society*, Oxford University Press, 2008.

The key determinant in the continuance of Rule of Law is the provision of adequate safeguards against abuse of power, particularly by the Executive Government; equally important is the existence of an effective government capable of maintaining law and order and of ensuring proper

social and economic conditions for life with dignity for its citizens. The strategy by which abuse of power by the Executive is attempted to be prevented is twofold. First, by a scheme of limitations of power including guaranteed rights of citizens and separation of executive and judicial powers. Secondly, the existence of an independent Judiciary with powers of judicial review of executive action to ensure that power is exercised within the limits of law. Naturally, an independent Judiciary is an indispensable prerequisite of a free society under the Rule of Law. Such independence implies freedom from executive/legislative interference in the exercise of judicial functions.

P.B.Vijaya Kumar, *Dynamics of Justice at the Supreme Court of India*,
Gogia Law Agency

In this Book the author deals with a paradigm shift and expansion in the role of judiciary in this country. The dynamics of judiciary travelled beyond the original perceived role of interpreting the law made by the legislature and extended its tentacles to examine the constitutionality of actions in administration, Implementation of laws, governance of the society and the life of an individual. Pre-Independence Judiciary in India was British in its perception and after independence it gained Independence and acted independently. It is, in fact, a great transformation. The administrative structure of India changed into the constitutional frame of federation with union and states. The judiciary has emerged into a single unified structure with the Supreme Court and the High Courts and the lower Courts as its components, working with Union and State laws and rights of the people in general.

S.P.Sathe, *Judicial Activism in India*, Oxford University Press, 2nd
Edition;

In this work, Professor Sathe is not overly concerned with the tasks of construction of the meanings of judicial activism. Quite rightly, he remains concerned with more important issues of its 'efficacy' and 'legitimacy'. His principal message is that judicial activism must always remain just that: judicial activism is a form of state power inherently at odds with itself. Put another way, justices can be activists only within the confines of the traditions of administration of justice. They may expand

and enhance that tradition (as they have done somewhat spectacularly) but their work remains tradition-constituted. Judicial activism makes sense only when its performers remain recognizable as judges. It is clear that Professor Sathe is in search of the Golden Mean. Too little activism is a dangerous portent signifying under enforcement of constitutional notions of good governance, rights, and justice. Too much activism results in over-enforcement of these ideals, imperiling the legitimacy and efficacy of judicial power.

To testify the hypothesis, the Researchers proceeded to discuss different issues under various Chapters. Apart from the Introduction, the whole work was divided into seven chapters.

The concept of Judicial Review has a long and chequered history. It originated in English legal system and became a very important principle in the systems of government based on rule of law. When India was a colony of the British Empire the concept of Judicial Review was followed by the Courts and has continued to be a part of the legal system of our country since then. In order to know more about its ambit and scope it is necessary to note the historical background of the concept in English legal system and its adoption in Indian Legal system. Thus, to trace the source and development of judicial review in India and its place under the Indian Constitution, Chapter 1 of the work traces the historical background and Constitutional foundation of judicial review in India.

The power of judicial review is exercised differently in different political systems. In countries like the United Kingdom where the constitution is largely unwritten and unitary in character and parliament is sovereign, the courts can declare an act of parliament to be incompatible with the constitution, but they cannot invalidate a law for being inconsistent with the constitution. In other words, the judiciary can only interpret the Constitution. The situation is different in countries where a written and federal constitution limits the powers of parliament. For instance, in USA, the Supreme Court can strike down legislation enacted by Congress if it finds the same to be incompatible with the constitution. The principle of judicial review became an essential feature of written

Constitutions of many countries. Chapter 2 of the work, focuses on the system of judicial review and its existence in different countries legal system.

The Indian Constitution affirmatively authorises the legislature to make laws but prohibits it from making laws which are not in conformity with its provisions. These affirmative and negative constitutional provisions are the mandates of the sovereign people. And all legislative activities are to be controlled and guided by the mandates of the Constitution, implied or express, indirect or direct. The Constitution of a State distributes the legislative powers among different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, question do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional power. But, apart from these, there are other constitutional limitations and restrictions, the infringement of which occasions judicial review and render the legislative Act void. Chapter 3 deals with the need of judicial review of legislative actions. Judicial review of legislation is a result of two of the most fundamental features of Indian constitution. The first is the two-tier system of law with the Constitution as the Supreme law and other legislation being the ordinary law which is valid only in so far as is consistent with the Constitution and secondly, the laws should not be made in violation of the rule of the fundamental rights.

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. In India, the doctrine of judicial review is the basic feature of Indian Constitution. Judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. Judicial review is the touchstone of the Constitution. The Supreme Court and High Courts are the ultimate interpreters of the Constitution. It is, therefore, their duty to find out the extent and limits of the power of coordinate branches, viz. executive and legislature and to see that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the Constitution. Judicial review is thus the touchstone and essence of the rule of law. It is in this context, Chapter 4 of the work focuses on the

function of administrative authorities in our country and the various means by which the judiciary in our country review the administrative action of executives to ensure good governance.

The Constitution makers gave the power to amend the Constitution in the hands of the Parliament by making it neither too rigid nor too flexible with a purpose that the Parliament will amend it as to cope up with the changing needs and demands of “we the people”. The Parliament in exercise of its constituent power under Article 368 of the Indian Constitution can amend any of the provisions of the Constitution and this power empowers the Parliament to amend even Article 368 itself. On its plain terms Art.368 is plenary and is not subject to any limitations or exceptions. The Constituent Assembly debates indicate that the founding fathers did not envisage any limitation on the amending power. In the celebrated case of *Keshavanda Bharathi v. State of Kerala*⁴, the Supreme Court of India propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution. The Judges made no attempt to define the basic structure of the Constitution in clear terms. The ‘Doctrine of Basic Structure’ is a judge-made doctrine to put a limitation on the amending powers of the Parliament so that the basic structure of the basic law of “the land” cannot be amended in exercise of its constituent power under the Constitution. Thus, Chapter 5 deals with the analysis of various judicial judgments regarding the impact of the doctrine in the legislative power of the legislature and power of judicial review in our country.

The activist Court in its new role handed down many opinions to make basic human rights meaningful to the deprived and vulnerable sections; of the community and assure them social, economic and political justice. By such expansive interpretation it recognized the rights of under trial prisoners, prison inmates, and children and re-examined the validity of the provisions of the penal law sanctioning death sentence, and recognized the right to a speedier trial, the right to an independent judiciary, and the right to efficient and honest governance etc. Thus, the rights given by the Constitution were therefore, given maximum

⁴*Supra n.1.*

expanse so as to make them real expressions of liberty, equality, and justice and the preamble of the Constitution no longer remained a mere decoration, but, became the source of the basic structure of the Constitution and the State actions could be scrutinised not merely in terms of their compatibility with specific provisions but in terms of; their compatibility with the broad principles of constitutionalism. Chapter 6 deals with this expanded role of judiciary.

Finally, the whole study was rounded off in Conclusion and Suggestions under Chapter 7 of the Research work.

CHAPTER - 1

HISTORICAL BACKGROUND AND CONSTITUTIONAL FOUNDATION OF JUDICIAL REVIEW IN INDIA

1.1 An Overview

Judicial review is the power of the courts to determine the constitutionality of legislative act. It determines the ultravires or intravires of the Act challenged before it. In the words of Smith and Zurcher, “The examination or review by the courts in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written constitution or are in excess of powers granted by it and if so, to declare them void and of no effect.”¹ The judicial review, within could act as a commanding checked on the republic in contrast to disintegrating obsessed by monocracy and give in to the rule of oppression. India has incorporated into her Constitution itself, the provision of the judicial review. To safeguard the liberty and rights of individuals, the judicial review is recognized as necessary and a basic requirement for construction up of a novel civilization, which is constructed on the perception of community and well-being morals. The powers of judicial review are vested significantly by means of the higher judiciary of states and the Supreme Court of India. The privileges of persons are sure fire in the transcription of the Constitution of India. The necessities of judicial assessment were felt necessary post-independence by the Constituent Assembly’s Drafting Committee.

The creation of the Federal Court of India by the Government of India Act, 1935 was a landmark in the judicial and legal history of British India. The evolution of the courts in India under the British rule and the progressive application of the British common law to India by enactment of laws, have left their indelible mark on legal history of India during last 200 years.

¹ Edward Conard Smith & Arnold John Zurcher , *Dictionary of American Politics*, Barnes & Nobel, New York, 1959, p. 212.

The Government of India Act, 1935 envisaged a federal form of government, with clearly defined spheres of legislation as between the federating units and the Centre. In fact of all the federal agencies envisaged under the Act, the federal court was the only one that held its abiding influence in the Indian Constitution.

In a federal constitution there is division of power between the Centre and the State and there is every possibility of dispute between the Centre and State government so in all such cases there must be a proper agency to settle all these disputes and define the exact sphere of each Government (State) and its respective authority. It is the federal judiciary, more than any other organ of the government that interprets the constitutional document. The judiciary in a federation is therefore, an unavoidable institution to interpret the Constitution and thereby to resolve the dispute that arises between the States.

The federal scheme of the Government of India act of 1935 was indeed the fore runner of the federal system of an independent India. The Supreme Court is a substantially different institution when compared to the Federal Court. Under Article 32 of the Constitution of India, the Supreme Court is made the protector of all the fundamental Rights embodied in the Constitution. And the Court has to guard these rights against every infringement at the hands of either the Union Government or the State Government by declaring the significance and operation of these rights from time to time. It protects the citizens from unconstitutional laws passed by the legislatures and arbitrary acts done by the administrative authorities.

The peculiar position of the Indian States was to be accommodated in the new set up thus to protect the inherent rights of the Indian States and to protect the cultural and religious liberty as well as political rights of the minorities the Indian Constitution had to provide a judicial machinery explicitly vested with the authority to declare ultra vires any legislation which infringe the Constitution.

Though there is no specific provision of the Judicial Review provided under Constitution of India,1950, but the Constitution of India has explicitly establishes the Doctrine of Judicial Review under various Articles 13,32,131-136,143,226,227,245,246.,372.

In the initial years, after independence the Supreme Court of India adopted an

approach characterised by caution and circumspection. Being steeped in the British tradition of limited judicial review, the Court generally adopted a pro-legislature stance. This is evident from the rulings such as *A.K. Gopalan's case*², but however it did not take long for judges to break their shackles and this led to a series of right to property cases in which the judiciary was loggerhead with the parliament. The nation witnessed a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect followed by another decision reaffirming the earlier position, and so on. The struggle between the two wings of government continued on other issues such as the power of amending the Constitution. During this era, the Legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court. At the time, an effort was made to project the Supreme Court as being concerned only with the interests of propertied classes and being insensitive to the needs of the masses. Between 1950 and 1975, the Indian Supreme Court had held a mere one hundred Union and State laws, in whole or in part, to be unconstitutional.

After the period of emergency the judiciary was on the receiving end for having delivered a series of judgment which were perceived by many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution. The Supreme Court said that any legislation is amenable to judicial review, be it mementoes amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen.

In the celebrated case of *Keshavanda Bharathi v. State of Kerala*³, the Supreme Court of India the propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution. The Judges made no attempt to define the basic structure of the Constitution in clear terms.

The Constitutional bench in *Indira Nehru Gandhi v. Raj Narain*⁴, held that Judicial Review in election disputes was not a compulsion as it is not a part of

²AIR 1950 SC 27
AIR 1973 SC 1461
(1975) Supp SCC 1

basic structure. In *S.P. Sampath Kumar v. Union of India*⁵, P.N. Bhagwati, C.J., relying on *Minerva Mills Ltd*⁶, declared that it was well settled that judicial review was a basic and essential feature of the Constitution. If the power of judicial review was absolutely taken away, the Constitution would cease to be what it was.

1.2 Meaning and Conceptual Basis of Judicial Review

Judicial review is not an expression exclusively used in our constitution. Literally, it means the revision of the decree or sentence of an inferior court by a superior court. Under general law, it works through the remedies of appeal, revision and the like, as prescribed by the procedural laws of the land, irrespective of the political system which prevails.

In common parlance, 'Review' means to view again and if we refer to literal technicality, Review means:-

Formal examination of something so as to make changes if necessary;

A critical assessment of a book, play or other work;

A report of an event that had already happened.⁷

Thus the dictionary meaning itself indicates that 'Review' is an examination with a purpose i.e to make changes if necessary, apart from being a critical assessment of a work, situation. Thus Review is an activating concept.

In legal parlance, judicial review is a legal activation of people's life. In *Parduman Singh v. State of Punjab*⁸, the court held that Review means a judicial re-examination of the case in certain specified and prescribed circumstances.

Judicial Review in its most widely accepted meaning is the power of the courts, to consider the constitutionality of acts of other organs of Government when the issue of constitutionality is germane to the disposition of law suits properly pending before the courts. This power to consider constitutionality in appropriate

⁵(1987) 1 SCC 124 at 128
(1980) 3 SCC 625

AIR 1958 Punj 63

cases includes the courts' authority acts they find to be unconstitutional.⁹ Thus Judicial Review is not to be construed as a 'procession tinkering' but a substantial switch over to justice process. Its play and operation is not confined to procedural law domain only but also extends to substantial law domain

Judicial review means overseeing by the judiciary of the exercise of power by other co- ordinate organs of government with a view to ensuring that they remain confined to the limits drawn upon their powers by the Constitution.¹⁰ The power to judicially review any decision is an extraordinary power vested in a superior Court for checking the exercise of power of public authorities, whether they are statutory, quasi-judicial or administrative. It is only available for exercise when a person who is aggrieved by such a decision brings it before the Court. It is common knowledge that while discharging administrative functions, public authorities take exercise of discretion. It is keeping this in mind that, by and large it is only the decision making process that is actually subjected to judicial review.

The concept of judicial review has technical significance in public law, particularly in countries having written constitutions. In such countries it means that courts have the power of testing the validity of the legislative as well as other governmental actions. The necessity of empowering the courts to declare a statute unconstitutional arise not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on the one hand and the judiciary on the other and vice versa. The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the Constitution and make a declaration accordingly.¹¹ Judicial review means the revision of a decree or sentence of an inferior Court, but these days the concept has undergone great

Encyclopedia of American Constitution, Vol.3 ,New York ,1986, P.1054.
S.P.Sathe, *Judicial Activism in India*, 2nd. Edition-,Oxford India Paper Backs, P.1.
A.S.Anand, *Judicial Review-Judicial Activism-Need for caution*, JILI Vol.42, P.149.

changes and the literal meaning of judicial review is longer valid.

Judicial review is the power of an independent judiciary, or courts of law, to determine whether the acts of other components of the government are in accordance with the constitution. Any action that conflicts with the constitution is declared unconstitutional and therefore nullified. Thus, the judicial department of government may check or limit the legislative and executive departments by preventing them from exceeding the limits set by the constitution. The concept of judicial review was created during the founding of the United States and specifically included in the Constitution. Judicial review is not mentioned in the U.S. Constitution, but most constitutional experts claim that it is implied in Articles III and VI of the document. Article III says that the federal judiciary has power to make judgments in all cases pertaining to the Constitution, statutes, and treaties of the United States. Article VI implies that the judicial power of the federal courts of law must be used to protect and defend the supreme authority of the Constitution against acts in government that violate or contradict it.

The distribution of legislative powers, which is the hall-mark of a federal constitution, quite often presents an important question as to who is to decide in case of a dispute as to whether the law made by the state legislative encroaches upon there as assigned to the central legislature or vice versa. For the purpose of resolving such disputes, the power is given to the courts and they are vested with the power of judicial review, as to the validity of the laws made by the legislature. The power of judicial review is not limited to enquiring about whether the power belongs to the particular legislature under the constitution. It extends also as to whether the laws are made in conformity with and not in violation of other provisions of the constitutions.

The interpretative function of the courts is referred to as 'Judicial Review' which can be direct as well as indirect. The direct judicial review involves the court to declare a legislation enactment or an executive act as null and void because it is unconstitutional¹². The concept of judicial review has its foundation on the doctrine that the constitution is the supreme law. It has been so ordained by the

¹².M.P. Jain, *Indian constitutional Law*, LexisNexis, Nagpur, 1974, P.755.

people, and in the American conception, it is the ultimate source of all political authority. The constitution confers only limited source powers on the legislature. If the legislature consciously or unconsciously oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to indicate and presence inviolate the will of the people as expressed in the constitution¹³. In the democratic state the court is the essential organ for maintaining the fundamental object of the constitution and for keeping the legislature within the limits assigned to its authority by the constitution for saving the people from the dangers of democratic tyranny and for materializing the aim of the constitution of establishing a harmonious and cohesive society based on ideal common morality.

In England, since there is no written constitution and Parliament is supreme, there is no judicial review of legislation enacted by Parliament. An English court cannot declare an act of Parliament ultra vires. This theoretical position remains unchanged even after the enactment of the European Communities Act, 1972, which makes the community law directly enforceable in the United Kingdom, and the Human Rights Act, 1998, which requires the English courts to point out that an act of Parliament is not compatible with the European Charter on Human Rights. The courts, however, cannot declare an act of Parliament unconstitutional.¹⁴

Britain, however, extended the practice of judicial review of legislation to colonies such as India whose constituent acts enacted by British Parliament laid down the limits of the legislative power vested in the colonial legislatures. India therefore experienced judicial review of legislations as well as executive acts since the days of British rules. Since there was no bill of rights in the constituent acts, the scope of judicial review was limited. The judicial attitude in countries ruled by Britain was to interfere with legislative acts only if they clearly transgressed the limits drawn upon their powers. They interpreted the constituent acts in the same manner as they interpreted the ordinary statutes. Judicial attitude was influenced by the theory of parliamentary supremacy and the courts denied that they had anything to do with policy or principles beyond what was clearly

¹³Rocco J. Tresolim, *American Constitutional Law*, The Macmillan Co. , New York, 1965,p.63.

¹⁴*Supra n.10.*

laid down by the words. The judges in India were brought up in the British tradition of parliamentary supremacy and therefore rarely questioned the validity of the legislative action except on the ground of its being ultra vires. Such occasions used to be few. The courts, however, scrutinized the acts of the executive with vigilance and held them invalid where they went beyond the powers given to it¹⁵.

Judicial review of legislation became the most significant aspect of American constitutional law. Although the Constitution nowhere mentions that the Supreme Court of the United States has the power to invalidate acts of Congress if they are contrary to the provisions of the Constitution, Chief justice Marshall held in *Marbury v. Madison*¹⁶ that such power was implied in a written constitution.

Although the assertion of the power of judicial review by the US Supreme Court became controversial, over a period of time, its legitimacy as well as desirability came to be accepted. Judicial review of legislative acts has been acknowledged as a product of American constitutional law.¹⁷

Unlike in the United States, judicial review in India, was provided for expressly in the constitution. Article 13, clause (1) of the Constitution of India, says that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions containing the fundamental rights, shall, to the extent of such inconsistency, be void. Clause of that article further says that the State shall not make any law made in contravention of the above mandate shall, to the extent of the contravention, be void.

The Constitution was criticized by some members of the Constituent Assembly for being a potential lawyers' paradise. Dr. B. R. Ambedkar defended the provisions of judicial review as being absolutely necessary and rejected the above criticism.¹⁸ According to him, the provisions for judicial review and particularly

¹⁵*Ibid.*
(1803) 5 US (1 Cranch) 137

¹⁷Westel Woodbury Willoughby, *The constitutional law of the United States*, vol. I, 2nd ed., Baker, Voortur and Co., 1929,p.1
CAD Vol. 7, p. 700 (Official Report reprinted by the Lok Sabha Secretariat, New Delhi).

for the writ jurisdiction that gave quick relief against the abridgement of fundamental rights constituted the heart of the Constitution, the very soul of it.¹⁹

Several constitutional democracies, such as the Netherlands and Great Britain, do not practice judicial review. The rule of law is maintained in these countries through the democratic political process, especially elections, whereby the government is held accountable to the people. However, judicial review or constitutional review seems to be an especially strong means to protect the rights of minorities against the threat of oppression by a tyrannical majority of the people acting through its representatives in the government.

1.3 Theoretical Basis and Justification of Judicial Review

As the concept of judicial review referred as part of natural justice by some jurists, thus it is very important to know views of certain natural law jurists and also Kelsen's view to understand the justification of the power of judicial review provided under constitutions of various countries.

1.3.1 Natural Law: Jurists view in Application on Judicial Review

Most modern commentators agree that the American founders were firm believers in natural law and sought to craft a constitution that would conform to its requirements, as they understood them, and embody its basic principles for the design of a just political order. The framers of the Constitution sought to create institutions and procedures that would afford respect and protection to those basic rights ("natural rights") that people possess, not as privileges or opportunities granted by the state, but as principles of natural law which it is the moral duty of the state to respect and protect. Throughout the Twentieth century, however, a lively debate has existed regarding the question of whether the Constitution incorporates natural law in such a way as to make it a source of judicially enforceable, albeit unwritten, constitutional rights and other guarantees²⁰. In my remarks this evening, I will discuss two significant "moments" in this debate: (1) the exchange between majority and dissenting Justices in the 1965 Supreme

CAD vol. 7, p. 953. .

²⁰. For a valuable summary of, and important contribution to, the debate, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907 (1993).

Court case of *Griswold v. Connecticut*²¹ and (2) an important effort by a distinguished constitutional law scholar, the late Edward S. Corwin of Princeton University, to specify, and draw out the implications of, the rootedness of American constitutional law in natural law concepts.

In 1965, the Supreme Court of the United States, by a vote of seven to two, invalidated a Connecticut anti-contraception law on the ground that it violated a fundamental right of marital privacy that, though nowhere mentioned or plainly implied in the text of the constitution, was to be found in "penumbras, formed by emanations ' from various "specific guarantees in the Bill of Rights." ²² Writing in dissent, Justice Hugo Black accused the majority of indulging in "the natural law due process philosophy"²³ of judging. Although critics would later heap ridicule on the majority's metaphysics of "penumbras formed by emanations," Black was content on this score to merely record his view that we "get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions."²⁴ His focus, rather, was on unmasking what he judged to be an implicit revival by the majority of the long discredited "natural law" doctrine. As far as Black was concerned, bringing to light the "natural law" basis of the *Griswold* decision was sufficient to establish the incorrectness of the ruling and the unsoundness of the reasoning set forth in Justice William O. Douglas' opinion for the Court. Black assumed that Douglas would not dare to defend the proposition that judges are somehow authorized to enforce an unwritten "natural law," or invalidate legislation that allegedly violated unwritten "natural rights" or substantive due process." He was correct in this assumption. Douglas emphatically denied that the majority was resurrecting the jurisprudential doctrine under which the Court had earlier in the century struck down worker protection laws and other forms of economic regulation and social welfare legislation as violations of unwritten natural rights (above all the right to freedom of contract) allegedly protected by the due process clauses of the Fifth and Fourteenth Amendments.

It is true that natural law thinkers held (and hold) that the constitutive power of

²¹.381 U.S. 479 (1965)

²². *Id.* at 484.

²³. *Id.*,at 524 (Black, J., dissenting).

²⁴. *Id.*,at 509-10 (Black, J., dissenting).

humanly posited law to create (or reinforce existing) moral obligations depends on the substantive justice ("reasonableness") of the law, and not merely on the jurisdictional authority of the person or institution purporting to promulgate it. But, again, this is true whether that person or institution in question is a judge (or court) or a legislature. Either way, valid law is the fruit (or, as traditional natural law theorists would put it, "an act") of both reason and will.²⁵

Corwin suggests that an important strand of the English legal tradition conceives the common law as enjoying a certain superiority to acts of Parliament. He gives significant weight to the "famous 'dictum,' so-called [of Lord Coke] in which reads: 'And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void' " In this "dictum," according to Corwin, we have a jurisprudential notion which, when allied later (as it would be) with John Locke's conception of substantive ("inherent and inalienable") rights of the individual, provides the foundation for American-style judicial review."²⁶ He notes that "the dictum had won repeated recognition in various legal abridgements and digests before the outbreak of the American Revolution," and cites various invocations of the substance of the dictum by American lawyers and political figures in the years leading up to the Revolution.²⁷

A central feature of Corwin's account is his claim that "judicial review initially had nothing to do with a written constitution."²⁸ He asserts that the idea of judicial review appeared in America some twenty years before the first written constitution, and that judicial review was practiced "in a relationship of semi-independence of the written constitution on the basis of 'common right and reason,' Natural Law, natural rights, and kindred postulates throughout the first third of the Nineteenth Century."²⁹ He argues that the "competing conception of

²⁵.See John Finnis, *The Truth in Legal Positivism, in The Autonomy of Law: Essays on Legal Positivism*, Robert P. George (ed.), 1996,p.195.

²⁶. Corwin, *The Debt of American Constitutional Law*, 258 [quoting what is cited by Corwin as 8 Rep. 113b 77 Eng.Rep.646 (1610)]

²⁷.*Id* at 263.

²⁸. *Id* at 266 (emphasis in original).

²⁹*Id* at 262.

judicial review as something anchored to the written constitution had been in the process of formulation in answer to Blackstone's doctrine that in every [s]tate there is a supreme, absolute power, and that this power is vested in the legislature."³⁰ It was one thing, according to Corwin, for Blackstone to reject the idea of judicial review, as he did, in the context of a system in which the supreme will was embodied in the legislature; it is another thing altogether, however, where the supreme will is understood to be that of the people themselves as expressed in their constitution. In the latter case, as American authorities such as Alexander Hamilton³¹ and John Marshall³² recognized, the duty of courts facing a conflict between legislation (considered as the act of mere agents of the people) and the constitution (considered as the act of the people themselves), was plainly to give effect to the constitution.

Robert Bork, perhaps the leading contemporary critic of "natural law" jurisprudence, explains his position: "I am far from denying that there is a natural law, but I do deny both that we have given judges authority to enforce it and that judges have any greater access to that law than do the rest of us".³³ Of course, Bork's view of the scope of judicial authority under the Constitution might or might not be correct. A proposition may be logically sound yet substantively false. Perhaps the Constitution, properly interpreted, does, in fact, confer upon judges the power to enforce their views of natural law and natural rights, even in the absence of textual or historical warrant for their views.

What matters for purposes of the current analysis is that the issue is itself textual and historical. If judges do, as Ronald Dworkin, for example, claims, legitimately enjoy the constitutional authority to invalidate legislation precisely on the ground that it violates abstract constitutional principles understood in light of the judges' own best judgments of natural law (viz., moral truth), then, as Dworkin himself acknowledges, that is because this power is conferred on courts by the positive law of the Constitution, not by the natural law itself.³⁴ Any argument seeking to

³⁰*Id.* (emphasis in original).

³¹*Id.* (citing *The Federalist No. 78* Alexander Hamilton).

³²*Id.* at 267 [citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137]

Robert H. Bork, *The Tempting of America: The Political Seduction of the Law*, BYU L. Rev. 665 (1990).

³⁴See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Harvard University Press, Introduction (1996).

establish the authority of courts to invalidate legislation by appeal to natural law and natural rights ungrounded in the constitutional text or history, therefore, will itself have to appeal to the constitutional text and history. This is by no means to suggest that there is anything self-contradictory or necessarily illicit about such arguments. Further, Robert P. George, said, that there is no reason in principle why a Constitution cannot, expressly or by more or less clear implication, confer such authority on Courts. It is merely to indicate that the question whether a particular constitution in fact confers it is, one of positive, not natural, law.

1.3.2 Kelsen's View on Judicial Review

Kelsen was the architect of the centralized (or concentrated) model of legislative review, which consisted in creating a special Tribunal, a Constitutional Court, who is the unique body empowered to guarantee the constitutionality of legislation. Kelsen obviously realizes that there can be Parliaments which enact statutes apparently contrary to the Constitution and, for this reason, considers that the best constitutional guarantee is to confer the power to declare null and void the statutes containing unconstitutional provisions.³⁵ He considers also that conferring this power to the same Parliament will be inefficient, and one extreme case of violation of the maxim: 'Nemo iudex in causa sua'. Therefore, it is appropriate to provide legal mechanisms which entrust either the judiciary in general or a specific Court. Judges and Courts, specific or not, are independent from the legislator.³⁶ In fact, this argument is very similar to the argument in favour of the judicial review in the famous book of *The Federalist* by A. Hamilton³⁷:

*Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.*³⁸

And Hamilton's reason for this trust in the judiciary is again similar to

Hans Kelsen, *Pure Theory of Law. Legality and Legitimacy*, Oxford: Oxford University Press, 2007, p. 88.

Hans Kelsen, '*La garantie juridictionnelle de la Constitution*', Laval : Impr. Barneoud , Paris , p.223.

Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, New York: Buccaneer Books, 1999, p. 395.

³⁸*Ibid*

Kelsen's³⁹: There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. And as it is well-known this is also the doctrine which opens the practice of judicial review in American constitutional history.⁴⁰

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void.

Kelsen suggested, the establishment of a Constitutional Court that was in a position to continually preserve legislation according to the Constitution and the protection of minorities in democracy is also guaranteed by this Court, then we would achieve a fine justification of the constitutional review of legislation.

1.4 Evolution of the Concept of Judicial Review

The genesis of the process of judicial review can be traced back to the American case of *Marbury v. Madison*⁴¹. But the seeds of this doctrine were sowed by the natural law theory propounded in *Dr. Bonham's*⁴² case in England, in which it was held that 'man made law was susceptible to correction and invalidation by reference to a higher law.' In 1610, Lord Chief Justice Coke of England applied this natural law doctrine in *Dr. Bonham's case*⁴³ while declaring an Act of the Parliament, which had put its seal on the Charter of the Royal College of Physicians, as void. He asserted, "*When an Act of Parliament is against common law right*

Ibid

⁴⁰*Marbury v. Madison*, Supra n. 16.

⁴¹*Ibid.*

⁴²(1610)8Coke'sReports1136;77ER646

⁴³*Ibid.*

*and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void".*⁴⁴

But the natural law doctrine failed to operate later, when the judges sided with Parliament in the conflict between the Parliament and the Crown. Thus the theory of Parliamentary Sovereignty was accepted as a norm, and the supremacy of the Parliament emerged as the hallmark of the unwritten Constitution of the United Kingdom after the English Revolution of 1688. But the English Courts applied the doctrine in relation to the legislation of overseas colonies. The theoretical foundation of the process of judicial review, that, "*in case of a conflict between the Constitution and a legislative statute, the Court will follow the former, which is superior of the two laws, and declare the latter to be unconstitutional,*" was laid down by the epoch making judgment of Chief Justice Marshall of the United States Supreme Court in 1803, in *Marbury v. Madison*⁴⁵.

In 1800, the Federalists lost the election and in February 1801, the outgoing President John Adams appointed Marbury, along with forty one others, as Justices of Peace for a period of five years, under the Judiciary Act of 1789. It is true that Marbury's eleventh hour appointment was part of the Federalist Party's strategy to transform the Judiciary into a Federalist stronghold and this action gave them the name '*John Adams' midnight judges.*' Even though the warrant of appointment was signed and sealed, it could not be delivered. At the instance of the new president Thomas Jefferson, who took charge in March 1801, the Secretary of State, James Madison, declined to deliver the warrant of appointment. Marbury sought a writ of mandamus from the Supreme Court against the Secretary for the delivery of warrants. Justice Marshall, appointed by the outgoing President faced the imminent prospect of the Government not obeying the judicial fiat, if the claim of Marbury was to be upheld. He faced a risk greater than ridicule and there was also a possible fear of being impeached as the Federalist District Judge John Pickering was impeached and removed, and action against Justice Chase of the Supreme Court was also contemplated⁴⁶

Asserting the power of the Court to review the actions of the Congress and

⁴⁴*Ibid.*

⁴⁵*Supra n. 16.*

⁴⁶Lavis Fisher & Neal Devins, *Political Dynamics of Constitutional Law*, 1996, p. 11 & 29.

Executive, Chief Justice Marshall declined the relief on the ground that Section 13 of the Judiciary Act of 1789, which was the foundation for the claim made by Marbury, was unconstitutional, since it conferred original jurisdiction on the Supreme Court to issue a writ of mandamus, which was violative of the American Constitution.

Needless to say, Justice Marshall was between the devil and the deep sea, and in that perplexing situation, his challenge was to deliver an opinion that would uphold the judicial supremacy over the elected branches as well as to avoid a confrontation between the Judiciary and the Executive. Thus, the scrutiny of the political backgrounds underlined in *Marbury's case*⁴⁷ leads to the conclusion that the decision rendered by Justice Marshall was to protect the Court, the Federalist Judiciary, from the hostile Jeffersonian. But this decision still stands as the beacon of the judicial authority, which established the Judiciary's power to declare unconstitutional, any Act of the Legislature, the Executive or the State Government. .

The constitutions of Canada, Australia and U.S.A. do not contain any provisions for direct judicial review, but it has become an integral part of the constitutional law of these countries. It is realized that mere are not suffice to check abuse of power; these “a dependence on the people”, Medison says in the content of USA “is, no doubt, the Government, but experience has taught mankind the necessity of auxiliary precaution.”⁴⁸

The decision of the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America. Judicial review in its broadest context is the self-assured right of the court to pass upon the constitutionality of legislative acts.

The United States Constitution does not explicitly establish the power of judicial review. Rather, the power of judicial review has been inferred from the structure, provisions, and history of the Constitution. The United States Supreme court established the power of judicial review in the landmark decision of *Marbury v.*

⁴⁷*Supra* n.16.

⁴⁸Bernard Schwartz, *The powers of Government*, Volume I, The Macmillan Company New York, 1963,P. 19.

*Madison*⁴⁹ where it held “It is emphatically the province and duty of the Judicial Department to say what the law is”. Any piece of legislation or administrative action can be reviewed by the courts. In England, unlike other jurisdictions, Parliament is supreme.⁵⁰ Hence only the actions and decisions of public authorities can be reviewed by the judiciary.⁵¹ The laws passed by the Parliament cannot be reviewed by the judiciary, except in circumstances where it is contrary to the law of European Union. Though India follows the Parliamentary form of democracy, it is the constitution which is supreme. Therefore, not just legislation, but even a constitutional amendment which seeks to change the “basic structure” of the constitution can be called in question (for review) before the courts⁵². The Constitution ensures that an administrative action is subject to judicial review by providing for a comprehensive scheme of judicial control over the administration under Article 32, 136, 226, and 227.

Judicial review as a mechanism for the protection of rights and liberties seems to have gained acceptance in other Commonwealth countries also. In New Zealand, the courts defer to parliamentary intention if there is no possibility of interpreting a statute consistently with the bill of rights and in Canada, although courts can invalidate a primary legislation if it is inconsistent with any of the rights given by the bill of rights legislation, Parliament can insulate a legislation by specifying that its provisions shall apply notwithstanding any contrary decision. However, experience shows that it has been difficult for the Canadian Parliament to respond to judicial decisions in this way.⁵³ This has increasingly shown that legislative supremacy is no longer the only democratic value and that judicial review is no longer considered to be undemocratic. In democratizing societies, judicial review can contribute towards the deepening of the commitment to constitutional values.

1.5 Origin of the Doctrine of Judicial Review in India

India achieved independence from Britain in 1947. Shortly afterwards, India’s

⁴⁹*Supra* n.16.

⁵⁰*Doctrine of parliamentary sovereignty.*

⁵¹*Anisminic Ltd vs. Foreign Compensation Commission, (1969) 2 AC 147*
Kesavananda Bharati vs. The State of Kerala and Others, Supra n.3.

⁵³P.N. Hogg, ‘*The Charter Dialogue between Courts and Legislatures*’, 15 *Osgoode Hall L.J.*, 75-124 (Spring 1997).

leaders crafted the Constitution of India, which came into effect on January 26, 1950. Authored by Dr. B.R. Ambedkar, it is the longest written constitution in the world.⁵⁴ As with most constitutions, all laws passed by the legislative branch must conform to its provisions.⁵⁵

In England, since there is no written constitution and Parliament is supreme, there is no judicial review of legislation enacted by Parliament. An English court cannot declare an act of Parliament ultra vires. This theoretical position remains unchanged even after the enactment of the European Communities Act, 1972, which makes the community law directly enforceable in the United Kingdom, and the Human Rights Act, 1998, which requires the English courts to point out that an act of Parliament is not compatible with the European Charter on Human Rights. The courts, however, cannot declare an act of Parliament unconstitutional.⁵⁶

Britain, however, extended the practice of judicial review of legislation to colonies such as India whose constituent acts enacted by British Parliament laid down the limits of the legislative power vested in the colonial legislatures. India therefore experienced judicial review of legislations as well as executive acts since the days of British rules. Since there was no bill of rights in the constituent acts, the scope of judicial review was limited. The judicial attitude in countries ruled by Britain was to interfere with legislative acts only if they clearly transgressed the limits drawn upon their powers. They interpreted the constituent acts in the same manner as they interpreted the ordinary statutes. Judicial attitude was influenced by the theory of parliamentary supremacy and the courts denied that they had anything to do with policy or principles beyond what was clearly laid down by the words. The judges in India were brought up in the British tradition of parliamentary supremacy and therefore rarely questioned the validity of the legislative action except on the ground of its being ultra vires.⁵⁷

The Indians demanded that their constitution should contain a declaration of

⁵⁴Soli J. Sorabjee, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, Louis Henkin & Albert Rosenthal (eds.), 1990, p.97.

⁵⁵*Supreme Court of India, Constitution of Supreme Court of India*, <http://supremecourtsofindia.nic.in/news/constitution.htm> (last visited on 2/7/17).

⁵⁶*Supra* n.10
Ibid.

fundamental rights but that demand was not conceded by the British government till the passing of the Government of India Act, 1935. The traditional British distrust of such declarations was behind the rejection of such a demand. It was believed that such a bill of rights would merely serve as a string of platitudes. Such distrust of a bill of rights as a restriction on the supremacy of the legislature, however, does not seem to have survived since the United Kingdom has accepted the European Convention on Human Rights and the jurisdiction of the European Court on Human Rights and has of late also enacted the Bill of Rights Act, 1998⁵⁸.

Unlike the Constitution of the United States, which gave rights in unqualified terms and left it to the courts to define their limits and legitimize restrictions on them, the Constitution of India enumerated the rights as well as the restrictions. The makers of the Indian Constitution were apprehensive of the wider role assumed by the Supreme Court of the United States through interpretation of the 'due process' clause of the Fifth Amendment to the constitution of the United States. They purposely avoided the use of the words 'due process of law' so as not to allow the courts to invalidate laws that might be disliked by the judges. The debates in the Constituent Assembly show that the maker's admirers of the Westminster model of democracy and wanted the courts in India to interpret the Constitution so as to cause minimum interference with the legislature.

The Supreme Court of India started off as a technocratic court in the 1950s but slowly started acquiring more power through constitutional interpretation. Its transformation into an activist court has been gradual and imperceptible. In fact the roots of judicial activism are to be seen in the Court's early asserted that its power of judicial review was inherent in the very nature of the written constitution. Article 13 of the Constitution said that the States shall make no law that takes away or exists at the commencement of the Constitution, it shall be void. Referring to this article, which provided for judicial review in explicit terms, the Court said⁵⁹: "The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if

⁵⁸. Nicholas Bamforth, 'The Application of the Human Rights Act, 1998 to Public Authorities and Private Bodies', 58 *Cam. L.J.*, 159-70 (1999).

⁵⁹. *A.K. Gopalan v. State of Madras*, *Supra* n.2.

any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment; to the extent it transgresses the limits, invalid”.

Not long after the enactment of the constitution, Parliament found reason to amend it. Yet, India’s new constitution had guaranteed a right of property to its citizens, and therefore Nehru’s grand plans for equitable redistribution of zamin (land) were soon confronted by the zamindars (landowners) in the courts.⁶⁰ As a result, Prime Minister Nehru introduced the First Amendment to the constitution of India on May 29, 1951, creating a famous scheme known as the “Ninth Schedule.”⁶¹ The First Amendment created article 31B,⁶² which described the Ninth Schedule and was inserted into part III of the constitution.⁶³ Originally consisting of thirteen laws, the Ninth Schedule was narrowly crafted to immunize land reform laws from judicial review.⁶⁴

From the moment of the First Amendment and the introduction of land reform laws under the Ninth Schedule, a long saga ensued in the courts⁶⁵. Between 1951 and 1967, property owners challenged the laws and constitutional amendments that placed land reform laws within the Ninth Schedule.⁶⁶23 Initially, the laws were challenged as violations of article 13(2) of the constitution, which provides against derogation of fundamental rights.⁶⁷ Analogizing the constitutional amendments to laws, plaintiffs creatively argued in *Sankari Prasad Singh Deo v. Union of India*⁶⁸ and *Sajjan Singh v. Rajasthan*⁶⁹ that the amendments were abridging the fundamental right to property and therefore were invalid under

⁶⁰See A.G. Noorani, *Ninth Schedule and the Supreme Court*, Econ. & Pol. Wkly., March 3, 2007, at 731.

⁶¹See Constitution (First Amendment) Act, 1951.

Article 31B reads: “Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force.”

See Constitution (First Amendment) Act, 1951.

⁶⁴*Supra n.53.*

⁶⁵*Id.* at 731–33.

Id.

⁶⁷Article 13(2) reads: “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

A.I.R 1951SC 458

A.I.R 1965 SC 845

article 13(2). Nevertheless, in both decisions, the Indian Supreme Court rejected the arguments and “upheld the constitutional validity” of article 31B.⁷⁰ In 1967, however, the Supreme Court reversed itself and held, by a slim six-to-five majority, that the amendments were “laws” within the meaning of article 13.⁷¹ This was a significant decision, for the court ruled for the first time that there were implied limitations on Parliament’s power to amend the constitution. The court held that “Parliament would have no power from the date of the decision (February 27, 1967) to amend any of the provisions of part III so as to take away or abridge fundamental rights.” The court further noted that, if Parliament wished to amend fundamental rights, it would have to convene a Constituent Assembly (constitutional convention).

India’s experience with judicial review, starting from 1950, can be broadly classified under two eras *viz.* the pre emergency era and the post emergency era. The pre emergency era of judicial review, from 1950 to 1975, was a period of conservatism merged with judicial restraint. Though the Supreme Court went to the extent of judicial supremacy, it generally adopted a pro Legislature stance. The Supreme Court, in its beginning, adopted the British tradition of limited judicial review starting from *Gopalan’s case*⁷², in that decision, while approving the mutual exclusivity of Article 19 and Articles 21 and 22, the Court rejected the argument based on the ‘due process of law’ and refused to introduce the American doctrine into Indian Constitutional law. However, through a very cautious and restrictive approach, the Court tried to assert the power of judicial review by declaring Section 14 of the Prevention of Detention Act, 1950, as *ultra vires* the Constitution⁷³.

Between 1950 and 1960, though the Supreme Court gave a liberal interpretation to the Right to Property, its contributions to socio-economic reforms were not remarkable. The decade being a nascent period, and the Court being in its infant stage concentrated more on establishing the power of judicial review. The struggle between the Legislature and the Judiciary continued, and the nation witnessed a series of events where a Supreme Court decision was followed by a

⁷⁰*I. C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643

Ibid.

⁷²*Supra* n.2.

⁷³*Id.*

nullifying legislation. In *Golaknath's case*⁷⁴, the Supreme Court held that the Parliament was not competent to amend Part III of the Constitution. This was a landmark judgement in the history of the Court, where the Court for the first time became a law maker and it had made a long step away from the initial restraint in the sphere of fundamental rights. The decision attracted criticism on the ground that the power of the Judiciary was directed to the wrong end for securing a wrong purpose, i.e., to protect and safeguard private property, and had the potentiality to curb the aspirations and sentiments of the popular organ, the Parliament.

Subsequently in 1970 in the *Bank Nationalisation case*⁷⁵, the Court held that so long as the right to property was guaranteed as a fundamental right, the right to compensation was also guaranteed. By virtue of the majority judgement in this case, the Supreme Court successfully asserted its power as a final authority in determining economic policies. Another development was that, for the first time the Indian version of the due process clause, which was rejected by the Court in *Gopalan's case*⁷⁶ as inapplicable in the field of personal liberty, was introduced and applied in the domain of property rights. But there was massive criticism that by the rigid adherence to the sanctity of right to property, the Court ignored the incompatibility of adherence to the concept of private property at the expense of social welfare and economic development. The action is also criticized as a proof for the Court's failure to realize the socio-economic realities of the country. In civil rights, the change from the limited attitude of the court in *Gopalan's case*⁷⁷ on personal liberty and on relation between Articles 19 and 21 was overruled. But *Gopalan's case*⁷⁸ on procedural law remained intact.

The imposition of Emergency in 1975 had a negative impact on the Apex Court too. Fundamental rights under Part III of the Constitution were suspended and the amendments⁷⁹ made thereafter had two results. The imposition of Emergency became unquestionable and the draconian provisions of the Maintenance of Internal Securities Act (MISA), 1973 were immunized by including it under the

⁷⁴*Supra* n.70.

⁷⁵*R.C.Cooper v. U.O.I.*, AIR 1970 565

⁷⁶*Supra* n.2.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹Constitution (38th Amendment)Act,1975 and Constitution (39th Amendment)Act,1975.

protective umbrella of the IX Schedule. The detention petitions challenging the order of the detention. In the *Habeas Corpus case*⁸⁰, it was held by the Supreme Court, by a 4:1 majority, that in the event of Emergency, no person had any locus standi to file a writ petition and, since Article 21 was suspended, no one could move any Court for any remedy. Justice H. R. Khanna in his historic dissent held that, “even in the absence of Article 21 in the Constitution, the State had no power to deprive a person of his life and liberty without the authority of law.”⁸¹ The majority judgment received wide criticisms. The court repeated the error in the *Detenus’ Case*⁸² by holding the conservative approach. The judgement in *Shukla’s case*⁸³ and *Detenus’ case*⁸⁴ was considered by critics of all times, to be the most ineffaceable blot on the pages of Indian judicial history.

In March 1977, there was a great sigh of relief as the Emergency period came to an end and the Court entered into a new phase. Emerging out of the emergency days, the Supreme Court chose a different arena, the field of civil rights instead of property rights. In the post emergency period, the dominating factor was the expansion of fundamental rights and the introduction of the Indian version of the due process clause in personal liberties. In a series of decisions starting with *Maneka Gandhi’s case*⁸⁵, where due process was introduced into the field of personal liberty, the trend was to expand the scope of human rights of citizens and to make Indian law in conformity with the global trends in human rights jurisprudence. Twenty eight years after the judgment in *Gopalan’s case*⁸⁶, the Apex Court in *Maneka Gandhi’s case*⁸⁷ held that the procedure established by law must be ‘right, just and fair’ and must pass the ‘test of reasonableness’ and further, ‘procedural conformity’ with the principle of natural justice is essential.

From 1980 onwards, the Court moved beyond a mere institution and emerged as a champion of individual rights and its decisions had tremendous socio-economic and political ramifications. By the emergence of relaxed the traditional concept of *locus standi* the test underlying the concept of equality saw a transition from

⁸⁰ *A.D.M. Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207

⁸¹ *Id.*

⁸² *U.O.I. v. Bhanu Das Krishna*, AIR 1997 SC 1027

⁸³ *Supra n.80.*

⁸⁴ *Supra n. 82.*
(1978) 1 SCC 248

⁸⁶ *Supra n.2.*

⁸⁷ *Supra n.85.*

the ‘doctrine of classification’ to the ‘doctrine of non- arbitrariness.’⁸⁸By approving judicial review as a basic feature of the Indian Constitution, the Court sought to reconcile its position with the Legislature, since the earlier period had witnessed, the Judiciary seeking to achieve supremacy by imitating the American doctrine upholding the same and the Legislature also striving to achieve a similar effect by adopting the British theory of Parliamentary Supremacy. Expanding the scope of Article 21, the Supreme Court established that right to life includes the “right to live with human dignity free from exploitation.”

By rationalizing, innovating and expanding the frontiers of law, the Court through its creative and dynamic approach sowed the seeds of ‘activism’ in order to uplift the downtrodden and to ‘wipe out the tears from some eyes.’ Thus, the change from pre Emergency era to the post Emergency era and the spectrum of difference ranging from *Gopalan’s case*⁸⁹ to *Maneka’s case*⁹⁰ reveals that judicial review in its form that we experience today is the results of a revolutionary process of evolution. The process, which started with property rights gradually changed its arena to individual rights and culminated in the establishment of a deep rooted review power.

After adhering to the conventional wisdom for seventeen long years, the Supreme Court asserted the power of judicial review over the Amendments to the constitution in *Golaknath’s case*⁹¹. Later in *Kesavananda Bharati’s case*⁹² the Court held that fundamental rights are amendable, but the process must not affect the basic structure of the Constitution. The Supreme Court even though changed its earlier position and accepted the constituent power of the Parliament, cautioned that the “constituent power was only within the framework of the Constitution.” It is presumed that the radical change in the approach of the Court in 1967 in *Golaknath’s case*⁹³ and subsequently in *Kesavananda Bharati’s case*⁹⁴ points out to the ‘argument of fear,’ the fear of overrunning the constitution by a Legislature comprised of the new breed of politicians the practical,

⁸⁸See, *R.D.Shetty v. Int.Air Authority of India*, AIR 1979 SC 1628 ; *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487

⁸⁹*Supra* n.2.

⁹⁰*Supra* n.85.

⁹¹*Supra* n.70.

⁹²*Supra* n.3.

Supra n.2.

⁹⁴*Supra* n.3

professional politicians, playing the dynamic game of power politics. The unpredictability of Indian politics after the death of Nehru and the absence of other eminent leaders of the national movement promoted the Court to protect Part III of the Constitution from the immature manipulation of the Legislature comprised of the new breed. Thus, the court had won the game by not giving the unbridled power of amendment to the Legislature. The Court checked the rule of two third majorities with the doctrine of basic structure. The ‘argument of fear’ later changed into ‘save the court motto’ in *Indira Nehru Gandhi’s case*⁹⁵ and the Court tried to shield the ‘save the Court’ notion by successfully projecting the image that ‘the Court is deciding the matter in accordance with the settled law.’ If the argument of fear resulted in the amenability of Part III of the Constitution, the image of ‘in accordance with the law’ resulted in satisfying both the ruling as well as the opposition parties. Whatever may be the cases and causes, critics hold that the Court feared the power packet political tycoons and their totalitarian regime in the governmental process. It is argued that, the instance of this fear can be traced from its inception itself, due to which the Court kept silent till 1967, and after that though the court had revealed its courage with some pronouncements, which gave a silver line of hope, it again circumvented its decision due to fear of being thrown out. It is criticized that while the fear in the beginning was interpreted as ‘conservatism’ the latter one was interpreted as ‘restraint’ and during the Emergency regime, the self-inflicted wounds of the Court gave rise to too much criticism⁹⁶.

Additionally, the court again looked to its previous jurisprudence in the *Kesavananda Bharati case*⁹⁷ and pointed out that although “Parliament has [the] power to amend the provisions of Part III so as to abridge or take away fundamental rights . . . that power is subject to the limitation of basic structure doctrine,” and “at least some fundamental rights do form part of basic structure of the Constitution.”⁹⁸ The Supreme Court thus held it could strike down any law inserted into the Ninth Schedule if it were contrary to the basic structure of the

⁹⁵ *Supra* n.4.

Roshen D. Alexander, We, the people: Experiments with Judicial Review, Vol.2, 2008, p.112.

⁹⁷ *Supra* n.3.

⁹⁸ *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1, at 100

constitution and passed after the *Kesavananda Bharati case*⁹⁹ was decided.¹⁰⁰

1.5.1. Constitutional provisions of Judicial Review in India

Judicial Review refers to the power of the judiciary to interpret the constitution and to declare any such law or order of the legislature and executive void, if it finds them in conflict the Constitution of India. The Indian Constitution adopted the Judicial Review on lines of U.S. Constitution Parliament is not supreme under the Constitution of India Its powers are limited in a manner that the power is divided between centre and states. Moreover the Supreme Court enjoys a position which entrusts it with the power of review in the legislative enactments both of Parliament and the State legislatures. Though there is no specific provision of the Judicial Review in Government of India Act, 1935 and the constitutional problems arising before the court necessitated the adoption of Judicial Review in a wider perspective. Now, Constitution of India, 1950 explicitly establishes the Doctrine of Judicial Review under various Articles 13,32,131-136,143,226,227,245,246.,372.¹⁰¹ Judicial Review is thus firmly rooted in India and has the explicit sanction of the Constitution. The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to the constitutional spirit. In doing so, the courts act as a ‘sentinel on the qui vive’.¹⁰²

1.5.1.1 Article 13: Power of Judicial Review and its effect in India

The justifiability of fundamental rights and the source of Judicial Review can be found under Article 13 which are regarded as a key provision as it gives teeth to the fundamental rights cannot be infringed by the state either by enacting a law to that effect or through an administrative action. It declares that all pre-constitution laws shall be void to the extent of their inconsistency with the fundamental rights¹⁰³ and expressly provides that the State ‘shall not make any law’ which takes away or abridges the fundamental rights and a law contravening a fundamental right is, to the extent of such contravention is void.¹⁰⁴ Essentially, it is crucial provision dealing with the post-constitution laws and if any such law

⁹⁹*Supra* n.3.

¹⁰⁰*Supra* n.98.

Chapters IV, VIII, X, XXXIII Constitution of India.

¹⁰²*State of Madras v. V.G.Row* AIR 1952 SC 196

Art. 13(1) of the Constitution of India.

Article 13(2) of the Constitution of India.

violates any fundamental right, it becomes void ab-initio.

The foundation of this power of judicial review has been explained by a nine judge bench of Supreme Court in *S.C. Advocates on Record association v. Union of India*¹⁰⁵. The apex court has held that the Constitution, which is the fundamental law of the land, is the will of the people', while a statute is only the creation of the elected representatives of the people. If therefore, the will of the legislature as declared in a statute, stands in opposition to that of the people as declared in the Constitution, the will of the people must prevail.

Article 13 is thus an express declaratory provision dealing with the power of judicial review which cast a constitutional obligation on the judiciary to check constitutional transgressions. The power is conferred on the constitutional courts, i.e. High Courts and Supreme Court. Further, 'state' for the purposes of this provision means 'state' as defined under Article 12. Apart from guaranteeing the fundamental rights which are in the nature of political and civil rights, the Constitution also provides the mechanism for their enforcement. It does so by making right to constitutional remedies itself a fundamental right. Articles 32 and 226 confer power of Judicial Review on Supreme Court as well as High Courts respectively to review the validity of any law or administrative action on the touchstone of fundamental rights.

1.5.1.2 Article 32: Writ Jurisdiction of Supreme Court

This provision, for the want of better purposive expression, is called as the right to constitutional remedies' and confers express powers on the Supreme Court to carry out the obligations declared under Article 13, that is, to act as a protector of fundamental rights. It constitutes one of the major constitutional safeguards against the state tyranny and can be said to confer ample scope for 'judicial activism' on Supreme Court which is evident from a catena of pronouncements made by it while giving a contemporary meaning to the fundamental rights and thereby creating new rights and obligations from time to time. The Supreme

(1993) 4 SCC 441

Court has described the significance of this provision in *Prem Chand Garg v. Excise Commissioner, U.P.*¹⁰⁶

The Fundamental Right to move this court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this court should itself as the protector and guarantor of fundamental rights declare that it cannot. Consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights in discharging the duties assigned to it, this court has to play the role of a 'sentinel on the qui-vive' and it must always do it as its solemn duty to protect the said fundamental rights zealously and vigilantly.

It guarantees right to move to the Supreme Court, by appropriate proceedings for the enforcement of fundamental rights enumerated in the Constitution¹⁰⁷ and empowers the Supreme Court to issue appropriate orders or directions or writs including writs in the nature of habeas corpus, mandamus, quo-warranto, certiorari and Public Interest Litigations (PIL's) for the enforcement of fundamental rights.¹⁰⁸ It also empowers the Parliament by law to empower any other court to exercise within the limits of its territorial jurisdiction all or any of the powers exercisable by the Supreme Court under Article 32(2). This can however be done without prejudice to the Supreme Court's powers under Article 32 (1) and 32(2) and it further declares that the right guaranteed by it shall not be suspended except as otherwise provided under the Constitution.

Right of access to the Supreme Court under this provision is a fundamental right per se providing a guaranteed, quick and summary remedy for enforcing them as a person can straight away approach the Supreme Court without having been undergone any dilatory process involved in the judicial hierarchy. The Supreme Court enjoys a broad discretion in the matter of framing the writs to suit the exigencies of a particular case. Apart from issuing writs as discussed above, it can also issue any order including even a declaratory order, or give any direction, as may appear to it to be necessary to give proper relief to the petitioner.¹⁰⁹

¹⁰⁶AIR 1963 SC 996
Art.32(1) of the Constitution of India.
Art.32(2) of the Constitution of India.

¹⁰⁹*Kuchunni v. State of Madras*, AIR1959 SC 725

Enforcement of fundamental rights under this provision permissibly includes the judicial review of administrative, legislative and governmental action or inaction. However, it cannot be invoked simply to adjudge the validity of any legislation or an administrative action unless it adversely affects the petitioner's fundamental rights. The Supreme Court under this provision is only confined to the infringement of fundamental rights and is not expected to go into any other question.¹¹⁰ In this event, once the court is satisfied that the petitioner's fundamental right has been infringed, he need not establish either that he has no other alternative remedy or that he has exhausted all other remedies provided by law, but only has to satisfy the court that he has not obtained proper redressal of his grievances. Similarly, recourse to the same is not available to assail the correctness of a decision rendered by the apex court on merits or to claim its reconsideration by it.¹¹¹ While exercising review power under this provision, the court also has power to decide the disputed questions of facts arising in a writ petition if it so desires.¹¹²

Being a fundamental right per se, this power cannot diluted or whittled down by any law and can be invoked even when a law declares a particular administrative action. The Constitution stands silent as to the procedure to be followed under this provision. The Supreme Court in *Bandhua Mukti Morcha v. Union of India*¹¹³ clarified that it is not bound under this provision to follow the ordinary adversary procedure and may adopt such procedure as may be effective for the enforcement of the fundamental rights.

Though this provision basically aims at empowering the apex court to guard the infringement of fundamental rights, nevertheless it has been used for a much wider purpose than what is expected, by laying down general guidelines having the effect of law to fill the vacuum till such time the legislature steps to fill in the gap by making the necessary law.

The provision supplements enormity in judicial power since it empowers the apex court, apart from issuing writs as discussed above, to make any order, pass directions as it may consider appropriate to grant adequate relief to the

¹¹⁰*Shantabhai v. State of Maharashtra*, AIR 1958 SC 532

¹¹¹*Khyerbari Tea Co. v. State of Assam*, AIR 1964 SC 925

¹¹²*Mohd. Aslam v. Union of India*, AIR 1996 SC 1611
(1997)10 SCC 549

petitioners. It may also grant declaration or injunction as well if that be the proper relief and can mould relief to meet the exigencies of specific circumstance. This is been made explicit in *M. C. Mehta v. Union of India*¹¹⁴ This court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding namely, enforcement of a fundamental right and has the implicit power to issue whatever direction, orders or writ necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the Fundamental Right.

However, in due course of time, the activism shown by the Supreme Court has given a new dimension to Article 32 and the court has implied there from the power to award damages when a fundamental right of a person has been infringed and there is no other suitable remedy available to give relief and redress in the specific situation for the injury caused to the petitioner. While doing so, the argument it has put forth is that under Article 32, its power is not only injunctive in ambit, but is also remedial in scope and that in the absence of such a power, the Article would be robbed of its entire efficacy, become emasculated and weakened. Similarly, in *Rudul Shah v. State of Bihar*¹¹⁵ the court awarded damages to the petitioner against the State for breach of his right of personal liberty guaranteed under Article 21 as he was kept in jail for 14 years even after his acquittal by a criminal court.

Since Rudul Shah, damages have been awarded in quite a few cases to the victims themselves or their kith and kins for police brutality or harassment, custodial deaths, medical negligence, environment pollution, tortuous acts of government servants thereby opening a new vista of compensatory jurisprudence in exercise of this provision.

1.5.1.3 Article 226: Writ Jurisdiction of High Court

This provision signifies an essential aspect of Indian Constitution since it confers writ jurisdiction on high courts as well, with a much wider scope as compared to what is enjoyed by the Supreme Court under Articles 32. Consequently, it can

(1987)4 SCC 463
(1983)4SCC 141

possibly be understood in the sense of arming the judiciary with enormous power to act in an activist manner.

It empowers the high court to issue directions, orders or writs including writs in the nature of habeas corpus, mandamus, quo warranto and certiorari for the enforcement of a fundamental right and certiorari for the enforcement of a fundamental right and for any other purpose.¹¹⁶ The distinguishing feature of this power is the extension of the writ jurisdiction of high courts for any other purpose in addition to fundamental rights. Such purposes may rightly be understood as forming the actions of the state entities in various delegated capacities. These words for any purpose enable the high court to take cognizance of any matter even if no fundamental right infringement is involved. Since Indian Constitution does not favour the doctrine of separation of powers in strict sense, public authorities in India often exercise various types of powers including executive, adjudicatory and legislative powers, for which the rule of law demands such a power to keep check on their malafide and whimsical exercise thereby making the writ jurisdiction in India more firm as compared to the English system.

The Supreme Court has time and again emphasized that this power of the high court to issue writs is supervisory in nature and is not akin to its appellate power. That is to say that while exercising jurisdiction under this provision, the high court cannot go into the correctness of merits of the decision taken by the concerned authority but can only review the manner in which the decision is made.¹¹⁷ It only ensures that the authority arrives at its decision according to law and in accordance with the principles of natural justice wherever applicable.¹¹⁸ At the same very time, the court can intervene if the authority acts unfairly and unreasonably. This can make one say that judicial review under this provision is not directed against a decision, as such, but is confined to the decision making process.

Unlike Article 32, the high court under Article 226 does not ordinarily issue a writ when an alternative efficacious remedy is available. The High Court, under this

¹¹⁶Art.226 (1) of the Constitution of India.

¹¹⁷H.B.Gandhi, *Excise and Taxation Officer cum Assessing Authority v.Gopi Nath & Sons*(1992) Supp (2) SCC 312

¹¹⁸*State of Madhya Pradesh v. M.V.Vyavasaya & Co.*, AIR 1997 SC 993

provision, has jurisdiction to determine questions of both fact and law by having recourse to affidavits and may even permit cross examination of a person who has sworn to such an affidavit.¹¹⁹ It can also intervene in case the question pertains to a mixed question of law and fact both. Where, however, disputed questions of fact arise, a petition under Article 226 is not a proper remedy.¹²⁰

1.5.1.4 Article 131: Power to decide Inter-governmental disputes

Since Indian Constitution sets up a federal polity where intergovernmental disputes often arise, Article 131 takes care of such instances by providing a mechanism for settling such disputes quickly at the highest judicial level. Under this provision, the Supreme Court has exclusive original jurisdiction in any dispute between the centre and the state, or the centre and state on one side and a state on the other side, or between two or more States. A dispute to be justifiable under this article should involve a question of law or fact on which the existence or extent of legal right depends. That is to say that the dispute must involve assertion or vindication of a legal right of Government of India or a state. Questions of political nature not involving any legal aspect are excluded from the Court's view.¹²¹ Supreme Court's jurisdiction under this provision is limited by two fold fetters, that is, as to the parties and as to the subject matter. Commenting on the necessity of such a provision, Bhagwati J. has observed in *State of Karnataka v. Union of India*¹²² as thus —This article is a necessary concomitant of a federal or a quasi federal form of government and it is attracted only when the parties to the dispute are the government of India or one or more States arranged on either side.

The Supreme Court has observed that the distinguishing feature of this provision is that the court is not required to adjudicate upon the disputes in exactly the same way as ordinary courts of law are normally called upon to do for upholding the rights of the parties and enforcement of its orders and decision. The court rather is only concerned to give its decision on questions of law or of fact on which the existence or extent of a legal right claimed depends. Once the court

¹¹⁹*Barium Chemiclas v. Company Law Board*, AIR 1967 SC 295

¹²⁰*Sharma Prashant v. Ganpatrao*, AIR 2000 SC 3094

¹²¹*State of Bihar v. Union of India*, AIR 1970 SC 1446

¹²²AIR 1978 SC 68

comes to its conclusion on the cases presented by any disputants and gives its adjudication on the facts or the points of law raised the function of the court under article 131 is over.¹²³

In its exercise of jurisdiction, the Supreme Court has power to grant whatever relief may be necessary for the enforcement of the legal right claimed. It can pass any order or direction as may be found necessary to meet the ends of justice.

1.5.1.5 Article 132: Constitutional Appellate Jurisdiction

The Supreme Court primarily being a court of appeal enjoys extensive appellate jurisdiction in various jurisdictions. Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final order, whether civil, criminal or other proceeding, of a high court of it certifies that the case involves a substantial question of law as to the interpretation of the Constitution.¹²⁴ On obtaining such a certificate any party in the case may appeal to the Supreme Court on the ground that any such question has been wrongly decided. However, only those questions can be agitated for which the high court has granted leave unless permitted by the Supreme Court.¹²⁵ A very broad power is thus conferred on the Supreme Court to hear appeals in constitutional matters.

This symbolizes the Supreme Court as the final court of constitutional interpretation. Questions of constitutional interpretation are thus placed in a special category irrespective of the nature of proceedings in which they arise. The Supreme Court has commented on this provision as the principle underlying the article is that the final authority of interpreting the Constitution must rest with the Supreme Court.¹²⁶ With that object the article is freed from other limitations imposed under Art.133 and 134 and the right of the widest amplitude is allowed irrespective of the nature of the proceedings in a case involving only a substantial question of law as to the interpretation of the Constitution.

¹²³*Supra* n. 121.
Art.132(1) of the Constitution of India.
Art.132(3) of the Constitution of India.

¹²⁶*Pedda Narayana v. State of Uttar Pradesh*, AIR 1975 SC 1252

1.5.1.6 Article 133: Civil Appellate Jurisdiction

Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final orders in a civil proceeding of a high court if it certifies that the case involves a substantial question of law of general importance and that in the opinion of the high court, the said question needs to be decided by the Supreme Court.¹²⁷

No appeal in a civil matter lies to the Supreme Court as a matter of right. It can only lie upon the grant of certificate by the high court. The Supreme Court has emphasized that for grant of certificate, the question, howsoever important and substantial, should also be of such pervasive import and deep significance that in the high court's judgment, the question imperatively needs to be settled at the national level by the highest court, otherwise the apex court will be flooded with cases of lesser magnitude.¹²⁸ This provision covers all civil proceedings including all proceedings affecting civil rights. Proceedings under Art. 226 are also regarded as civil proceedings affecting civil rights. Proceedings under Art.226 are also regarded as civil proceedings for the purposes of this provision.

1.5.1.7 Article 134: Criminal Appellate Jurisdiction

This provision regulates the criminal appeals to the Supreme Court and is so designed as to permit only important criminal cases to come before it. It confers a limited criminal jurisdiction on the Supreme Court¹²⁹ as the court hears appeals only in exceptional criminal cases where justice demands the intervention of the apex court. An appeal, under this provision, lies as a matter of right to the Supreme Court from any judgment, final order, or sentence of a high court in a criminal proceeding if the high court in a criminal proceeding has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death.¹³⁰ However, no appeal lies if the high court reverses an order of conviction and acquits the accused.

Art.133(1)of the Constitution of India.

¹²⁸*State Bank of India v. N. Sundara Money* AIR 1976 SC 1111

¹²⁹Under Art. 134(2), the Parliament is authorized to enlarge the criminal appellate jurisdiction of the Supreme Court. To this effect, it has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, further authorizing the Supreme Court to hear appeals from High Courts.

Art.134(1)(a) of the Constitution of India.

Secondly, an appeal also lies to the Supreme Court if the high court withdraws for trial a case from the lower court and sentences the accused to death.¹³¹

Thirdly, the Supreme Court can hear an appeal in a criminal case if the high court certifies that the case is a fit one for appeal purposes.¹³²

1.5.1.8 Article 136: Power to grant special leave to appeal

Over and above all the constitutional provisions expressly declaring and regulating the power of the Supreme Court in various capacities, this provision empowers the Supreme Court to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.¹³³ It however, excludes from its scope any judgment or order passed by a tribunal functioning under a law relating to the Armed Forces. An outstanding feature of this provision is that it empowers the Supreme Court to hear the appeals not only from courts but also from tribunals in any cause or matter.

The power of the Supreme Court under this provision is unaffected by Art.132, 133 and 134 and plenary as the provision puts no qualificatory fetters in its exercise. It is a sweeping power, exercisable outside the purview of ordinary law to meet the pressing demands of justice. The Supreme Court characterizes this power as —an untrammelled reservoir of power incapable of being confined to definitional bounds the discretion conferred on the Supreme Court being subjected only to one limitation, that is, the wisdom and good sense of justice of the judges.¹³⁴ The provision does not define the nature of proceedings from which the Supreme Court may hear appeals and therefore, it could hear appeal in any kind of proceedings whether civil, criminal, or relating to income-tax, revenue or labour disputes sec. It even accommodates the Supreme Court in hearing appeals even though the ordinary law pertaining to the dispute makes no provision for such an appeal. Supreme Court can even disregard the limitations as discussed above and can hear appeals which it could not otherwise hear under

Art.134(1)(b) of the Constitution of India.

Art.134(1)(c) of the Constitution of India

¹³³Art.136(1) of the Constitution of India.

¹³⁴*Kunhayammed v. State of Orissa*, AIR 2000 SC 2587

these provisions. Being a jurisdiction conferred by the Constitution, it cannot be diluted or circumscribed by ordinary legislative process.

In its exercise, the Supreme Court claims to have power to give whatever relief may be necessary and proper in the facts and circumstances of the specific case. The Court has power to mould the relief according to the circumstances of the specific case.¹³⁵ The court can also invoke its power under Art.142 for this purpose.

1.5.1.9 Article 141: Authority to make final declaration of law

Under this provision, the Supreme Court has the power to declare any law and the said declaration has the force of an authoritative precedent, binding on all other courts in India, of course except the Supreme Court itself. Such a final authority which the Supreme Court claims to possess includes power to decide the validity of a law and to interpret it. Such a claim gives the court an unbridled discretionary power without any accountability whatsoever and the consequent development is the judicial activism.

1.5.1.10 Article 142: Power to do complete justice

The Supreme Court, in exercise of the power conferred under this provision, is entitled to pass any decree, or make any orders, as is necessary for doing complete justice in any cause or matter pending before it.¹³⁶ The expressions 'cause or matter' used include any proceeding pending in the court including civil or criminal proceeding. The provision confers very wide powers on the Supreme Court to do complete justice in any case and it has been given a broad and purposive interpretation by the Supreme Court. Under this provision, the jurisdiction and powers of the Supreme Court are supplementary in nature and are provided for doing complete justice in any matter. In the course of time, the apex court has given much wider dimension and ambit to this Article, practically raising it to the status of a new source of substantive power for itself.

As claimed by the judiciary, it contains no limitations regarding the causes or the circumstances in which the power can be exercised nor does it lay down any

¹³⁵*Collector of Customs & Central Excise v. Oriental Timber Industries*, AIR 1985 SC 746. 489

¹³⁶*Delhi Eleric Supply Undertaking v. Basanti Devi*, AIR 2000 SC 43

condition to be satisfied before such power is not exercised, nor does it lay down any condition to be satisfied before such power is exercised. The apex court claims to have a complete discretion in its exercise.

In *Supreme Court Bar Association v. Union of India*¹³⁷, the Supreme Court characterized its role in the following words. Indeed the Supreme Court is not a court of restricted jurisdiction of only dispute settling. The Supreme Court has always been a law-maker and its role travels beyond merely dispute settling. It is a problem solver in nebulous areas.

Further, describing the nature of its power under this provision, it has held that: The plenary powers of the Supreme Court under Art.142 of the Constitution are inherent in the court and complementary to those powers which are specifically conferred on the Court by various statutes though is not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers exist as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis of its exercise, may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is thus, the residual source of power which this court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law.

1.5.2 Doctrines Formulated by Courts Using the Power of Judicial Review in India

Article 13 of constitution incorporates “Judicial Review of Post constitution and Pre- constitutional laws”. This Article inherited most important doctrines of judicial review like Doctrine of Severability, Doctrine of Eclipse. Article 13 provides for the “judicial review” of all the legislations in India, past as well as future.

Some other doctrines are formulated by courts using the power of judicial review

¹³⁷AIR 1998 SC 1895

are Doctrine of Pith and Substance, Doctrine of Colourable legislation. These doctrines are originated by Supreme Court by using power of judicial review through interpreting various Articles. Doctrine of Prospective overruling is the doctrine to interpret the judicial decisions. These doctrines are enumerated through interpret the constitution provisions by Supreme Court.

1.5.2.1 Doctrine of Severability

Article 13 of the Indian constitution incorporates this doctrine. In, Article 13 the word” to the extent of contravention” are the basis of Doctrine of Severability. This doctrine enumerates that the court can separate the offending part unconstitutional of the impugned legislation from the rest of its legislation. Other parts of the legislation shall remain operative, if that is possible. This doctrine has been considerations of equity and prudence. If the valid and invalid parts are so inextricably mixed up that they cannot be separated the entire provision is to be void. This is known as “doctrine of severability”

In *A. K. Gopalan vs. State of Madras*¹³⁸, case section 14 of Prevention Detention Act was found out to be in violation of Article 14 of the constitution. It was held by the Supreme Court that it is Section 14 of the Act which is to be struck down not the act as a whole. It was also held that the omission of Section 14 of the Act will not change the object of the Act and hence it is severable. Supreme Court by applying doctrine of severability invalidate the impugned law.

1.5.2.2 Doctrine of Eclipse

This doctrine applies to a case of a pre constitution statute. Under Article 13(1) of the constitution, all pre constitution statutes which are inconsistent to part III of the constitution become unenforceable and unconstitutional after the enactment of the constitution. Thus, when such statutes were enacted they were fully valid and operative. They become eclipsed on account of Article 13 and lost their validity. This is called “Doctrine of Eclipse”. If the constitutional ban is removed, the statute becomes free from eclipse, and becomes enforceable again. In *Bhikaji Narain Dharkras vs. State of M.P.*¹³⁹, an existing State law authorized the State Government to exclude all the private motor transport operators from

¹³⁸*Supra* n.2.

¹³⁹AIR 1955 SC 781

the field of transport business. After this parts of this law became void on the commencement of the constitution as it infringed the provisions of Article 19(1)

and could not be justified under the provisions of Article 19 (6) of the constitution. First Amendment Act, 1951 amended the Article 19(6) and due to this Amendment permitted the Government to monopolize any business. The Supreme Court held that after the Amendment of clause (6) of Article 19, the constitutional impediment was removed and the impugned Act ceased to be unconstitutional and became operative and enforceable.

1.5.2.3 Doctrine of Prospective Overruling

The basic meaning of prospective overruling is to construe an earlier decision in a way so as to suit the present day needs, but in such a way that it does not create a binding effect upon the parties to the original case or other parties bound by the precedent. The use of this doctrine overrules an earlier laid down precedent with effect limited to future cases and all the events that occurred before it are bound by the old precedent itself. In simpler terms it means that the court is laying down a new law for the future. This doctrine was propounded in India in the case of *Golak Nath vs. State of Punjab*¹⁴⁰. In this case the court overruled the decisions laid down in *Sajjan Singh*¹⁴¹ and *Shankari Prasad*¹⁴² cases and propounded Doctrine of Prospective Overruling. The Judges of Supreme Court of India laid down its view on this doctrine in a very substantive way, by saying "The doctrine of prospective overruling is a modern doctrine suitable for a fast moving society." The Supreme Court applied the doctrine of prospective overruling and held that this decision will have only prospective operation and therefore, the first, fourth and nineteenth Amendment will continue to be valid.

1.5.2.4 Doctrine of Pith and Substance

Pith means 'true nature' or 'essence of something' and Substance means 'the most important or essential part of something'. Doctrine of Pith and Substance says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. Thus, if the substance falls within Union List, then

¹⁴⁰*Supra* n.70.

¹⁴¹*Supra* n.69.

¹⁴²*Supra* n.68.

the incidental encroachment by the law on the State List does not make it invalid.

The doctrine has been applied in India to provide a degree of flexibility in the otherwise rigid scheme of distribution of powers. The reason for adoption of this doctrine is that if every legislation were to be declared invalid on the grounds that it encroached powers, the powers of the legislature would be drastically circumscribed.

The *State of Bombay And Another v F.N. Balsara*¹⁴³, is the first important judgment of the Supreme Court that took recourse to the Doctrine of Pith and Substance. The court upheld the Doctrine of Pith and Substance and said that it is important to ascertain the true nature and character of a legislation for the purpose of determining the List under which it falls.

The case of *Prafulla Kumar Mukherjee v. The Bank of Commerce*¹⁴⁴ succinctly explained the situation in which a State Legislature dealing with any matter may incidentally affect any Item in the Union List. The court held that whatever may be the ancillary or incidental effects of a Statute enacted by a State Legislature, such a matter must be attributed to the Appropriate List according to its true nature and character.

Thus, we see that if the encroachment by the State Legislature is only incidental in nature, it will not affect the Competence of the State Legislature to enact the law in question. Also, if the substance of the enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid.

However, the situation relating to Pith and Substance is a bit different with respect to the Concurrent List. If a Law covered by an entry in the State List made by the State Legislature contains a provision which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to the provisions of any existing law with respect to that matter in the Concurrent List, then the repugnant provision in the State List may be void unless it can coexist and operate without repugnancy to the provisions of the existing law.

AIR 1951 SC 318
1947 PC 11

1.5.2.5 Doctrine of Colourable Legislation

In India ‘doctrine of colourable legislation’ signifies only a limitation of the law making power of the legislature. It comes to know while the legislature purporting to act within its power but in reality it has transgressed those powers. So, the doctrine becomes applicable whenever a legislation seeks to do in an indirect manner what it cannot do directly.

Under our Constitution, the legislative powers of Parliament and the State Legislatures are conferred by Article 246 and distributed by Lists I, II, and III, in the Seventh Schedule. The Parliament has power to make law respect to any of the matters of the List II and the Parliament and the State Legislatures both have power to make laws with the respect to any of the matters of the List III and the residuary power of legislation is vested in the Parliament by virtue of Article 248 and entry 97, List I. For making any law or for that law’s validity legislative competency is an issue that relates to how legislative power must be shared between the Centre and the States or it focuses only on the relationships between both of them.

In *K.C. Gajapati Narayan Deo v State of Orissa*¹⁴⁵, while explaining the doctrine held that “if the constitution of a state distributes the legislative spheres marked out by specific legislative entries or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of the constitutional power or not. Such transgression may be patent, manifest and direct, but may also be distinguished, covered and indirect and it is the latter class of cases that the expression ‘colourable legislation’ has been applied in certain judicial pronouncements”.¹⁴⁶

1.6 Rule of Law: An Essential Component Judicial Review in India

The rule of Law is an important contribution of the British Constitution. It means that in the eyes of the law all persons, whether big or small, the highest government official or ordinary citizen, a big capitalist or a poor man, are equal.

AIR 1953 SC 375

¹⁴⁶*Id.*

Dicey has given three meanings of the rule of law. According to him, “It means in the first place, the absolute supremacy or predominance of regular laws as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogatives or even of wide discretionary authority on the part of the Government. Englishmen are ruled by the law and by the law alone a man may be punished for a breach of law but he can be punished for nothing else... no man’s punishable or can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”¹⁴⁷ Further Dicey writes, “It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. Dicey continues that, “Not only that with us no man is above the law but (what is a different thing) that here everyman. Whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.” Prof. Dicey while elaborating the equality of all before law. Say, “With us every official, from the Prime Minister to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen”.

Thirdly, according to Dicey, the Rule of Law may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries, naturally form part of the constitutional code, are not the sources but the consequences of the rights of individuals as defined and enforced by the courts.... It means that the main principle of the constitution, such as the right to personal or of public meeting, has been set up on the foundation of the old common law and not as things derived from any general Constitution Theory. Rights in brief, do not flow from the constitution but from judicial decisions as in the famous Wilkes, case¹⁴⁸.

India has many attributes which if properly utilized can shape it as a world leader in many spheres while providing in that process a better quality of life to all it

¹⁴⁷E.C.S. Wade, *Dicey: Introduction to the Study of the Constitution*, 10th edition, London, Macmillan, 1959, p.188.

¹⁴⁸N.R. Madhava Menon, *Constitutional Institutions and the maintenance of Rule of Law; Rule of Law in a Free Society*, (ed.) N.R. Madhava Menon, Oxford University Press, 2008, p.41-42.

citizens. It has one of the ancient civilizations, which gave to the world universal values of love, peace and non-violence based on 'Dharma'. It has a relatively younger population with tremendous potential for nation-building activities in a knowledge society. It is blessed with a democratic Constitution and a tradition for orderly change and peaceful coexistence.

For a culture shaped in the philosophy of 'Dharma', Rule of Law is not an alien concept. It is innate in the Indian ethos and tradition. The Supreme Court recently reminded the government of "Raj Dharma" in the context of Gujarat violence. The spiritual content of the Rule of Law rests in the universal values of justice and tolerance-tolerance of people who differ from you, tolerance of systems, beliefs and practices which are at variance from yours tolerance with a view to coexist peacefully in a diverse world respecting the rights of others in equal measure as you claim for yourself. It is too simple a proposition to need an explanation for people with common sense. The Rule of Law involves a sense of human equality and respect for basic human rights of all people irrespective of their status in society. It demands acceptance of the supremacy of law and willingness to abide by it howsoever unpleasant its consequences are. In short, the Rule of Law rests in an attitude of the mind, which accommodates differences, respects all human beings alike, and submits to the collective wisdom expressed in the form of law in case conflicts arise¹⁴⁹.

Rule of Law is imperative for a democratic regime in which equality, basic rights and popular will are respected. Rule of a law does not exist where arbitrary exercise of power prevails. In other words, Rule of Law presupposes division of powers and a system of checks and balances intended to prevent authoritarian and arbitrary exercise of public power. It is in this context that the legal system becomes relevant for Rule of Law. Constitution is about division, distribution and management of State power in such a manner that arbitrariness is prevented and accountability (to law) is established. The division of powers among the Centre, state and local governments on the one hand, and the separation of powers between the Legislature, Executive and Judiciary on the other, is a constitutional scheme to ensure the principle of checks and balances under Rule of Law. In a written Constitution, the Judiciary exercising powers of judicial

¹⁴⁹*Id.* at p.43.

review performs a significant role in the maintenance of Rule of Law by resolving disputes between the citizen and the state. The complementarily of constitutional institutions and their capacity to function within their legitimate jurisdictions enable Rule of Law to be a living reality in constitutional governance¹⁵⁰.

Whenever public discourses on Rule of Law take place, invariably attention is focused on the institution of Judiciary, as it is the principal arbiter under the Constitution to protect the rights of citizens and decide on limits of public authority. In a written Constitution of a federal type based on division of powers and guaranteed rights, the Judiciary inevitably occupies position to declare the law finally. In fact, Article 141 of the Constitution does state that the law declared by the Supreme Court shall be binding on all courts within the territory of India¹⁵¹.

The Supreme Court and the High Court's engaging concurrent jurisdiction in determining constitutionality of administrative action and of legislation, enjoy vast powers of what is called "judicial review", a vita instrument for preventing arbitrariness in State action. Given the range and scope of powers under judicial review, the Indian Supreme court is possibly the world's most powerful court safeguarding Rule of Law in the world's largest democracy¹⁵².

Government by the "Rule of Law" envisages judicial review as an inevitable projection of the fundamental principles implicit in the doctrine. Public law enforces the proper performance by public bodies of their public duties. Administrative Law is a branch of Public Law concerned with the various organs of government engaged in administering public policies. This is the concept of legal control of government under the Rule of Law. A constitutional guarantee of rights, as in India, wherein constitutional remedy is also guaranteed under Article 32 in the Supreme Court and under Article 226 in the High Courts, transforms the court's power into a constitutional mandate for the protection and enforcement of the rights. Rule of Law is firmly entrenched in this manner¹⁵³.

Id. at p.43-44.

Id. at 47-48

Id. at 48.

J.S.Verma, *Rule of Law and Inter- State Relations; Rule of Law in a Free Society*,(ed.)

Rule of Law has been held to be a basic feature of the Indian Constitution. In the Indian Constitution, Article 14 combines the English doctrine of the Rule of Law and the equal protection clause of the Fourteenth Amendment. Rule of law postulates the preservation of the spirit of law through the whole range of government. Because of its amorphous nature Sir Ivor Jennings called it an unruly horse¹⁵⁴.

Soon after the Constitution came into force in 1950 in *A. K. Gopalan's case*¹⁵⁵ the Supreme Court placed rather a narrow and restrictive interpretation upon article 21 of the Constitution. By a majority, it was held in this case that "... the procedure established by law' means procedure established by a law made by the State" and the court refused to infuse in that procedure the principles of natural justice. The court also arrived at the conclusion that article 21 excluded enjoyment of the freedoms guaranteed under article 19.

*Gopalan's case*¹⁵⁶ was decided soon after, the Constitution came into force, more than 49 years ago. The judgement was mainly based on the language of the Constitution and the requirements of the particular case before the court. The law has not remained static. The doctrine of exclusivity of fundamental rights as evolved in *Gopalan's case*¹⁵⁷ was thrown overboard by the same Supreme Court, about two decades later in *Bank Nationalization case*¹⁵⁸, and four years later in 1974, in *Hardhan Saha's case*¹⁵⁹, the supreme court judged the constitutionality of preventive detention with reference to article 19 also. Twenty eight years after the judgement in *Gopalan's case*¹⁶⁰, in 1978 the Supreme Court in *Maneka Gandhi's case*¹⁶¹, pronounced that the procedure contemplated by article 21 must be 'right, just and fair' and not arbitrary; it must pass the test of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would be no procedure at all and the requirement of article

N.R.Madhava Menon, Oxford University Press,2008,p.97.

M.N.Venkatachaliah,*Rule of Law and Judiciary ;Rule of Law in a Free Society*,(ed.)
N.R.Madhava Menon, Oxford University Press,2008,, p.123

¹⁵⁵*Supra* n.2.

¹⁵⁶*Supra* n.2.

¹⁵⁷*Id.*

¹⁵⁸*Supra* n. 75.

AIR 1974 SC 2154

¹⁶⁰*Supra* n.2.

¹⁶¹*Supra* n. 85.

21 would not be satisfied. The courts have, thus, been making judicial intervention in cases concerning violation of human rights as an ongoing judicial process. Decisions on such matters as the right to protection against solitary confinement as in *Sunil Batra v. Delhi Admn.*¹⁶², the right not be held in fetters as in *Charles Sobraj v. Supdt., Central jail*¹⁶³, the right against hand cutting as in *T.V.Vatheeswaran v. State of Tamil Nadu*¹⁶⁴, the right against custodial violence as in *Nilabati Behera v.State of Orissa*¹⁶⁵, the rights of the arrestee as in *D.K. Basu v. State of West Bengal*¹⁶⁶, or the right of the female employees not to be sexually harassed at the place of work as in the case of *Vishaka v. State of Rajasthan*¹⁶⁷ and *Apparel Export Promotion Council v. A. K. Chopra*¹⁶⁸ are just a few pointers in that direction.

In the case of *Nilabati Behera v.State*¹⁶⁹ the court crystallized the judicial right to compensation, which was further reiterated in *D. K. Basu v. State of W.B*¹⁷⁰. In this the court went to the extent of saying that since compensation was being directed by the courts to be paid by the State, which has been held vicariously liable for the illegal acts of its officials, the reservation to clause 9(5) of ICCPR by the Government of India had lost its relevance. In fact, the sentencing policy of the judiciary in torture related cases, against erring officials in India, has become very strict.

1.7 Separation of Powers and Power of Judicial Review in India

The necessity of keeping the State under the law led to the establishment of certain written Constitution as fundamental law. This law was above the ordinary law and the latter was invalid to the extent of its inconsistency with the former. The question arose, however, as to who was to determine when ordinary law was inconsistent with the Constitution. The principle of separation of powers or functions of the State into legislative, executive and judicial was invoked to find the answer. Straggly enough, this principle could lend equal support to two

¹⁶²(1978) 4 SCC 494
(1978) 4 SCC 104

¹⁶⁴(1983) 2 SCC 68

¹⁶⁵(1993) 2 SCC 476
(1997)1 SCC 416
(1997) 6 SCC 241
(1999)1 SC 61

¹⁶⁹*Supra* n.165.

¹⁷⁰*Supra* n.166.

conflicting answers. On the one hand, it was urged that the separation of powers or functions required that the Legislature, the Executive and the Judiciary should each keep within its own sphere.

Montesquieu emphasized the need to keep judicial and executive powers in different hands and also spoke of the mutual balancing and restraining of the legislative and executive powers. What is the theory behind this balance of powers? Geoffrey Marshall attempts a tentative answer as follow:

(P)erhaps through a running together of the checking and balancing theories of mixed government with the separation of persons doctrine, neither he (Montesquieu) nor many others down to the present day seem clear as to whether 'checking' of one branch by another is a participation in the other's function and a partial violation of the separation of powers doctrine, or whether it is actually an exemplification of the doctrine, which carries out the very purpose of the separating and balancing off against each other of the three branches of Government¹⁷¹.

The apprehension underlying this theory is that the recognition of the judicial power as a check on the legislative power would be contrary to the democratic theory by which the people vest the sovereign powers in the Legislature. One answer to this theory is that people may choose to separate the constituent legislative powers from the ordinary legislative powers by enacting written Constitutions which would stand as the fundamental law above ordinary legislation. A more satisfying answer is that the exercise of the power of judicial review of legislation should not be regarded as a legislative power.

1.8 Independence of Judiciary: An Essential Feature of Constitution of India

The framers of the Constitution were conscious of this fundamental element for free and peaceful life of the nation as well as development of the nation towards achieving egalitarian goal. The independence of the judiciary was in the mind of the freedom fighters by way of reaction to colonial experience. The Constitution of India contains elaborate provisions regarding appointment, removal and

¹⁷¹Geoffery Marshall, *Constitutional Theory*, 1971, Clarendon Press, Oxford, p.102.

service security of the judges.

Article 124(4) which is applicable to High Court Judges vide Article 217 (1)(b) which reads: “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 the 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 misbehavior or incapacity”.

The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual reviews just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eye of law.

As observed by Supreme Court in *Minerva Mills Ltd. v. Union of India*¹⁷³, the Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and the validity of legislation. Judicial review aims to protect citizens form abuse or misuse of power by any branch of the State.

It is for this reason that an independent Judiciary has to perform its function which may often consist in limiting acts of the Legislature no less than the acts of the Executive.

Dr. Ambedkar’s constitutionalism was based on the recognition of the independence of judiciary and its power of judicial review. He did not want to create an Imperium in Imperio. But at the same time he preferred to give the judiciary ample independence so that it could act without fear or favour of the executive¹⁷⁴.

Moreover the role of the judiciary is becoming more and more important in the modern world. It means that independence of the judiciary is very vital for the maintenance and upkeep of the confidence reposed upon it in respect of judicial

Chief Constable v. Evans, (1982) 3 All ER. 29

¹⁷³(1980) 3 SCC 625 (677-78)

¹⁷⁴Kanta Kataria, *Ambedkar's Role in the Making of the Indian Constitution*, Madhya Pradesh Journal of Social Sciences, Vol.16, No.2, 2011.

review, judicial independence would then have to be recognized as an ingredient of the basic structure.

The question of importance of independence of the judiciary was raised before the Supreme Court on many occasions. In *Shri Kumar Padma Prasad v. Union of India*¹⁷⁵ the question raised was whether the person who held only non-judicial posts could be appointed District Judge or Judge of High Court. The Court observed that though Judges were used to be appointed from among the members of executive offices, after independence Judges were not being appointed from such offices. One of the Directive Principles also mandates the State to separate judiciary from the executive¹⁷⁶, which means that judiciary shall be free from executive control. Such a separation of the judiciary from the executive was necessary for the maintenance of judicial independence. Hence, Justice Kuldip Singh speaking for the Court held that independence of the judiciary was one of the features of the basic structure of the Constitution of India.

Addition of judicial independence as a feature of the basic structure is certainly a creative stride of the Court. It was very much necessary also. The necessary implication and clear consequence of the decision is that Parliament cannot amend the Constitution in a manner damaging the independence of judiciary.

Independence of the judiciary received further consideration by a constitutional bench of the Court consisting of nine Judges in *S.C. Advocates-on-Record v. Union of India*¹⁷⁷. In that case the Court had to deal with important questions relating to appointment of judges to the Supreme Court, appointment and transfer of judges to High Courts and the importance and weight the opinion of the Chief Justice of India would carry in these matters. While construing the related provisions in the Constitution, the Court observed that those questions were to be dealt with in the light of the concept of independence of the judiciary. The court unanimously held that the concept of independence of the judiciary. The court unanimously held that the concept of independence of judiciary was very important from the point of view of the Constitution. The Judges quoted the views of legal luminaries, judicial decisions and other authorities with approval

¹⁷⁵(1992)2SCC428

¹⁷⁶The Constitution of India, Article 50.

¹⁷⁷(1993)4SCC441

to hold that independence of the judiciary was a cardinal virtue. It was observed that independence of judiciary was very much necessary for the maintenance of rule of law and democracy. Considering its importance in the modern society, the Court unanimously held that the concept of independence of the judiciary formed an essential and basic feature of the Constitution of India. The Court construed the constitutional provisions and rendered the decision in tune with the requirements of the concept of independence of the judiciary.

The review power conferred under this head deals with the legislative competence and constitutionality of different laws i.e., whether it violates Constitutional or legislative limitations including derogation of fundamental rights.

1.9 Judicial Activism: Expansion of Power of Judicial Review in India

The concept of Judicial Activism originated in the U.S. It is the process in which Judiciary uses the concept of judicial review to tell unconstitutionality of the legislature and executive orders. Inactiveness of legislature and the Executive makes or compels the Judiciary to be more active. We have followed British legal System besides adopting a parliamentary form of Government. We adopted the concept of United States but there is a difference. In U.S. judicial review is in due course of law but in India it is a procedure established by law.

The Supreme Court of India began as a positivist court and strictly followed the traditions of the British Courts. In *Gopalan's case*¹⁷⁸ the Court declined an invitation made on behalf of the petitioner, Mr. Gopalan, a communist leader who had been detained under a law of preventive detention, to read the provisions of the Constitution liberally so as to give effect to the spirit of the Constitution rather than remaining in the confines of its text. The court gave a narrow construction to words such as “personal liberty” and “procedure established by legitimated law” contained in Article 21 of the Constitution. The economy, the Court observed judicial restraint and legitimated the actions of the government. These were the days of the welfare state and the court was supposed to Latinize the expanded sphere of the state and its powers. The court and Parliament clashed only on the scope of the right to property. Parliament

¹⁷⁸*Supra* n.2.

wanted to usher in a radical programme of changes in property relations and the Court had adopted the policy of interpreting the right to property relations and the Court had adopted the policy of interpreting the right to property expansively so as to impede such programme. Since the constitution allowed Parliament to amend the Constitution, a decision of the Court could be circumvented. Since the Constitution could be amended by a majority vote of two-thirds of the members present and voting and an absolute majority of the total membership in each house of Parliament, and the ruling party could easily muster such majority, the Court's decisions could not obstruct the property rights reforms. The struggle between the two wings continued and, in fact it was during this time that the Supreme Court, while interpreting Article 368 of the constitution empowering parliament to amend the constitution, made its landmark judgment in *Keshwananda Bhait's case*¹⁷⁹ holding that the basic structure of the constitution was not amendable, not even by a legislation of the Parliament. Even this judgment was described by then prime minister as road blocks to reforms. During the last two decades, judicial activism has played a major role in protecting the rights and freedoms of individuals, as guaranteed under the Constitution. After the landmark decision in the *Menaka Gandhi's case*¹⁸⁰, courts have assumed an activist posture, the judiciary interpreted the constitutional provision in its wider possible meaning to protect basic civil liberties and fundamental rights. During this period, our judiciary developed the concept of social action litigation and public interest litigation by discarding the traditional and self-imposed limitations on its own jurisdiction.

The activist Court delivered many verdicts expanding the scope of right to life under Article 21. The court held the right to speedy trial as an essential part of the right to life and liberty under Article 21¹⁸¹. The inhuman conditions that prevailed in protective homes, trafficking in women, non-payment of wages to bonded labourers, and the inhuman conditions of prisoners in jail were held to be gross violations of Article 21¹⁸² and directions were issued for the protection and

¹⁷⁹*Supra* n.3.

¹⁸⁰*Supra* n.85.

¹⁸¹*Hussainara Khatoon (I-VI) v. Home Secretary, State of Bihar, Patna*, (1980) 1 SCC 81

¹⁸²*Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308

preservation of human rights of female prisoners¹⁸³. The Court further expanded the scope of Article 21 by including right to protection against solitary confinement¹⁸⁴, the right against custodial violence¹⁸⁵, the rights of the arrested¹⁸⁶, the right of the female employees against sexual harassment in working place¹⁸⁷, etc. within it. The court also ensured a pollution free environment and established the link between environment development and human rights¹⁸⁸. The court even developed a new environmental health jurisprudence through its judicial creativity and later incorporated the theory of sustainable development ensuring green belts and open spaces for maintaining ecological balance¹⁸⁹. The court even granted compensation under Article 32 for the deprivation of the fundamental right to life and liberty caused by the unlawful acts of the instrumentalities of the State. Thus, as corrective machinery, the court achieved many beneficial results, due to the then identified Constitutional obligations viz. the protection of human rights.

1.10 Public Interest Litigation and Judicial Review

With the interpretation given by it in *Menaka Gandhi case*¹⁹⁰ the Supreme Court brought the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human-rights-jurisprudence. This was made possible in India, because of the procedural innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to the phenomenon of Social Action Litigation/Public Interest Litigation. During the Eighties and the first half of the Nineties, the Court have broken there shackle's and moved much ahead from being a mere legal institution, its decisions have tremendous social, political and economic ramifications. Time and again, it has sought to interpret constitutional provisions and the objectives sought to be achieved by it and directed the executive to comply with its orders.

¹⁸³*Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96

¹⁸⁴*Sunil Batra v. Delhi Administration*, Supra n.162.

¹⁸⁵*Nilabati Behera v. State of Orissa*, Supra n.165.

¹⁸⁶*D. K. Basu v. State of West Bengal*, Supra n.166.

¹⁸⁷*Vishaka v. State of Rajasthan*, Supra n.167; *Appareal Export Promotion Council v. A. K. Chopra*, Supra n.168.

¹⁸⁸*Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598

¹⁸⁹*M. C. Mehta v. Union of India*, (1996) 4 SCC 351

¹⁹⁰Supra n.85.

In view of the operations by the courts on a wider canvass of judicial review, a potent weapon was forged by the Supreme Court by way of public interest litigation (PIL) also known as social action litigation. The Supreme Court has ruled that where judicial redress is sought in respect of a legal injury or a legal wrong suffered by persons, who by reason of their poverty or disability are unable to approach the court for enforcement of their fundamental rights, any member of the public, acting bonafide, can maintain an action for judicial redress. Thus, the under privileged and the downtrodden have secured access to court through the agency of a public-spirited person or organisation. This weapon was effectively used by the Supreme Court and the high courts, being Constitutional courts, to a large extent from 1980 onwards.

The decision of the Supreme Court in *Sunil Batra v. Delhi Administration*¹⁹¹; *Municipal Council, Ratlam v. Vardhichand*¹⁹² ; *Akhil Baratiya Soshit Karamchhari Sangh, Railway v. Union of India*¹⁹³ and umpteen number of decisions thereafter by the Supreme court and more particularly the decision of the supreme court in *S.P.Gupta's case*¹⁹⁴ represent watersheds in the development of PIL and liberalization of the concept of locus standi to make access to the courts easy. The principle underlying order 1 rule 8, Code of Civil Procedure has been applied in public interest litigation to entertain class action and at the same time to check misuse of PIL. The appointment of amicus curiae in these matters ensures objectivity in the proceedings. Judicial creativity of this kind has enabled realization of the promise of socio-economic justice made in the preamble to the Constitution of India.

The Supreme Court of India had developed new strategy of Public Interest Litigation (PIL) or Social Action Litigation (SAL) for upholding and enforcing the rights of the unprivileged. It has devised new methods, forged new tools and innovated new strategies. The credit of this new development goes primarily to the activist judges like P.N. Bhagwati, Krishna Iyre, D.A. Desia, Chinnappa Reddy J.J., etc. their attitude was influenced by radicalism .

The Supreme Court has played this vital role of social justice and human rights

¹⁹¹ *Supra* n.162.

¹⁹² AIR 1980 SC 1622
AIR 1981 SC 298
AIR 1982 SC 149

while exercising its writ-jurisdiction. It is well-settled principle of the Commonwealth law that an aggrieved person only may approach to court. This rule is called rule of locus standi. Thus, ordinarily, only the affected person should approach the courts. However, this rule limits access of justice to several underprivileged sections of society as they may not be able to approach the court even if their rights are abridged. This may be because of ignorance or their weak financial position. .

The expanded concept of locus standi in connection with PIL, by judicial interpretation from time to time, has expanded the jurisdictional limits of the courts exercising judicial review. This expanded role has been given the title of 'judicial activism' by those who are critical of this expanded role of the judiciary. The main thrust of the criticism is that the judiciary by its directives to the administration is usurping the functions of the legislatures and of the executive and is running the country and, according to some, ruining it. What these critics of the judiciary overlook is that it is the tardiness of legislatures and the indifference of the executive to address itself to the complaints of the citizens about violations of their human rights which provides the necessity for judicial intervention. In cases where the executive refuses to carry out the legislative will or ignores or thwarts it, it is surely legitimate for courts to step in and ensure compliance with the legislative mandate. When the court is apprised of and is satisfied about

1.11 Judicial Review as the Part of Basic Structure of the Constitution in India

Judicial review is a part of the basic structure of the Indian Constitution. The Supreme Court propounded this in the *Fundamental Rights case*¹⁹⁵ after sowing its seeds in *Sajjan Singh's case*¹⁹⁶ and *Golaknath's case*¹⁹⁷. While Justice Hidayatullah and Justice Mudholkar expressed their anxiety on 'fundamental rights being the play things of majority' and the 'erosion of basic features' of the Constitution in *Sajjan Singh's case*¹⁹⁸, the majority in *Golaknath's case*¹⁹⁹ held

¹⁹⁵ *Kesavananda Bharati v. The State of Kerala and Others*, AIR 1973 SC 1461

¹⁹⁶ *Supra* n. 69.

¹⁹⁷ *Supra* n.70.

¹⁹⁸ *Ibid*, n.196.

¹⁹⁹ *Ibid*, n. 197.

that the term law under Article 13 of the Constitution includes Constitutional Amendments and thereby asserted the power of judicial review over Amendments to the Constitution. While this position was reversed in *Kesvandra Bharati's case*²⁰⁰, it put a limitation on the amending power and held that the amending process should not damage and destroy the 'basic structure of the Constitution.

Then, it was further observed in *Minerva Mill's case*²⁰¹ that the power of judicial review is an integral part as well as a part of the basic structure of the Constitution for the maintenance of democracy and the rule of law. The power of review as a basic structure, which was further upheld in many cases, could never be excluded, as it envisages checks and balances upon the actions of the Legislature and the Executive by confining these powers within the four walls of the Constitution. The Legislature and the Executive is omnipotent and may exercise their powers arbitrarily. The courts, by exercising the power of judicial review, controlled and prevented the evils committed against our Constitutional democracy and ensured the observance of the rule of law. It also acted as the 'balance wheel of federalism' by invoking the power of review over the States and the Union, and States inter se, thereby harmonizing the federal system.

Even though law is a changing phenomenon which changes with the changing aspirations of time and society, several age old laws are unable to work in par with the emerging modern trends. Here Judiciary plays an important role by 'filling the lacunae' and adapting the old laws to the new society. In a democracy, the power is held by the majority and these vast powers can be misused to suppress the minority. By virtue of the power of judicial review, the Judiciary protects the minority over majority against the capricious, tyrannical and whimsical power of the State. In the ultimate analysis, the aged criticisms against the process of review like usurpation of powers by the Judiciary, overthrowing of separation of powers, etc. need not be answered since judicial review is the only potent weapon to check the omnipotent Legislature and the Executive from arbitrariness.

Ibid n.195.

²⁰¹*Supra* n.6.

The decisions in *Minerva Mills*²⁰², *Sampath Kumar*²⁰³ and *Samba Murthi*²⁰⁴ share some common features. In all of them judicial review was recognized as part and parcel of basic structure not in an independent capacity but as one necessary for guaranteeing the continuance of the aspects of the Constitution which the Court recognized as ingredients of the basic structure was out of the fear of the Court that its absence might lead to termination of democracy and decadence of rule of law. That perhaps is the reason for the Court to hold in all of these cases that though judicial review cannot be abrogated, it could be partially excluded and substituted by an equally efficacious and alternative remedy. The idea that even if a feature is an ingredient of basic structure, it could have a substitute was raised for the first time by Justice Bhagwati in the *Minerva Mills Case*²⁰⁵. It is doubtful whether feasibility of such a proposition was examined by the Court in a proper perspective in *Sampath Kumar*²⁰⁶ and *Sambamurthy*²⁰⁷. If a feature is identified as an ingredient of the basic structure, it implies that it is so important for the maintenance of the identity of the Constitution. In such a context it is doubtful whether it can be substituted by any other scheme at all. For, substitution of such a feature by any other concept may help destroy some of the characteristics of the basic structure and amounts to watering down its contents. Further, it would also imply that the feature is not so essential one. Moreover, judicial review is imbued with certain features that cannot exist in its absence. The training of a judicial mind and the independence extended to the judicial officers are some of the prerequisites for effective judicial review, which are absent in any mechanism other than judicial review however efficient it be. Therefore, the holding of the Court that though judicial review constitutes a part of basic structure, it can be substituted by equally efficient methods is certainly open to objection. It is in such a context that the decision of *L. Chandra Kumar v. Union of India*²⁰⁸ becomes highly relevant. This case was decided by a constitutional bench consisting of nine Judges²⁰⁹. The court reiterated its stand in *Minerva Mills*²¹⁰ that

Id.

²⁰³*Supra* n.5.

AIR 1987 SC 663

²⁰⁵*Supra* n.6.

²⁰⁶*Supra* n.5.

²⁰⁷*Supra* n.204.

²⁰⁸A.I.R. 1997 S.C. 1125

²⁰⁹Justice A.M. Ahmadi, C.J. M.M. Punchhi, K. Ramaswamy, S.P. Barucha, S. Saghir Ahmed, K. Venkataswamy and K.T. Thomas JJ

judicial review was a feature of the basic structure of the Constitutions. The Court further held that the jurisdiction of the Supreme Court under Article 226 and 227 also formed part of the basic structure of the Constitution and therefore they cannot be ousted or excluded at all. It was justified on the ground that the jurisdiction of High Court under Articles 226 and 227 was as important as that of the Supreme Court under Article 32²¹¹.

The court highlighted the importance of judicial review on the basis of the independence enjoyed by the judiciary.²¹² In reaching the conclusion that Article 32 formed part of the basic structure, the Court might have been influenced by the observation made by Dr. Ambedkar at the time of enacting the provision in the Constituent Assembly that it was the most important one in our Constitution²¹³. On a variety of grounds, the Court considered the powers vested in High Courts under Articles 226 and 227 as very important which therefore could not be excluded²¹⁴. The court observed that administration of justice by Tribunals leaves much to be desired²¹⁵ and the remedy under Article 136 was too costly and would lead to crowding of cases in the Supreme Court²¹⁶. Therefore, the Court held that decisions of Tribunals, were reviewable by Division Bench of High Courts. The Court further extended the scope of judicial review to include specifically jurisdiction of judicial superintendence by High Courts over the decisions of all courts and tribunals within their respective jurisdictions as envisaged by the Constitution of India.

In short, the court deviated from its earlier stand in *Minerva Mills*²¹⁷, *Sampath Kumar*²¹⁸ and *Samba Murthi*²¹⁹ that judicial review could be substituted by equally

²¹⁰*Supra* n. 6.

²¹¹*Supra* n.208, the court observed, “If the power under Article 32 of the Constitution, which has been described as the “heart” and “soul” of the Constitution, can be additionally conferred upon “any other Court,” there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution.”

²¹²*Id.*, at p. 1149.

²¹³C.A.D., Vol. VII, p. 953. He said, “If I was asked to name any particular Article in this Constitution as the most important – and Article without which the Constitution would be a nullity – I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realized its importance.”

²¹⁴*Supra*, n. 208 at p. 1150.

²¹⁵*Id.* at p. 1153.

²¹⁶*Id.*

²¹⁷*Supra* n.6.

²¹⁸*Supra* n.5.

²¹⁹*Supra* n.204.

effective methods and clarified that judicial review as envisaged by Article 32, 226 and 227 cannot in any way be substituted. The court further held that the jurisdiction of Tribunals was only supplemental to and not in substitution of the review power of High Courts. Clearly, it is only after the decision of *L. Chandra Kumar*²²⁰ that the concept of judicial review got the full-fledged status as a feature of basic structure. The change in the view of the Court in Chandra Kumar reflects the correct perception of the Court that judicial review is so important in our legal system that it is a basic feature which cannot be substituted. While in the earlier decisions the court had given importance to judicial review only as an accessory to some other goals to be achieved by the Constitution, in Chandra Kumar, the Court has raised judicial review from its status of an accessory element to the level of a salient feature of the basic structure of the Constitution. It is evident from the decision in Chandra Kumar that the Court considered the status of the higher judiciary as different from that of any other authority.

Moreover the role of the judiciary is becoming more and more important in the modern world. It means that independence of the judiciary is very vital for the maintenance and upkeep of the confidence reposed upon it in respect of judicial review, judicial independence would then have to be recognized as an ingredient of the basic structure.

1.12 Amending Power of the Legislature and Power of Judicial Review

Though India follows the Parliamentary form of democracy, it is the constitution which is supreme. Therefore, not just legislation, but even a constitutional amendment which seeks to change the “basic structure” of the constitution can be called in question for review before the courts²²¹. The Constitution ensures that an administrative action is subject to judicial review by providing for a comprehensive scheme of judicial control over the administration under Article 32, 136, 226, and 227.

After adhering to the conventional wisdom for seventeen long years, the Supreme Court asserted the power of judicial review over the Amendments to the

²²⁰ *Supra* n.208.

²²¹ *Kesavananda Bharati v. The State of Kerala and Others*, *Supra* n.3.

constitution in *Golaknath's case*²²². Later in *Kesavananda Bharati's case*²²³ the Court held that fundamental rights are amendable, but the process must not affect the basic structure of the Constitution. The Supreme Court even though changed its earlier position and accepted the constituent power of the Parliament, cautioned that the “constituent power was only within the framework of the Constitution.” It is presumed that the radical change in the approach of the Court in 1967 in *Golaknath's case*²²⁴ and subsequently in *Kesavananda Bharati's*²²⁵ case points out to the ‘argument of fear,’ the fear of overrunning the constitution by a Legislature comprised of the new breed of politicians the practical, professional politicians, playing the dynamic game of power politics²²⁶. The unpredictability of Indian politics after the death of Nehru and the absence of other eminent leaders of the national movement promoted the Court to protect Part III of the Constitution from the immature manipulation of the Legislature comprised of the new breed. Thus, the court had won the game by not giving the unbridled power of amendment to the Legislature. The Court checked the rule of two third majorities with the doctrine of basic structure. The ‘argument of fear’ later changed into ‘save the court motto’ in *Indira Nehru Gandhi's case*²²⁷ and the Court tried to shield the ‘save the Court’ notion by successfully projecting the image that ‘the Court is deciding the matter in accordance with the settled law.’ If the argument of fear resulted in the amenability of Part III of the Constitution, the image of ‘in accordance with the law’ resulted in satisfying both the ruling as well as the opposition parties. Whatever may be the cases and causes, critics hold that the Court feared the power packet political tycoons and their totalitarian regime in the governmental process. It is argued that, the instance of this fear can be traced from its inception itself, due to which the Court kept silent till 1967, and after that though the court had revealed its courage with some pronouncements, which gave a silver line of hope, it again circumvented its decision due to fear of being thrown out. It is criticized that while the fear in the beginning was interpreted as ‘conservatism’ the latter one was interpreted as

Supra n.70.

²²³*Supra* n.3.

Supra n.70.

Supra n.3.

Upendra Baxi, *Courage, Craft Contentio: The Indian Supreme Court in the Eighties*, N. M. Tripathi Ltd., Bombay, (1985) p. 68.

²²⁷*Supra* n.4.

‘restraint’ and during the Emergency regime, the self-inflicted wounds of the Court gave rise to too much criticism²²⁸.

1.13 Ninth Schedule of the Constitution and Judicial Review

Asserting its right to judge the validity of any law, the Supreme Court has ruled that Acts placed in the Ninth Schedule of the Constitution by the legislature, to make them immune from challenge for violation of fundamental rights, were open to judicial scrutiny²²⁹. A nine judge Constitution Bench headed by Chief Justice V.K. Sabharwal delivered the verdict on Jan 11, 2007. It said²³⁰:

“Justification for conferring protection not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall not be a matter of constitutional adjudication by examining the nature and extent of the infraction of a Fundamental Right...”

The court said the authority to enact a law and to decide the legality of the limitations cannot be vested in one organ. It observed²³¹:

“The validity to the limitation on the rights in Part III (Fundamental Rights as given in the Constitution) can only be examined by another independent organ, namely, the Judiciary.”

The court, however, upheld the validity of Article 31B of the Constitution which empowers Parliament to place laws in the Ninth Schedule. But it said that even though an Act is put in the Ninth Schedule, its provisions would be open to attack on the ground that they destroy or damage the basic structure, if the Fundamental Rights are taken away or abrogated pertaining to the basic structure²³².

Upholding Parliament’s power under Article 368 to amend the Constitution and place laws in the Ninth Schedule, the Court said it was a limited power, which was subject to judicial review. Deciding a reference made by a five member constitution bench on the justifiability of laws placed in the Ninth Schedule after

²²⁸ Roshan D. Alexander, *We, The People: Experiments With Judicial Review*, Nuals Law Journal, Vol.2, 2008, p.112.

²²⁹ *Supra* n.98.

²³⁰ *Id.*
Id.

²³² *Id.*

April 24, 1973 (when the Supreme Court propounded the ‘basic structure doctrine’ in the *Keshavananda Bharati*²³³, will be open to challenge. Laying down the tests to be adopted to examine the validity of laws placed in the Ninth Schedule, the Court said it would have to be seen if the law in question violated any fundamental right²³⁴.

Thus, the Supreme Court has upheld Parliament’s power to place a law in the Schedule. But it said such laws are open to judicial scrutiny and do not enjoy blanket protection. The process of judicial review, thus, is a neutralizing and nationalizing influence over various interest groups and classes in the community to keep them sufficiently balanced²³⁵.

1.14 Development and Expansion of Scope of Judicial Review in India

In the present era of Globalization where international regulatory regimes such as WTO and GATT are working parallel to the constitutional and other domestic regimes. It becomes necessary to develop constitutional interpretations that can make the private entities that are largely international in character performing public functions without popular mandate that comes through elections liable under the domestic laws of the nation. This further included the application of present constitutional principles to the private entities that were developed with the State entities in view²³⁶.

In *Amar Alcohli Ltd. v. SICOM Ltd.*²³⁷ the issue was whether respondent No. 1 is a State Financial Corporation within the meaning of and governed by State Financial Corporation Act, 1951. The Supreme Court dismissed the appeal upholding the decision of the High Court that it was a financial corporation and it had been notified as such by the Central Government in exercise of its powers under Section 46 of the Act. It was further held that reduction of shareholdings below 50% of the Govt. of Maharashtra would not make any difference to the status of the respondent being financial corporation. Supreme Court observed that when it is not in dispute that it has been established by State and Central Government had extended the provisions of Section 29 of the Act to the

²³³*Supra*, n.3.

²³⁴*Supra* n.98.

²³⁵*Id.*

²³⁶Priya Bansal, *Changing Dimensions of Judicial Review*, AIR 2006(Jour.) 161.

²³⁷AIR 2006 SC 286

respondent then, it would be covered by the expression “an institution established by a State Government” offering range of services including the object of financing industrial concerns in the State. It would thus be financial corporation covered under the Act.

Thus, it becomes apparent that in the era of outsourcing and privatization, the number of functionaries against whom judicial review is applicable is expanding.

In addition to expanding the subjects of judicial review, the scope of judicial review has also been greatly expanded. This can either be done by giving a wider meaning to illegality, irrationality or procedural irregularities or through the utilization of new doctrines such as the doctrine of judicial review on fact and the doctrine of proportionality.

In recent times the scope of judicial review has been expanded in several ways. One very interesting aspect has been with regard to the development of the concept of judicial review on fact. This concept seeks to enlarge the scope of judicial review on counts of irrationality.

The concept of judicial review on fact was viewed with a great deal of suspicion. Although the Courts have intervened in relation to factual error whenever they felt this to be necessary, they did so without too close an inquiry as to whether such intervention was justified in the light of the existing case law. In fact, issues have always been raised with regard to the scope of this head of judicial review, rather than with its existence. Thus, there is very little in terms of a systematic and principled judicial guidance as to when facts ought to be susceptible judicial scrutiny.

This was the prevalent situation until very recently when the English and Indian Courts and some jurists have taken the issue head on. Carnwath, L. J. in *E. v. Secretary of State for the Home Department*²³⁸ elucidated upon the existing literature on the subject and opined on what should be the position of the Courts with regard to this elusive concept. P. P. Craig in a fascinating article titled “Judicial Review, Appeal and Factual Error”²³⁹, also gave some shape to this developing concept. The Indian Supreme court acknowledged both these

(2004) 2 WLR 1351
2004 Public Law, pg. 788.

opinions in very recent judgments.

Prior to these developments, there were two views on the scope of judicial review on facts. The first was a narrower view, which claimed that judicial review for error of fact only existed in limited circumstances, and there was no general right to challenge the decision of a public body on fact alone. The second was a much broader view, which cited several authorities in a variety of circumstances to explain the Courts jurisdiction to review error of fact.

This view was approved in *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai*²⁴⁰ wherein it was opined that even a judicial review on facts might be available in certain situations.

It can be said that this concept is yet to gain a universal acceptance and attain a jurisprudential position. However, while courts and jurists in the United Kingdom have directly discussed the issue, it has been only hinted at in India. It has become a distinct possibility for the expansion of the scope of judicial review in India.

1.15 A Sum Up

Judicial review is the evolution of the mature human thought. Law must be in conformity with the constitution. Judicial review is the cornerstone of constitutionalism which implies limited Government. It is the duty of the judiciary to keep different organs of the state within the limits power conferred upon them by the constitution. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked.

The Constitution of India invests our independent judiciary, especially the Apex Court with extensive jurisdiction over the acts of the legislature and the executive. Judicial review is part of the basic structure and cannot be altered even by amending the Constitution. It is the judiciary which ensures the

(2005) 7 SCC 627

effectiveness of Judicial Review. The independence and integrity of our judiciary is therefore of the highest importance not only to the judges but also to people at large who seek judicial redress against perceived legal injury or executive excess.

In India the power to enforce the fundamental rights was conferred on both the Supreme Court and the High Courts. The judiciary can test not only the validity of laws and executive actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders, supported with the power to punish for contempt, can reach everyone throughout the territory of the country. Since its inception, the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public policies and establishment of rule of law and constitutionalism.

In recent years the judiciary has widened its field of operation by declaring judicial review as a basic feature of the Constitution. Supreme Court has not merely interpreted the language of the Constitution but also pronounced on issues which involve matters of policy.

The power of judicial review has in itself the concept of separation of powers an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf by the courts.

The division of powers among the Centre, state and local governments on the one hand, and the separation of powers between the Legislature, Executive and Judiciary on the other, is a constitutional scheme to ensure the principle of checks and balances under Rule of Law. In India, as we have a written Constitution, the Judiciary exercising powers of judicial review performs a significant role in the maintenance of rule of law by resolving disputes between the citizen and the state.

The Supreme Court in India, in order to make access to justice equal for all classes of citizens a reality is endeavouring to dismantle the barriers of poverty that exist between poor man and the justice/judicial system. And this task is

accomplished by liberalizing the scope of locus standi. Supreme Court, during the last two and half decades has been responding to this new responsibility in an admirable manner. It has been guarding political liberties as well as socio-economic and developing Public Interest Litigation (PIL) wherein the courts are now allowing even the third parties to vindicate the socio-economic rights of the unprivileged and weaker sections of the society.

Though one does not deny that power to review is very important, at the same time one cannot also give an absolute power to review and by recognizing judicial review as a part of basic feature of the constitution Courts in India have given a different meaning to the theory of Checks and Balances this also meant that it has buried the concept of separation of powers, where the judiciary will give itself an unfettered jurisdiction to review anything that is done by the legislature. Judicial review is one of the basic features of the Constitution of India and hence no Legislative Assembly or even the Parliament can be vested with an unchallengeable power to deprive an individual of his life or liberty.

CHAPTER-2

COMPARATIVE CONSTITUTIONAL STUDY OF JUDICIAL REVIEW BETWEEN INDIA, U.S.A AND U.K.

2.1 An Overview

Since the world's first modern, written national constitution was drafted for the United States of America in 1787, an explosion of new technology and science has almost obscured the equally astounding explosion of constitutions and constitutionalism throughout the world. In fact, in many countries more people are directly affected by the radical change in their relationship with those who govern them than they are by the trappings of technology and science so pervasive in post-industrial societies.

The countries that have adopted modern constitutions can exercise their fundamental human rights or enforce the popular sovereignty so grandiosely declared in constitutional documents and politicians' speeches. But what is clearly evident is the evolving desire in nearly all these nations to strive for a system of constitutional government that meets these expectations. In 1787, except in the United States, Britain, and perhaps a few other countries, the mere expectation of popular sovereignty, individual rights, or checks and balances on the absolute power of rulers was an absurd pipe dream, as foolish then as planning a trip to the moon or watching a live sports even being played halfway around the world.

Most written constitutions recite a list of fundamental rights of the country's citizens or inhabitants, analogous to the U.S. bill of rights, and many also include a list of duties of their citizens. Key fundamental rights include freedom of the press, religion, association, assembly, and petition of grievances against government authorities, as well as protections for private property and persons accused of crimes. But the fact that a right is not expressly provided for in a constitutional document does not always mean that it is not recognized in other law or by judicial rulings or tradition¹.

Robert L. Maddex, *Constitutions of the World*, CQ Press, 2001, 2nd Edition, p.xi.

Some constitutions expressly limit guaranteed fundamental rights. Regardless of whether such limitations are expressed, how well any guaranteed rights are implemented varies from country to country. In some extreme cases, violations of human rights in countries with express constitutional guarantees of fundamental rights are noted in the text².

Courts in many nations, to the extent that they choose to undertake the task, are often the ultimate guarantors of how well a constitution does its job. This is true also in many parliamentary systems that started out with no form of judicial or constitutional review.

In the United States the role of the federal courts in maintaining the integrity of the constitution was understood, if not expressly mentioned, by the framers. It took a specific declaration of the policy by the Supreme Court, however, to bring to life the principle of judicial review. Other countries like Germany have created a special court for the purpose of constitutional review; in France a constitutional council can implement constitutional review only when called on by other branches of the government.

In India Judicial Review based on three important dimensions, these are: Judicial Review of Constitutional Amendments, Judicial Review of Legislative Actions, and Judicial Review of Administrative Actions. To determine the unconstitutionality of legislative Acts is the fundamental objects of judicial review. It adjusts constitution to the new condition and needs of the time. To uphold the supremacy of constitutional law and to protect the fundamental rights of the citizens and also to maintain federal equilibrium between Centre and the States are the main concerns of objectives of judicial review in India.

It is the duty of the judiciary the constitution to keep different organs of the state within the limits power conferred upon them by the constitution. The legitimacy of judicial review is based in the Rule of Law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked

²*Ibid.*

Under the historic model of the parliamentary constitutional system, the supremacy of the legislature over the other branches of government theoretically precludes any form of judicial review of legislation for constitutionality, because the same parliament that can pass a law with a simple majority could also change the constitution just as easily. But in most countries with a parliamentary system of government, some form of judicial or constitutional review has developed. The parliamentary form of government in Norway, for example, did not impede the growth of judicial review, although the power is used sparingly.

2.2 Judicial Review in United States of America

2.2.1 Origin of Judicial Review in United States of America

The early decades of the nineteenth century saw the U.S. Supreme Court beginning to map out its own role in the tripartite system of government provided for in the new Constitution. In a series of important decisions, the Supreme Court under the leadership of Chief Justice John Marshall not only established the principle of judicial review of federal legislative action but also gave meaning to important structural Constitutional provisions, such as the Commerce Clause, that defined the respective spheres of competence of the states and the new federal government³.

In 1794, *United States vs. Tale Todd*⁴ was decided by the Supreme Court of the USA in which Act of Congress was declared unconstitutional. It is said that this was the first case in which the Supreme Court a statute of Congress unconstitutional. Again, in 1796, in *Hylton vs. United States*⁵, Chief Justice Chase observed that “It is necessary for me to determine whether the court constitutionally possesses the power to declare an Act of the Congress void on the ground of its being contrary to and in violation of the Constitution, but if the courts has such powers, I am free to declare it but in a clear case.

In 1803, the power of judicial review was again used with (*en banc*) judicial authority to declare the Act of the Congress unconstitutional in the historic landmark case of *Marbury vs. Madison*⁶.

³Arthur T. von Mehran ,Peter L. Murray, *Law in the United States*, Cambridge University Press, 2nd Edition, p.134.

⁴Wilfred J. Ritz, *United States V. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220 (1958), <http://scholarlycommons.law.wlu.edu/wlulr/vol15/iss2/5>, visited on 22/9/17.

⁵3 U.S. 171 (1796)

⁶5 U.S. (1 Cranch) 137 (1803)

While it is not expressly stated in the constitution, the framers were aware of the concept of judicial review, in which independent courts determine whether legislation or government action is unconstitutional and therefore void. In 1776 Thomas Paine declared that in America the law, rather than a monarch, should be king. The foundation for judicial review was laid even earlier by the English jurist Edward Coke when he described Magna Carta as “being the fountain of all the fundamental laws of the realm [emphasis added]”⁷. But it was not until the case of *Marbury v. Madison*⁸, at the beginning of the nineteenth century, that the U.S. Supreme Court declared invalid an act of the congress extending to the court authority that had not been granted by the constitution. Speaking for a unanimous court, Chief Justice John Marshall ruled: “Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions that law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.”

In the middle of the 1850s, a man named Dred Scott, held as a slave, brought a suit claiming that he had become a free man when his owner removed him into the northerly frontier territory, once part of French Louisiana. An act of the U.S. Congress had forever prohibited slavery in the territory. Scott’s case ultimately reached the Supreme Court of the United States. The Court held not only that because of his slave ancestry, he was not a “citizen” and consequently was under certain procedural disabilities, but also that the Act of Congress purporting to abolish slavery in the northerly territory was beyond the constitutional powers of the central government. *Dred Scott v. Sanford*⁹, was the second case in which the Supreme Court struck down federal legislation as incompatible with the Constitution.

The slavery issue proved to be too complex and difficult for judicial decisions to resolve. *Dred Scott’s case*¹⁰ became a rallying cry for antislavery sentiment in the North. The case played a role in the 1860 election of an antislavery President, Abraham Lincoln. Civil war between the northern and southern states broke out early in 1861.

Edward Coke, Institutes, 1628, 1:81

⁷*Supra*, n.6.

⁹60 U.S. 393 (1857)

¹⁰*Ibid*

The Civil War resulted in three amendments to the Constitution of the United States. The Thirteenth Amendment (1865) provides that slavery shall not exist within the United States or in any place subject to its jurisdiction. The Fourteenth Amendment (1868) is to the effect that all persons born or naturalized in the United States shall be citizens of the United States and of the state in which they reside, and that no state shall abridge the privileges or immunities of any citizen of the United States nor deprive any person of life, liberty, or property without due process of law, nor deny to any person equal protection of the laws. The Fifteenth Amendment (1870) provides that the right of citizens of the United States to vote shall not be denied or abridged by any state of the United States by reason of race, colour, or previous condition of servitude¹¹.

These three amendments furnish the basis on which the issue of the civil rights of racial minorities was later fought out in the courts¹². In 1954, a long struggle was won; in *Brown v. Board of Education*¹³, the Supreme Court held that “separate but equal” education did not satisfy the Fourteenth Amendment’s injunction that no person shall be denied the equal protection of the laws. The Brown decision established the bases on which integration of state school systems was to proceed.

From the above discussion, it can be said that, the opportunity of as well as the responsibility for setting out the terms on which courts will deal with major issues rest with the Supreme Court of the United States in its role as interpreter and guardian of the Constitution of the United States and the Court also ultimately resolves ambiguities in federal legislation and supervises the legislation’s application.

2.2.2 Position of Judicial Review under Constitutional scheme of United States of America

The United States is a federal state, with a national government and governments in each of the fifty constituent states. According to the fourteenth amendment, persons born in the country or naturalized are citizens of the United States and the state in which they reside. The national government handles defence and foreign policy exclusively, while the states have individual militia and police power. At the national level power is divided among three coequal branches: the executive branch headed by

¹¹*Supra*, n.1.

¹²*Ibid*.

¹³387 U.S. 483 (1954)

a president, who is head of state and government; the bicameral legislative branch with houses of basically coequal power; and the independent judiciary, which exercises judicial review.

The U.S. Constitution doesn't provide power of judicial review expressly but, the power of judicial review to declare the laws unconstitutional and to scrutinize the validity of law implicitly incorporated in the Article's III and IV. Article III of the U.S. Constitution provides "the judicial power of the United States which includes original, appellate jurisdiction and also matter arising under law and equity jurisdiction incorporates judicial power of Court". Article VI of the Constitution USA provides "all powers of government are exercisable only by on the authority of the organ established by the Constitution. Thus Article VI incorporates "Constitution of USA is the supreme law of the land".

The 5th Amendment (1791) of the U.S. Constitution says: "No person shall be deprived of life, liberty or property without due process of law". This momentous phrase has nearly for two centuries shaped the constitutional history of the U.S.A. and shown a remarkable capacity for adoption.¹⁴ De facto, the 'due process' clause in the American jurisprudence has proved a handmaid of the American judiciary and its fight against the powerful executive there and inter alia this is the clause which gave the power of judicial review to the American judges. This clause which has its origin in the famous Petition of Rights (1628) sub-mitted to the King (James I) in England, was worded as follows:-

*"Freemen be imprisoned or detained only by law of the land or by due process of law and not by the king's special command without any charge"*¹⁵.

Picked up from here, the American constitution makers, realizing the value of life and personal liberty, included it in the first instance, in the Bill of Rights as the Fifth Amendment. Since this amendment was only available against the federal government, it was later adopted mutatis mutandis as the 14th Amendment in 1868 so as to make it applicable against the States also. Built up against the background of a

¹⁴A.G. Noorani, *A Bulwark of Liberty*, The Span, June, 1983.
Ibid.

catena of compendious case law,¹⁶ and supported by genuinely activist judges like Cardozo, Brandeis, Holmes, “this varitable revolution in due process.....enabled the Supreme Court of the United States to test legislation – federal or State-on the touchstone of reasonableness and strike down unreasonable restrictions upon property rights and civil liberties”.¹⁷

Judicial review is not expressly provided in the U.S. Constitution, but it is the formulation by the Court. Supreme Court of U.S. has power to check the action of Congress and State Legislatures from delegating the essential legislative function to the executive. The principle “due process of law” creates a democratic balance in US by declaring the arbitrary and illegal laws.

Among the drafters of the Constitution of 1789, various views were held respecting the role and function of the Supreme Court provided for by Article III, Section I, of the Constitution. Presumably few, if any, foresaw the full range and importance of the role that the Court would ultimately play¹⁸.

The issue of judicial review is not directly implicated by federalism issues arising from state encroachment on federal authority. In such situations, an undisputed principle of intergovernmental hierarchy justifies the Court’s exercise of authority.

According to the **Bernard Schwartz** “*The decision on the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America*¹⁹”.

In *Minersville School Dt. v. Gobitis*²⁰, Felix Frankfurter J. observed, “Judicial Review as limitation on popular government and is a part of constitutional scheme of America.” In *Cooper v. Aaron*²¹, the federal basis of judicial review was emphasised by the Court that Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land.

Thus, it can be said that, while deciding whether a matter has in any measure been committed by the Constitution to another branch of Government, or whether the action of that branch exceeds whatever authority has been committed, is itself a

¹⁶*Barron vs. Baltimore*, (1833) 7 Pet 243; *Slaughter House Cases*, (1873) 16 Wal 36; *Smyth vs. Ames*, (1898) 169 US 466.

G.V. Subba Rao , *Revolution in due process*, AIR 1980 (J) 44.

Supra,n.I.

¹⁹Bernard Schwartz, *The Powers of Government*, 2nd Edition, The Macmillan Company, New York, 1963, p. 19.

²⁰(1940) 310 US 586 (600)

²¹358 U.S. 1 (1958)

delicate exercise of constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the Constitution.

2.2.3 Foundation of System of Judicial Review in U.S.A.: Marbury v. Madison Case

The Court's power of judicial review was settled less than fifteen years after the Constitution of U.S.A. came into force in a case in which no federalism issue arose. In the famous decision of *Marbury v. Madison*²², Chief Justice Marshall, writing for a unanimous Court, held that the Court had the power to strike down federal legislation that violated the Constitution.

Marbury arose out of the transfer of political power from the Adams administration to the Jefferson administration in the election of 1800. Following his election defeat, outgoing Federalist President John Adams made a number of appointments of federal officials. These were duly ratified by the lame-duck Federalist Congress. William Marbury was appointed a Justice of the Peace for the District of Columbia. Through oversight, not all of the commissions evidencing the appointments were delivered to the appointees before Adams left office. The incoming Republican Secretary of State, James Madison, found Marbury's signed commission undelivered on his desk. In hopes of thwarting the appointment, Madison declined to deliver the commission. Marbury brought suit in the U.S. Supreme Court, then under the leadership of newly appointed John Marshall, Adams' former Secretary of State²³.

The suit was brought pursuant to the Supreme Court's original or first-instance jurisdiction. The Judiciary Act of 1790, which established the structure of the federal judiciary, defined the original jurisdiction of the Supreme Court and authorized it to grant writs of mandamus²⁴.

On February 24, 1803, Marshall orally delivered the opinion of a unanimous Supreme Court to a packed audience. The genius of the opinion is the ordering of the reasoning and the remarkable twist at the end. Marshall first reasoned that Marbury had under the law a right to the commission. Withholding that commission was a violation of his legal right. The next question was whether the law provided a remedy for that violation of right. The answer was that the ancient writ of mandamus provides a

²²*Supra*, n.6.

²³*Ibid.*

²⁴*Ibid.*

remedy for violations of the kind experienced by Marbury. The stage was set for the constitutional confrontation. Once the Court had determined that Marbury was entitled to the commission and that mandamus was the correct remedy to secure it, it seemed inevitable that the Court would have to face the question of whether it had the power to order its coordinate branch of government. Marshall avoided this constitutional confrontation and simultaneously established a principle of even greater importance to the power of the Court by posing the third major issue: Could the writ of mandamus be issued from the Supreme Court? This issue had not been seriously contested by the parties. After all, the Congressional statute clearly gave the Supreme Court first-instance jurisdiction to issue writs of mandamus²⁵.

Marshall noted that the Act of Congress clearly authorized the Court to issue the writ of mandamus running against the Secretary of State. However, this was not the end of the inquiry. The Court had to determine whether that Act of Congress was in conformity with the Constitution. Here was the twist. For although Article III, Section 2, of the Constitution described the judicial power of the United States in general terms, it spelled out the “original” or first-instance jurisdiction of the Supreme Court rather specifically as extending to “all cases affecting ambassadors, other public ministers and consult, and those in which a state shall be a party.” In all other cases, the jurisdiction of Supreme Court was to be appellate. It was thus easy for the Court to determine that the Constitution did not authorize the jurisdiction conferred by the Act of Congress, and thus that the Act of Congress must be ignored as unconstitutional. Whereupon Marbury’s case was dismissed as brought in the wrong court and the constitutional confrontation was averted²⁶.

The genius of the Marshall opinion is that the principle of judicial review is that the courts have the last word in determining the constitutionality of legislation and that the Court is the branch of government to determine whether all legislation is in conformity with the Constitution.

The principle established in *Marbury v. Madison*²⁷ has become and remained fundamental to the American theory and practice of constitutionalism.

²⁵*Ibid.*
Ibid.
Supra n.6.

2.2.4 Scope of Judicial Review after Marbury’s Decision in the United States of America

After Marbury’s judgment the scope of judicial review was tremendously expanded in United States of America .The process of Judicial Review expanded the powers of the Federal .It increases the protection to civil liberties and personal freedom. Some of the relevant decisions are taken into consideration as follows:

*McCulloch v. Maryland*²⁸ is the historic case is related to the expansion of judicial review in the United States. In this case there was a dispute regarding the powers of Federal law and State law. The facts of the case that a bank was established by Federal law (by federal govt.) named Bank of America in the State of Maryland. Thereafter State of Maryland passed a tax legislation which imposes the tax on bank in relation to relative transaction. This was challenged on the ground that can State law imposes tax on bank which was established by Federal law? It was held by the Court that State cannot impose tax on Union authority; court creates immunity to the National Govt. According to this judgment US Supreme court formulate the doctrine of Immunity of Instrumentalities”

*Youngstown Sheet & Tube Co. v. Sawyer*²⁹, presented the issue of whether the President’s action was within his constitutional powers in the absence of authorizing legislation. The Supreme Court faced conflicting claims to authority by the executive and legislative branches. No express constitutional language granted seizure power to the President; can then authority be implied from the aggregate of the executive’s powers under the Constitution? Six of the nine justices held – in six separate opinions (there was also one dissenting opinion) – that, as Justice Black wrote in the Opinion for the Court, “The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.” The Supreme Court thus vindicated the exclusivity of the legislature’s authority against a conflicting claim by the executive branch of the federal government.

*United States v. Nixon*³⁰, President of the United States, involved a clash between the President’s claim of executive privilege for tape recordings and documents relating to his conversations with aides and advisors, on the one hand, and the need to use the aforesaid material as evidence in a criminal prosecution, on the other.

²⁸17 U.S. 316 (1819)

²⁹343 U. S. 579, 589 (1952)

³⁰418 U.S. 683, 704-705, 713 (1974)

Two arguments were made in support of the claims of presidential privilege. The first was that the principle of separation of powers precluded judicial review of the president's claim of privilege. It was further contended that, in the circumstances, the need for confidential communication between the president and his advisors outweighed the claim of the criminal prosecution. In an opinion written by Chief Justice Burger for a unanimous Court, both arguments were rejected³¹.

In the exercise of its constitutional responsibility, the Supreme Court went to hold that, the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. The Court has thus set aside what it considered improper legislative or executive claims respecting the constitutional division of functions among the legislative, executive, and judicial branches³².

In *Immigration & Naturalization Service v. Chadha*³³, the Supreme Court for the first time considered the constitutionality of such an arrangement; the legislative veto was held unconstitutional in principle. Exercising a discretionary authority contained in the Immigration and Nationality Act (INA), an Immigration and Naturalization Service official – pursuant to a delegation of authority from the Attorney General – suspended deportation of an alien. The INA provided that either House of Congress could set aside such discretionary suspensions of deportation. Acting pursuant to this authority, the House of Representatives disapproved the suspension. The alien obtained judicial review of the deportation order and the matter ultimately reached the Supreme Court.

The Court considered the House's veto a legislative act; as such, Article I, Section 7, of the Constitution deprived the action of effect because the measure had not been passed by a majority of both Houses and presented to the president for his signature or veto. A concurring opinion took the position that the House's veto was

³¹*Ibid.*

³²*Ibid.*

³³462 U.S. 919 (1983)

unconstitutional on a different ground because, in essence, an exercise of judicial power, it violated the principle of separation of powers³⁴.

Somewhat related issues respecting the allocation of federal powers were faced in *Bowsher v. Synar*³⁵, the Supreme Court in these case struck down a central provision of the Balanced Budget and Emergency Deficit Control Act of 1985. The Act, popularly known as the Gramm-Rudman Act after its principal Congressional sponsors, had been passed to bring the spiralling federal budget deficit under control. It placed a ceiling on the federal deficit for each fiscal year from 1986 to 1991.

The Court held that the provision in question assigned executive powers to a legislative agent – the Comptroller General – and thus violated the principle of separation of powers by allowing Congress to retain control over the execution of the Act. The Court’s majority took the position that the Act’s “reporting provision,” which delegated to the Comptroller General the task of calculating and ordering budget reductions, required him to exercise independent judgment and to interpret the Act. By entrusting these functions – which constitute “the very essence of ‘execution’ of the law” – to an official subservient to Congress, the legislature impermissibly intruded into the executive function. Accordingly, the challenged provision was unconstitutional; the severability principle permitted the remainder of the Act to survive, however, and a fallback provision provided by Congress for the eventuality that materialized came into operation³⁶.

2.3 Judicial Review in the United Kingdom

2.3.1 Origin of Judicial Review in the United Kingdom

Origin of the Judicial review in the United Kingdom can be traced from 17th century. In 1610,*Dr. Bonham vs. Cambridge University*³⁷ case was decided by Lord Coke laid the foundation of judicial review in England. But in the case of *City of London v. Wood*³⁸ Chief Justice Holt remarked that “An Act of Parliament can do no wrong, though it may do several things that look pretty odd.” This remark Chief Justice Holt

Ibid.
³⁵478 U.S. 714 (1986)
³⁶*Ibid.*
³⁷(1610) 8 Co. Rep.114
³⁸(1701) 12 Mod. Rep.669

establishes the 'Doctrine of Parliamentary Sovereignty' which means that the court has no power to determine the legality of Parliamentary enactments.

About a century later, in a Scottish case *Andrew v Murdoch*³⁹, Lord Hermand stated in the Court of Session that "there is a power paramount to acts of Parliament, and that is the power of right reason, to which Kings and Parliaments themselves must be subject". This may indicate a freer attitude towards parliamentary supremacy on the part of Scottish lawyers, but it is worth noting that these and other dicta of Lord Hermand were subsequently disapproved by Lord Holland in the House of Lords. The last case in this line is *Forbes v Cochrane*⁴⁰, in which Best J stated that he would refuse to recognise a statute legitimising slavery, since it would be "against the law of nature and God".

Earlier, there was no scope of judicial review in United Kingdom., but after the formation of European Convention of Human Rights, the scope of judicial review became wider. The enactment of Human Rights Act, 1998 also requires domestic Courts to protect the rights of individuals. In United Kingdom, there is no written Constitution and Parliamentary Supremacy is the foundation. Principle of "Parliamentary Sovereignty" dominates the constitutional democracy in United Kingdom. In England, there was judicial review of administrative action but the courts do not have the power to review the acts of Parliament, since Parliament is supreme.

In England, for a long time there has been resistance against a written bill of rights because the English people are brought up on the faith that the liberty of the subject is sacrosanct and the courts will allow its infraction only if it is supported by a provision of law. The following celebrated quote from Lord Atkin amply demonstrates such faith. The learned judge said:⁴¹

In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.

Over the years, even in England, parliamentary sovereignty has been considerably eroded in practice as well as in law. England has joined the European Convention on

³⁹(1806) Buch Rep 1

⁴⁰(1824) 2 B & C 448

Eshugbayi v. Government of Nigeria (1931) L.R. 670 (C.A.): 91931) All E.R. 44, 49.

Human Rights and has accepted the jurisdiction of the European Court on Human Rights. Further, the house of Lords in England has held that a European Community law would prevail over an Act of British Parliament⁴². This has been provided by the European Communities Act, 1972 but the above decision of the House of Lords whereby an earlier statute of Parliament was held to prevail over a later statute was clearly a constitutional revolution and meant the virtual demise of the Dicey's theory of parliamentary sovereignty.⁴³ The United Kingdom has after a long hesitation enacted the human Rights Act, 1998, which contains a declaration of rights. These rights act as limitations upon the executive and though theoretically they do not limit the power of the British Parliament, they would indirectly do so because the courts would presume that the act of Parliament could not be contrary to the rights given by that Act. These developments have doubtless changed the nature of the judicial review in the United Kingdom.

2.3.2 Parliamentary Sovereignty in United Kingdom

In England, people are the source of all the powers and they are also the sovereign power. But, the people snatching all essential powers from the Monarch respond to them in Parliament. Due to this, Parliament can legislate any matter and Constitution assigns no limitations to enact any legislation. The Act of the Parliament cannot be answerable to any authority whether it is unjust or contrary, no matter how it is. There is unlimited power of Parliament in United Kingdom. There is no scope of judicial review of legislative Act in United Kingdom. The legislative Act of Parliament is also known as Primary Legislation and the delegation by the Parliament to the executive with adequate legislative guidance are known as Secondary legislation, secondary legislation are administrative in nature, therefore it is subject to judicial review in United Kingdom . In England, before the doctrine of Parliamentary Sovereignty came into eminence, legislative acts were subject to judicial control, though with a very little practical effect; but even after the emergence of the doctrine of parliamentary sovereignty, judicial review is permissible regarding violation of the rules of delegated legislation and also in the field of subordinate legislation.

R. v. Secretary of State of Transport, ex. P. Factortame Ltd. (No. 2) (1991) A.C. 603: 1991 ALL E. R. (3) p. 769..

See H. W. R. Wade, 'Sovereignty-Revolution', 112 L. Q. E. p. 568 (1996).

2.3.3 Primary and Secondary Legislations

There is two dimensions of legislation in United Kingdom., one is Primary legislation which are basically legislations enacted by Parliament and another one is Secondary legislation which provides rules, regulation, directives and act of Ministries. Primary legislation is outside the purview of judicial review except in few cases which encroaches the law of European Community law.

After the formation of European Union and Human Rights Act 1998, Primary legislation is subject to judicial review in some cases. But on the other hand, Secondary legislation is subject to judicial review. There is no exception to secondary legislation, all the executive and administrative functions , rules , regulations .court can review any of the actions and may declare ultra vires and unlawful.

In more recent years, one gets the impression that judges have gone rather cool on the traditional doctrine. The last ringing reaffirmation of parliamentary sovereignty in the highest court of the land came over a generation ago, in *Pickin v British Railways Board*⁴⁴ . Vice-Chancellor Megarry reaffirmed the doctrine in *Manuel v Attorney General*⁴⁵ , but he expressly left out of account the consequences of membership of the EC. When *Manuel* reached the Court of Appeal, the appeal judges appeared to accept the traditional doctrine, but they curiously stopped short of affirming it in wholly clear, unequivocal terms. It may also be worth referring here to the case of *Oppenheimer v Cattermole*⁴⁶ , in which Lord Cross said, in reference to an anti-Semitic Nazi law:

*To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.*⁴⁷

Most recently, parliamentary supremacy received a less than unqualified endorsement from the House of Lords in the *Jackson v Attorney General*⁴⁸ , litigation brought by the Countryside Alliance following the enactment of the Hunting Act 2004. Lord Hope, in this case said that:

...Parliamentary sovereignty is no longer, if it ever was, absolute.... It is no longer right to say that its freedom to legislate admits of no

⁴⁴[1974] AC 765

⁴⁵[1983] Ch 77
(1976) AC 249
Ibid.

⁴⁸[2005] UKHL 56

*qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified...*⁴⁹

The rule of law enforced by the courts is the ultimate controlling factor on which constitution of United Kingdom is based.

2.3.4 Judicial Review under European Community Law

The United Kingdom's membership of the European has brought with it significant changes to the English legal system and the U.K. Constitution. European Community law in judicial review claims in England and Wales though that the needs to be set in general context of the European legal system. In the Administrative Court the claimants may challenge actions and omissions by English public authorities, and even provisions of an Act of Parliament, on the ground of breach of Community law⁵⁰. Mostly, claims for judicial review may also on the validity of administrative decisions and legislations made by the institutions of the European Union.

In *R vs. Secretary of State for Transport*⁵¹, it was observed by the Court that "by relying upon the direct effect of community law, the individual may be able to challenge national measures can be challenge national measures and have declared unlawful". Further observed that all national measures can be subject to judicial review on the grounds of compatibility with Community law, i.e. primary legislation, secondary regulations and administrative decisions.

In, *Les Verts vs. European Parliament*⁵², it was held that ,the European Union is a the Rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional character.

⁴⁹*Ibid.*

Harry Woolf, Jeffrey Jowell, Andrew Le Suer, *De Smith's Judicial Review*, Thomson Sweet & Maxwell, 2007, p.226.

⁵¹(1990) 2 A.C. 85

⁵²(1986) E.C.R 1339

2.3.5 Judicial Review of Administrative and Executive Acts (Secondary legislation)

In England, subordinate legislation (secondary legislation) is subject to judicial review, there is no exception to this. The Sovereignty of Parliament is not affected by such subordinate legislation. The doctrine of ultra vires in the domain of subordinate legislation which can be classified as procedural and substantive ultra vires. According to the European Convention, Parliament acting jointly with the Council, the Council and Commission making regulations, directives, take decisions, make recommendations or deliver opinions. Secondary legislation is administrative, or executive, legislation; it is valid only to the extent that it is enacted within the authority granted to the executive government by Parliament. Judicial review of secondary legislation is not only justified but mandated by the trinity of constitutional doctrines — the Rule of Law, the Separation of Powers and Parliamentary Supremacy, that lie at the core of the United Kingdom legal systems⁵³.

In *R vs. The Medical Control Agency & Nephew Pharmaceuticals Ltd.*⁵⁴ the Medical Control Agency granting a market authorization to a company in respect of a proprietary medical product. This was challenged, the review proceedings were taken by a competing undertaking which held an original market authorization had been granted by the Agency contrary to the provisions of relative directives. The ECJ held that the competitor was entitled to rely on the directive for the purposes of challenging the validity of the authorization.

2.3.6 Present Position of Judicial Review in United Kingdom

The Courts in United Kingdom, in present scenario, strictly follow the principles of judicial review with regard to administrative actions and secondary legislations. So far as primary legislations, they are outside the purview of judicial review but with some exceptional cases. Judicial review of administrative actions which are executive in nature are mostly subject matter of judicial review in United Kingdom.

In, *R. (on the application of Drammeh) v Secretary of State for the Home Department*⁵⁵, where an immigration detainee who had failed to take his medication

Professor Mark Elliott, *From Bad to Worse: Justice Secretary on Judicial Review*, <http://publiclawforeveryone.com/2015/01/14/the-justice-secretary-on-judicial-review-from-bad-to-worse/>, accessed on 27/7/17.

⁵⁴(1996) E.C.R I-5819

⁵⁵[2015] EWHC 2

for schizo-affective disorder and had gone on hunger strike, but who did not lack mental capacity, failed to establish that his detention was unlawful by virtue of his pre-existing serious mental illness where the facts indicated that his actions were calculated to avoid deportation. The claimant applied for judicial review of the lawfulness of his immigration detention.

The Court in these case held that, there was no doubt that the effect of detention on a detainee's mental health was a very relevant factor in evaluating what constituted a "reasonable period" of detention. The secretary of state's policy in Chapter 55.10 of the Enforcement Instructions and Guidance in relation to the detention of the mentally ill imposed a duty to inquire into the relevant circumstances of a detainee to assess whether serious mental illness existed and whether it could be satisfactorily managed in detention. Further held that, where a detainee had capacity, his refusal to consent to medical treatment put him outside the scope of the secretary of state's policy statements⁵⁶.

2.4 Judicial Review in France

2.4.1 Origin of Judicial Review in France

The evolution of judicial review in France has seen many transformations throughout its history. The milestones in this process of transformation were, respectively, the period of the ancient regime, the Revolution of 1789, the Fifth Republic of 1958 and the constitutional reform of 2008.⁵⁷

In the ancient regime, the parlements⁵⁸ were performing regional legislative and judicial functions. Since the 16th century and in particular in the early 18th century, parlements started their systematic opposition to monarchic power. They were opposed to all reforms that royalty tried to impose.

However they failed to become the representatives of the nation, they could not control governmental acts due to their ill-advised interventions⁵⁹.

Therefore, in the end, due to the infamous privileges and reactions caused by these parlements, they were removed from the scene of history just after the French

⁵⁶*Ibid.*

Ziya Bekir Buğuçam, *Common Principles of Judicial Review of Administration in Europe: A Comparative Study of France, the UK, the ECHR and the EU*, Law & Justice Review, Issue: 5, December, 2012, p. 19.

⁵⁸Parlements were the French Ancien Régime institutions and wholly different from present-day (post-Revolutionary) institution, namely the French Parliament.

⁵⁹*Ibid.*

Revolution of 1789. However they left behind an implication of loss of esteem and the notorious notion of “the government of judges.

The origins of judicial review date back to the period of the Curia Regis of the 13th century. At that time, Curia Regis (means the King’s court) of France had different sections and the Conseil d’État was one of them⁶⁰.

Besides the Conseil d’État, there was another important council, namely the Conseil Privé, which was regarded as “the highest judicial court in the land” and representing judicial authority of the king. Even though the meetings of this council were held in the palace, the kings did not preside over them. This council was consisted of a number of prominent lawyers. The Conseil Privé, technically speaking, could definitely not be regarded as a Supreme Court of Appeal because its functions were deliberately left vague⁶¹.

In the Revolutionary Act of 1789 and the Revolutionary Act of 1790 the separation of the administrative and the judiciary was adopted as the self-evident aforesaid negative approach toward the judiciary. And in tenth year of the Revolution, in 1799, the Conseil d’État was established. This body simultaneously was an advisory body on legal issues to the government, drafted significant laws and also had, although initially to small extent, a judicial organ empowered with the authority of judicial review of administrative acts.

In 1889, French Conseil d’État became officially the first instance court for the administrative justice system. This competence was going to be transferred to the newly established administrative tribunals in 1953. The final main reform was made in 1987 in which the regional administrative courts were established⁶².

After this reform, the function of appeal review was transferred to the regional administrative courts and the Conseil d’État became the last resort and the highest administrative judiciary organ.

2.4.2 The Scope of Judicial Review in France

France has had a dual judicial system since the Revolutionary Act of 1790 on the separation of the administrative power and judiciary. The reaction to the courts of pre-Revolutionary led the leaders of the Revolution to have the perception that courts

⁶⁰*Ibid.*

⁶¹*Ibid.*

⁶²*Ibid.*

should not interfere with the legislative and executive powers. Thus, in the post-revolutionary period, especially with the establishment of the Conseil d'État in 1799, ordinary judiciary and administrative judiciary have been structured separately.

The administrative judiciary is organized on three levels. From bottom to top, as of 2012, there are first instance administrative tribunals, regional administrative courts of appeal and finally the Council of State as the Supreme Court of administrative judiciary. The regional administrative courts of appeal may re-adjudicate on the judgments of first instances tribunals. However the Conseil d'État can only check the judgments of the regional administrative courts of appeal in terms of procedural rules and question of law, not question of fact. The very essence of the French administrative law is the principle of legality. According to this principle, administrative authorities must respect the law in all administrative acts.⁶³

Administrative acts in France are two types; normative (obligatory acts) and non-normative acts. Also, normative acts are divided into two sorts; regulations and individual decisions. For normative acts, there are certain remedies in French administrative law. The first one is called “the remedy for abuse of power”, namely an action for annulment (recours pour excès de pouvoir). In the second type of remedy, which is called “the remedy of full jurisdiction” (recours de pleine juridiction), the plaintiff who has suffered from the administrative act can demand pecuniary compensation in administrative courts. However non-normative acts are not subject to judicial review because they are non-bindings”.⁶⁴

The limit of the government's acts has been gradually lowered by virtue of Article 13 of ECHR. At this point, the “detachable acts theory”⁶⁵ has become important. By means of this theory, French administrative judges have kept the right to judge these acts and to find the administration responsible for the infringements.⁶⁶

According to the case law of Conseil d'État, the gravity of the exceptional circumstances and infringement level of administrative acts can be checked by judges and purely interpretative, informative or declaratory administrative acts or proposals and consultations are beyond the scope of judicial review. Thus, only administrative

⁶³*Ibid.*

Ibid.

According to the “detachable acts theory”, judges can separate the unlawful part of an act in order to save the remaining legal part or parts of that act.

⁶⁶*Ibid.*

acts producing or changing legal effects in natural or legal persons are subject to judicial review in France.

2.5 Judicial Review in Australia

2.5.1 Origin of Judicial Review in Australia

Australia's constitution draws on the parliamentary system of government in the United Kingdom as well as the U.S. Constitution, particularly the doctrine of enumerated powers in the allocation of authority between the federal and state governments⁶⁷.

Australia's basic constitutional document is contained in the ninth clause of the Commonwealth of Australia Constitution Act of 1900, a statute of the British parliament. Eight "covering clauses" present prefatory material. The first "whereas" clause of the act contains language similar to a preamble: "Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessings of almighty God, have agreed to unite in one indissoluble federal commonwealth. . . ." The sixth state, Western Australia, was added before the act became effective on January 1, 1901⁶⁸.

Written guarantees of fundamental rights in the Australian constitution are scant: section 116 of article 9 of the 1900 act, which applies to the federal government, guarantees freedom of religion; section 117 prohibits discrimination but limits the extent of protection; and section 51 requires just compensation for federal property acquisitions. The system of fundamental rights protection in Australia works, however, because any interference with civil liberties has to be justified to a court's satisfaction by showing that the action in question had some statutory or judicial authority. No presumption of authority is given to the federal government. States, on the other hand, are not so tightly restrained⁶⁹.

In Australia, a federal state, power at the national level is divided between the prime minister and the legislature, without a strict separation of the executive and legislative authority, and the judiciary, which exercises judicial review, although judicial matters may be framed as administrative matters by the government and the parliament. The

⁶⁷*Supra*, n.1. at p.19.

⁶⁸*Ibid.*

⁶⁹*Ibid.*

federal government is given specifically enumerated powers by the constitution, but with certain exceptions, such as defence, they may be exercised concurrently with the states; federal law prevails in the case of any inconsistency⁷⁰.

While the court system in Australia is similar in some respects to that of the United States, its high court is the ultimate court of appeal even from state courts, which provides more uniformity in the nation's laws. The acknowledged supremacy of the Australian constitution and the requirement of a referendum for amendments support the power of judicial review exercised by the Australian courts.

2.5.2 The Administrative Decisions (Judicial Review) Act, 1977

The enactment of the Administrative Decisions (Judicial Review) Act, 1977 ('ADJR Act') was an important milestone in the evolution of Australian administrative law. The ADJR Act was a central part of a series of sweeping reforms to administrative law at the federal level and a remarkable reform in its own right. The ADJR Act was the first Australian attempt to codify both the law and much of the procedure of judicial review in Australia. The Act introduced a unified and single test for standing and a right to reasons for decisions, codified the grounds of judicial review and contained a simple provision governing remedies. This new statutory avenue of judicial review provided a vastly simpler alternative to judicial review at common law and was for many years regarded as a great success.

A version of the Act was adopted without substantial modifications in the Australian Capital Territory, Queensland and Tasmania.⁷¹ But the spread of the ADJR Act faltered. The introduction of ADJR Act-style legislation was proposed but ultimately rejected in Victoria in 1999⁷² and Western Australia in 2002.⁷³ The adoption of any form of judicial review statute has never been publicly advocated by the governments

Ibid at p.20.

. See Administrative Decisions (Judicial Review) Act 1989 (ACT); Judicial Review Act 1991 (Qld); Judicial Review Act 2000 (Tas).

See Peter Bayne, *Judicial Review in Victoria* (Expert Report No 5, Victorian Attorney-General's Law Reform Advisory Council, 1999).

. Law Reform Commission of Western Australia, Report on Judicial Review of Administrative Decisions, Project No 95 (2002) 26.

or law reform agencies of New South Wales, South Australia or the Northern Territory.⁷⁴

2.5.3 The Structure and Operation of the ADJR Act

The wider reforms to federal administrative law of which the ADJR Act was a part included the creation of the Commonwealth Ombudsman, freedom of information legislation and the Commonwealth Administrative Appeals Tribunal ('AAT').⁷⁵ It could be argued that the ADJR Act can only be fully understood by reference to the creation of the AAT. More particularly, the simplified form of judicial review introduced by the ADJR Act operates in tandem with the relatively simple right of merits review by the AAT. In many areas of administrative decision-making, particularly those such as social security, migration and taxation, in which a large number of administrative decisions are made, it is likely that people granted a right to seek both merits and judicial review of decisions would often exercise their right of merits review. Merits review is, after all, intended to provide a quicker, simpler and cheaper alternative to judicial review.⁷⁶

The ADJR Act caused a sea-change in judicial review of administrative action. It introduced a uniform test for standing⁷⁷ and a streamlined remedy in the form of an order to review that could be invoked to perform the functions of one or more of the prerogative or equitable writs traditionally sought in administrative law proceedings.⁷⁸

During the first decade after its enactment, the ADJR Act was the leading avenue of judicial review and clearly exerted great influence over Australian administrative law.⁷⁹ A problem which is outside the ADJR Act and which ultimately may prove to be the most significant challenge to the Act is the jurisdiction granted to the High

⁷⁴ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action*, Lawbook, 4th ed, 2009, p.20.

.Mathew Groves, Should We Follow the Gospel of the Administrative Decisions (Judicial Review) Act,1977?,Melbourne University Law Review, Vol.34,2010, p.736.

Robin Creyke, 'Administrative Tribunals' in Matthew Groves and H. P. Lee (eds), *Australian Administrative law: Fundamentals, Principles and Doctrines*, Cambridge University Press, 2007,p. 77&83.

. Under ADJR Act ss 5-7, judicial review is available to 'a person aggrieved', which is defined in s 3(4).

Ibid, s 16.

Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance*, Oxford University Press, 2008, p. 96.

Court by ss 75(iii) and (v) of the Constitution.⁸⁰ These provisions invest the High Court with a judicial review jurisdiction that parallels, and in many aspects, exceeds that of the ADJR Act. These avenues of judicial review have assumed a central role in federal administrative law proceedings following the increasing use of privative clauses in federal legislation.⁸¹ The constitutionally entrenched right to relief in s 75(v) of the Constitution provides an entrenched minimum provision of judicial review' that cannot be narrowed or removed by legislation.⁸² Accordingly, it applies to cases that fall outside the jurisdictional formula of the ADJR Act and instances where the ADJR Act has been expressly excluded. A parallel right of review is vested in the Federal Court by ss 39B(1) and (1A) of the Judiciary Act 1903 ('Judiciary Act').⁸³ A crucial part of the Federal Court's jurisdiction for judicial review of administrative action is the grant to the Court of original jurisdiction 'in any matter arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.'⁸⁴

2.6 Position of Judicial Review in Canada

Canadian courts have some powers of judicial review. They can determine which of the governments – federal or provincial – has the authority to legislate in certain instances, and they can declare laws unconstitutional if they do not meet the standards of the 1982 Charter of Rights and Freedoms. In fact, since the charter came into force, many individual rights cases have been filed with the courts. In addition to cases coming before the courts in the course of litigation, a constitutional question may be brought in a taxpayer's suit, or an opinion may be requested by the federal government or a province⁸⁵.

The Constitution of Canada is less federal in structure than the Constitution of India, United States of America and Australia. Canada was formed as a federal colony in 1608. It came under the British rule by conquest in 1760. The dominion Constitution of Canada is federal and is the legal creation of British North America Act passed by

Supra, n 70 at 29-52.

In Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, 92 [18]

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, 513 [103]

Alan Robertson, *The Administrative Law Jurisdiction of the Federal Court – Is the AD(JR) Act Still Important?*, (2003) 24 *Australian Bar Review* 89.

Judiciary Act s 39B (1A)(c).

⁸⁵*Ibid.*

the British Parliament, which came into force in July, 1867. It created the Dominion by uniting the four original provinces, namely – Quebec, New Brunswick and Nova-Scotia. Later on six more provisions were added, making the dominion into a federation of ten provinces. The six more provinces added were. Prince Edward Island, Manitoba, Alberta, Saskatchewan, British Columbia and New Found land.

The British North America Act of 1867 is not a comprehensive constitutional document like the Federal Constitution of America. The federation has a Governor-General appointed by the Crown on the advice of the Canadian government. These are the Supreme Court of Canada. ‘Its Constitution is, as a matter of law, not completely federal, it is quasi-federal. But in constituting in practice, its system of government is federal predominantly.’⁸⁶ “Federalism is the most distinctive venture of Canadian democracy and its most notable achievement, its success and virtues are manifest.”⁸⁷ The framers of the Constitution of Canada (the British North America Act) had the example before them of the working of the federal constitution of America, which apparently lacked sufficient power in the Central Government, and this weakness created difficulties step by step and ultimately the federal Supreme Court had to come to the rescue. Therefore, in the British North America Act the framers had to provide for adequate powers to the centre and hence the Central Government is endowed with the authority not expressly given to the province.⁸⁸

Judicial review has contributed tremendously in America to the strengthening of the national power. But this is not the case in the Dominion of Canada. Till 1940, the final authority of constitutional interpretation in Canada was the Privy Council in England, which had no national feeling and no clear realization of the Canadian national needs. In times of peace, federal Govt. was denied any substantial power and only in the event of great national emergency the Privy Council interpreted the residuary clause with some freedom and elasticity. Privy Council interpreted the residuary clause with some freedom and elasticity. Williams Eaton remarks – “It can be concluded that the judicial committee, whether by nature of its training and

K. C. Wheare, *Federal Government*, Oxford University Press, 1964, p.20.
Alexander Brady, *Democracy in the Dominion*, University of Toronto Press, p.65.
Harold Zink, *Modern Government*, D. Van Nostrand Co. Inc., New York, 2nd Edition, 1962, Reprinted, Dec. 1963, PP 671-672.

experience, or because of innate conservative inclinations, or for some other reason, was very much out of touch with Canadian political and social reality.”⁸⁹

Judicial review has not been specifically provided. Only a few rights are guaranteed by the Constitution and there is no strict separation of powers to operate as limitation on the legislative powers. But the violation of any terms of the British North America Act is a matter of judicial review.” But the situation under a federal form of government powers, and there is thus a never-failing demand for the services of an austere and impartial arbiter to decide the question of jurisdiction. This function, the court can perform more acceptable than any other agency.”⁹⁰

2.7 System of Judicial Review Ireland

Modern Ireland dates from the beginning of the seventeenth century. Henry VIII had taken the title of king of Ireland as well as king of England, and although Irish rebels were routed in battle in 1601, various forms of “Irishness” were developing. Thereafter, distinctions between old and new English immigrants and the imposition of laws made by the British parliament, as well as religious differences, fuelled constant clashes; among them was the 1690 Battle of the Boyne, in which the Protestant King William defeated the Catholic James II. By the Act of Union, effective January 1, 1801, Ireland was to be represented in the British parliament, and the Roman Catholic Relief Act of 1829 allowed Catholics, who had previously been persecuted, to hold public office⁹¹.

Support for the separation was not unanimous in Ireland, and the constitution of the Irish Free State, set in operation by a British royal proclamation on December 6, 1922, had to bridge the gap between independence and continued British influence. The constitution was tied to the 1921 treaty that limited Irish sovereignty, but after the Statute of Westminster in 1931 dominion states, such as Ireland, Canada, and

Hessel E. Yntema, *The American Journal of Comparative Law Reader*, Oceana Publication, Inc., Dobbs Ferry, New York, 1966, P 122.

Robert McGregor Dawson, *The Government of Canada*, 3rd Edition, Revised Eleventh Printing, The University of Toronto, 1960, p.155.

⁹¹*Supra*, n.1 at 170.

Australia, were no longer subject to acts of the British parliament, thus paving the way for a new Irish constitution⁹².

The basic prototype for the 1922 constitution was the British parliamentary model. Its influence carried over to the 1937 document, which added a list of fundamental rights, as in the U.S. constitution, and provision for judicial review. Article 6, section 1, defines the source of sovereignty: “All powers of government, legislative, executive, and judicial, derive, under God, from the people, whose right it is to designate the rulers of the state and, in final appeal, to decide all questions of national policy, according to the requirements of the common good”.⁹³

Ireland is a unitary state and power is divided among the president, as head of state; the prime minister, as head of government; the legislature; and the courts, which exercise judicial review.

The highest court of appeal is the Supreme Court, headed by a chief justice, which hears cases on appeal from the high court and other courts. It also rules on constitutional questions; in these cases concurring or dissenting opinions are not permitted. In addition to typical judicial review functions, the Supreme Court has the authority to give opinions on bills before they become law when so requested by the president.

Article 37 of the Constitution of Ireland states, that the constitution does not invalidate judicial functions by other bodies, which include the land commission and the adoption board. Article 38 authorizes special courts to be set up by law where ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.

2.8. Judicial Review in India

2.8.1 Origin of Judicial Review in India

The Constitution of the United States of America is regarded as one of the oldest democratic written constitutions in the world. It is well known that it has overwhelmingly influenced the constitutions of a great number of countries,

⁹²*Ibid*, at 171.

⁹³*Ibid*.

particularly those of Asian countries.⁹⁴ India is no exception in this respect. Though India adopted the Westminster type of Government, yet since England has no written constitution, the members of Indian Constituent Assembly, particularly Shri B.N. Rau, the Constitutional Adviser to the Assembly and Sir Alladi Krishnaswamy Ayyar, in an effort to evolve comprehensive written constitution for India, relied heavily on the Constitution of the U.S.A. In fact, Shri Rau did have frequent deliberations with important American politicians, judges and academicians like President H. Truman, Justice Felix Frankfurter and Judge Learned Hand, to a name a few.⁹⁵

In India, since Government of India Act, 1858 and Indian Council Act, 1861 imposed some restrictions on the powers of Governor General in Council in evading laws, but there was no provision of judicial review. The court had only power to implicate. But in 1877 *Emperor vs. Burah*⁹⁶ was the first case which interpreted and originated the concept of judicial review in India. In this case court held that aggrieved party had right to challenge the constitutionality of a legislative Act enacted by the Governor General council in excess of the power given to him by the Imperial Parliament. In this case the High court and Privy Council adopted the view that Indian courts had power of judicial review with some limitations. Again in, *Secretary of State vs. Moment*⁹⁷, Lord Haldane observed that “the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. Government of India Act of 1858”. Then, in *Annie Besant v. Government of Madras*⁹⁸, Madras high court observed that, on the basis of Privy council decision that there was a fundamental difference between the legislative powers of the Imperial Parliament and the authority of the subordinate Indian Legislature, and any enactment of the Indian Legislature in excess of the delegated powers or in violation of the limitation imposed by the imperial Parliament will null and void.

Though there is no specific provision of the Judicial Review in Government of India Act, 1935 and the constitutional problems arising before the court necessitated the adoption of Judicial Review in a wider perspective. Now, Constitution of India, 1950 explicitly establishes the Doctrine of Judicial Review under various Articles 13,32,131-136,143,226,227,245,246.,372.

See, Lawrence Ward Beer (ed.), Constitutionalism in Asia, University of California Press, 1979. Supra, n.14.

2.8.2 Judicial Review of Parliamentary and State Legislative Actions

Article 245 and 246 of the Indian constitution gives legislatures powers to Parliament and State Legislatures. Article 245 (1) provides “subject to the provisions of the constitution, the parliament may make any laws for the whole and any part of the territory of India and a State Legislature may make a law for whole of the state and any part thereof”. The word “subject to the provisions of the Constitution” are imposed limitations to the Parliament and State Legislature to make legislation. These words are the essence of Judicial Review of legislative actions in India. It ensures that legislation should be within the limitations of constitutional provision.

In, *S. P. Sampat kumar vs. Union of India*⁹⁹ the constitutional validity of Administrative Tribunal Act, 1985, was challenged on the ground that that the impugned Act by excluding the jurisdiction of the High Court under Article 226 and 227 in service matters had destroyed the judicial review which was an essential feature of the constitution. The Supreme Court held that though the Act has excluded the judicial review exercised by the High Courts in service matters, but it has not excluded it wholly as the jurisdiction of the Supreme Court under Article 32 and 136. Further held that, the judicial review which is an essential feature of the constitution can be taken away from the particular area only if an alternative effective institutional mechanism or authority is provided¹⁰⁰.

Again in, *L Chandra vs. Union of India*¹⁰¹, clause 2(d) of Article 323-A and clause 3(d) of Article 323-B was challenged on the ground that these clauses excludes the jurisdiction of High Courts in service matters. The Constitutional Bench unanimously held that “these provisions are to the extent they exclude the jurisdiction of the High Courts and Supreme Courts under Article 226/227 and 32 of the constitution are unconstitutional as they damage the power of judicial review. The power of judicial review over Legislative Actions vested in the High Courts and Supreme Court under Article 226/227 and Article 32 is an integral part and it also formed part of its basic structure.

Recently in *I.R. Coelho vs. State of Tamil Nadu*¹⁰², the petitioner had challenged the various Central and State laws put in the Ninth Schedule including the Tamil Nadu Reservation Act. The Nine Judges Bench held that “any law placed in the Ninth

⁹⁹(1987) 1 SCC 124

Ibid.

¹⁰¹AIR 1997 SC 1125

¹⁰²AIR 2007 SC 861

Schedule after April 24, 1973 when *Keshvananda Bharati's case* judgment was delivered will open to challenge, the court said that the validity of any Ninth Schedule law has been upheld by the Supreme Court and it would not be open to challenge it again, but if a law is held to be violation of fundamental rights incorporated in Ninth Schedule after the judgment date of *Keshvanand Bharati's case*, such a violation shall be open to challenge on the ground that it destroy or damages the basic structure of constitution¹⁰³.

2.8.3 Judicial Review of Administrative Actions

Judicial Review of Administrative action is perhaps the most important development in the field of public law. In India, the Doctrine of Judicial Review is embodied in the Constitution and the subject can approach High Court and Supreme Court for the enforcement of fundamental right guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action is mala fide, the same can be quashed by the ordinary courts of law. All the rule, regulations, ordinances, bye-laws, notifications, customs and usages are “laws” within the meaning of Article 13 of the Constitution and if they are inconsistent with or contrary to any of the provisions thereof, they can be declared ultra vires by the Supreme Court and by the High Courts. Judicial review of administrative action aims to protect citizens from abuse of power by any branch of State. According to DE Smith:

*“When the legislature confers discretion on a court of law or on an administrative authority, it also imposes responsibility that such discretion is exercised honestly, properly and reasonably”*¹⁰⁴.

This view of “DE Smith” clearly point out that discretion of administrative action should be used with care and caution. So, if judiciary finds any ground of illegality of any administrative action, it is the duty of the judiciary to maintain check and balance.

As a general rule, courts have no power to interfere with actions taken by administrative authorities in exercise of discretionary powers. But this does not mean that there is no power of court to control over the discretion of administration. In India, the court will interfere with the discretionary powers exercised by the

Ibid.

¹⁰⁴J.M.Evans, *De Smith's Judicial Review of Administrative Action*, Stevens & Sons Ltd., London, 1995, p.296-99.

administration in the basically on two grounds: 1) failure to exercise discretion and 2) excess or abuse of discretion.

In, *Ajay Hasia vs. Khalid Mujib*¹⁰⁵ the Regional Engineering College made admissions on the ground that it was arbitrary and unreasonable because high percentage marks were allocated for oral test, and candidates were interviewed for very short time duration. The Court struck down the Rule prescribing high percentage of marks for oral test because allocation of one third of total marks for oral interview was plainly arbitrary and unreasonable and violative of Article 14 of the Constitution.

*Air India vs. Nargesh Meerza*¹⁰⁶ in this case one of the Regulation of Air India provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage, if it took place within the four years of service or on first pregnancy, whichever is occurred earlier. The Regulation did not prohibit the marriage after four years and if an Air Hostess after having fulfilled the first condition became pregnant, there was no reason why pregnancy should stand in the way of her continuing in service. The Supreme Court struck down the Air India and Indian Air Lines Regulations on the retirement and pregnancy bar on the services of air hostess as unconstitutional on the ground that the condition laid down therein was entirely unreasonable and arbitrary.

2.8.4 Judicial Review of Constitutional Amendments

In India, constitutional amendments are very rigid in nature. Although Supreme Court of India is the guardian of Indian Constitution, therefore Supreme Court time to time scrutinize the validity of constitutional amendment laws, parliament has the supreme power to amend the constitution but cannot abrogate the basic structure of the constitution the question whether fundamental rights can be amended under Art. 368 came for consideration of the Supreme Court in *Shankari Prasad v. Union of India*¹⁰⁷ the first case on amendability of the constitution the validity of the constitution (1st Amendment) Act, 1951, curtailing the “Right to Property” guaranteed by Article 31 was challenge. The argument against the validity of First Amendment was that Article 13 prohibits enactment of a law infringing an abrogating the fundamental rights, that the word ‘law’ in Article 13 would include “any law”,

¹⁰⁵AIR 1981 SC 487

¹⁰⁶AIR 1981 SC 1829

¹⁰⁷AIR 1951 SC 548

then a law amending the constitution and therefore, the validity of such a law could be judged and scrutinized with reference to the fundamental rights which it could not infringe. It was argued that the “State” in Article 12 included Parliament and the word “law” in Article 13(2), therefore, must include constitutional amendment. The Supreme Court, however, rejected the above argument and held that the power to amend the constitution including the fundamental rights is contained in Article 368, and that the word ‘law’ in Article 13(2) includes only an ordinary law made in exercise of the legislative powers and does not include constitutional amendment which is made in exercise of constituent power¹⁰⁸.

Again, In 1964 *Sajjan Singh v. Rajasthan*¹⁰⁹, the same question was raised when the validity of the Constitution (Seventeenth Amendment) Act, 1964, was called in question and once again the court revised its earlier view that constitutional amendments, made under Article 368 are outside the purview of Judicial Review of the Courts.

In 1967 in *Golak Nath vs. State of Punjab*¹¹⁰, the same question regarding constitutional amendment was raised. In this case the inclusion of the Punjab Security of Land Tenures Act, 1953 in the Ninth schedule was challenged on the ground that the Seventeenth Amendment by which it was so included as well as the First and the Fourth Amendments abridged the fundamental rights were unconstitutional. The Supreme Court overruled the decision of *Shankari Prasad* and *Sajjan Singh's case*. The Supreme Court observed that “An amendment is a ‘law’ within the meaning of Article 13(2) included every kind of law, “statutory as well as constitutional law” and hence a constitutional amendment which contravened Article 13(2) will be declared void.” Court further observed that “The power of Parliament to amend the constitution is derived from Article 245, read with Entry 97 of list 1 of the Constitution and not from Article 368. Article 368 only lays down the procedure for amendment of Constitution and amendment is a legislative process.”

Once again the Supreme Court was called upon to consider the validity of the Twenty-fourth, Twenty Fifth and Twenty Ninth Amendment in the famous case *Keshavananda Bharti vs. State of Kerala*¹¹¹ which is also known as “*Fundamental Rights Case*”. In this case the petitioner had challenged the validity of Kerala Land

¹⁰⁸*Ibid.*

¹⁰⁹AIR 1965 SC 845

¹¹⁰AIR 1967 SC 1643
AIR 1973 SC 1461

Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the Ninth Schedule by the Twenty Ninth Amendment Act. The petitioner was challenged the validity of Twenty Fourth, Twenty Fifth, and Twenty Ninth Amendment to the Constitution and also the question was involved was as to what extent of the amending power conferred by Article 368 of the Constitution? The Supreme Court held that Under Article 368 Parliament can amend the fundamental rights but cannot take or abridges the Basic Structure of the Constitution.

2.8.5 Doctrine of Basic Structure : Radical Change in the Indian Constitution

In *Keshavananda Bharti's case*¹¹², a largest bench in the constitutional history propounded the “Theory of Basic Structure” as a limitation on amending power of the legislature. This theory formulated by the Supreme Court through the Doctrine of Judicial Review.

In, *Indira Nehru Gandhi vs. Raj Narayan*¹¹³, the amendment was made to validate with retrospective effect the election of the then Prime Minister which was set aside by the Allahabad High Court. The Supreme Court struck down clause (4) of Art.329-A which was the offending clause an inserted in (39th Amendment) to validate the election with retrospective effect. Khanna .J. struck down the clause on the ground that “it violated the free and fair elections which was an essential postulate of democracy which in turn was a basic structure of the constitution”¹¹⁴.

Again in *Minerva Mills vs. Union of India*¹¹⁵, the petition was filed in the Supreme Court

challenging the taking over of the management of the mill under the Silk Textile undertaking (Nationalisation) Act, 1974, and an order made under S. 18-A of the Industrial (Development and Regulation) Act, 1951. The petition challenged the constitutional validity of clauses (4) and (5) of Art. 368 were introduced by Sec.55 of 42nd Amendment. If these clauses were held valid then petitioner could not challenge the validity of the 39th Amendment which had placed the Nationalization Act, 1974, in the IX schedule.

¹¹²*Ibid.*

¹¹³AIR 1980 SC 1789
Ibid.

¹¹⁵AIR 1975 SC 2299

The Supreme Court struck down clauses (4) and (5) of Art. 368 inserted by the 42nd Amendment on the ground that these clauses destroyed the basic feature of the basic structure of the Constitution. Limited amending power is a basic feature of Constitution and these clauses removed all limitations on the amending power and thereby conferred an unlimited amending power, and it was destructive of the basic feature of the Constitution¹¹⁶.

2.8.6 Current Position of Judicial Review in India

The Supreme Court of India since the *A. K. Gopalan's case*¹¹⁷ to the historic judgment in *I.R. Coelho's case*¹¹⁸ magnified the concept of Doctrine of Judicial Review. In the present scenario, Supreme Court plays a very crucial role to interpret the constitutional provisions and now the concept of Judicial Review became a fundamental feature of the Constitutional Jurisprudence. In its recent judgment in *Madras Bar Association vs. Union of India*¹¹⁹ the Supreme Court scrutinized the provisions of Companies Act, 1956 and declared some provisions ultra vires. In this case, the petitioner challenges the constitution of NCLT and NALAT and also challenges the formation of the Committee, the appointment of the judicial members as well as the technical members. The Supreme court upheld the validity of NCLT and NALAT, but declared the above mentioned provisions ultra vires and held that these provisions are unconstitutional in nature on the ground that any institution performing a judicial function should be constituted of members having judicial experience and expertise and thus judicial member were to exceed the technical members so as to maintain the essential feature of that constitution.

Thus, it can be said that, the Supreme Court of India time to time scrutinizes the validity of law through the Doctrine of Judicial Review and now it is the foundation to ensure the Supremacy of Constitution of India.

Ibid.

¹¹⁷AIR 1950 SC 27

¹¹⁸AIR 2007 SC 861

Writ Petition (C) No. 1072 of 2013

2.9 System of Judicial Review in Certain Other Asian Countries

2.9.1 Judicial Review in Malaysia

In Malaysia, two Supreme Court judges, one of whom was the Lord President, were impeached and removed based on trumped-up charges in 1988. In Singapore, the judiciary was equally shaken after Parliament passed a series of constitutional and statutory amendments – which ousted the judicial review of executive decisions taken under the Internal Security Act – within a month of the Court of Appeal’s ruling. In that decision, the judges held that they would henceforth objectively review the President’s exercise of his discretion to detain persons under the impugned Act. Where legislative and executive power is consolidated by a semi-permanent party or coalition, the dominant political entity in question can display its displeasure more easily, either by eliminating judicial review or even ousting the judges themselves¹²⁰.

the Malaysian Court of Appeal in *Mat Shuhaimi bin Shafiei v Pendakwa Raya*¹²¹ recently upheld the constitutionality of the Sedition Act, which imposes criminal liability on the sale and distribution of seditious publications, the judges were adamant that the draconian nature of the law was not suited for judicial resolution.¹²²

As observed by Justice Abdul Malik Bin Ishak for the unanimous Court: “The question whether the impugned Act is ‘harsh and unjust’ is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament.”¹²³

The judicial bifurcation of principles/rights from policy, as examined above, rests on a questionable but common assumption that courts merely interpret legal principles or rights, while legislatures are supreme in their exercise of policy, in particular over social policy.

In Malaysia, since the Constitutional Crisis of 1988, which saw the removal of the Lord President and another Supreme Court Justice, the Federal Court (the nation’s

Po Jen Yap, *Constitutional Fig Leaves in Asia*, Washington International Law Journal, Vol.25, No.3, June, 2016, p.422.

¹²¹[2013] M.I.J. 1342. 114

According to Section 3(1) (a) of the Sedition Act, a publication would have a seditious tendency if it would “bring into hatred or contempt or to excite disaffection against any Government” Sedition Act (Cap 290. 2013 Rev Ed) s 3(1)(a).

Supra, n.112.

court of final resort) has stopped exercising its prerogative to invalidate legislation deemed incompatible with the nation's constitutional bill of rights.¹²⁴

Recently, in the ostensibly landmark *Malaysian Trade Union Congress v. Menteri Tenaga decision*,¹²⁵ the Federal Court of Malaysia held that an applicant, in the context of public interest litigation (P.I.I.), merely had to show that he or she had a “real and genuine interest in the subject matter.”¹²⁶ In so doing, the court overruled longstanding precedent that required applicants to establish the infringement of a private right or the suffering of special damages before they would have standing for P.I.L. cases.¹²⁷ In this instance, the Malaysian federal government (the Selangor state government) and a consortium had entered into a tri-partite Agreement allowing the consortium to raise tariffs on the water it was supplying by 15% if certain performance targets were met. The Malaysian Trade Union Congress, a society of trade unions, applied for judicial review when the Government refused to disclose a copy of the Agreement and the Audit Report that justified an increase in water tariffs. While the Federal Court laudably agreed that the Trade Congress had the locus standi to bring judicial review proceedings against the government, the Court quickly dashed all hopes that it was remotely interested in providing any substantive relief. The Court held the Audit Report could not be disclosed, as it was tabled and deliberated in a Cabinet meeting and was therefore an “official secret.”¹²⁸

2.9.2 Position of Judicial Review in Singapore

Singapore and Malaysia have a semi-permanent form of government in power, and where a dominant, disciplined political party or coalition is in control, the less space domestic courts have to operate. Where legislative and executive power is consolidated in a single party or coalition, the dominant government can display its displeasure easily by eliminating judicial review or even ousting the judges themselves.

¹²⁴Yvonne Tew, *On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics*, 25 WASH. INT'L J. 669 (2016).

¹²⁵. [2014] M. I. J. 92

¹²⁶*Id.* At para. 58.

¹²⁷*Government of Malaysia v. Lim Kit Siang*. [1988] 2 M.I.J. 12

¹²⁸*Supra*, n.116 at para. 68.

An originalist understanding of the Singapore Constitution was explicitly endorsed by the Singapore Court of Appeal in *Yong Vui Kong v. Public Prosecutor*.¹²⁹ In that case, the accused was sentenced to death by the trial judge under the Misuse of Drugs Act for trafficking 47.27 grams of diamorphine, a controlled drug. On appeal, the accused argued that the mandatory nature of the death penalty (MDP) imposed by the impugned statute was not “in accordance with law” as required under Article 9(1) of the Singapore Constitution, as the expression “law” enshrined under Article 9(1) excluded inhuman forms of punishment.¹³⁰ Accordingly, he argued he could not be validly deprived of his life under the statute.

Specifically, counsel for the accused asked the Court to follow a series of Privy Council decisions from the Caribbean States where the Law Lords of the United Kingdom had overturned the MDP imposed by the respective State laws.¹³¹ Nevertheless, the Court of Appeal flatly rejected these cases applicability. According to the Chief Justice for the unanimous court, Singapore’s due process clause was based on its equivalent in the 1963 Malaysian Federal Constitution, which was likewise based on the 1957 Malayan Constitution drafted pursuant to the advice of the Federation of Malayan Constitutional Commission chaired by Lord Reid (the Reid Commission).¹³² Unlike those foreign decisions, which involved constitutions that expressly prohibited inhuman punishments, the Chief Justice opined that the Singapore Constitution did not expressly include such a prohibition. In his view, the fact that the Reid Commission did not recommend an express prohibition against inhuman punishment, even though such a provision existed in the European Convention on Human Rights – an instrument that applied in all the British colonies (including Singapore and Malaysia) prior to their independence – clearly illustrated that the omission was deliberate and was not due to ignorance or oversight.¹³³ Furthermore, the Chief Justice noted that in 1969 the Singapore Government had unambiguously rejected a proposal by Singapore’s Constitutional Commission to initiate a constitutional amendment that would have expressly prohibited the state

[2010] SING. C.A. 20

¹³⁰Constitution of the Republic of Singapore, 1999 Art 9(1) (“No person shall be deprived of his life or personal liberty save in accordance with law.”)

See, *Reyes v. The Queen*, [2002] 2 App. Cas. 235; *Fox v. The Queen*, [2002] 2 App. Cas. 284; *R. v. Hughes*, [2002] 1 App. Cas. 259.

¹³²Singapore became a constituent state of Malaysia in 1963 and gained full independence as a sovereign republic in 1965.

¹³³*Yong Vui Kong*. SING. C. A. 20 at [62].

imposition of inhuman punishment. Therefore, according to the Court of Appeal, it was “not legitimate for this court to read into Article 9(1) a constitutional right which was decisively rejected by the Government in 1969 especially given the historical context in which that right was rejected.”¹³⁴

However, the espousal of “hard originalism” as the preferred theory of constitutional adjudication in Singapore by the Court of Appeal in *Yong Vui Kong* is not unproblematic. First, the text of Singapore’s fundamental Liberties Clause, which include the due process clause, was not deliberated upon by a Constituent Assembly of the independent state in question. Instead, upon gaining independence from Malaysia in 1965, the Singapore legislature simply made most Fundamental Liberties provisions found in the Malaysia Federal Constitution applicable to Singapore via the Republic of Singapore Independence Act.¹³⁵ Since the Singapore constitutional framers did not deliberate upon the phraseology of the Fundamental Liberties Clauses, but merely imported them as a matter of expedience from Malaysia, one does wonder whether it is even possible to discern the original meaning they attached to those adopted provisions. At best, one can try to discern the original intent of the framers (and the members of the Reid Constitutional Commission) when the Malaysian Constitution was drafted and adopted, but it would be a very curious state of affairs for Singaporean judges in modern independent Singapore to give effect to and be fettered by the original intent of another nation state’s constitutional framers.¹³⁶

The Fundamental Liberties Clauses of the Singapore Constitution came into effect in 1965, the same year Singapore gained independence. Hence, it is unclear, even based on an originalist understanding of the Singapore Constitution, whether it was legitimate for the Court to discern the original intent of the constitutional framers in 1965 – when they imported the applicable Fundamental Liberties Clauses from Malaysia – from a Parliamentary decision made four years later to reject a proposal that would have provided for an express prohibition against inhuman punishment.

Given that the Singapore framers intentionally left the constitutional provisions enshrining terms like “in accordance with law” or “equal protection” ambiguously

. *Ibid* , at 72.
. *Supra*, n.111.
. See, Po Jen Yap, *Constitutionalising Capital Crimes: Judicial Virtue or Originalism Sin?* , SING. J. I. STUD. 281 (2011).

worded, fully comprehending that the language was not specific and could be interpreted in various ways, the choice to adopt a broader principle must thus be respected. After all, if a prohibition's reach is restricted to the practices that were thought to run afoul of the Constitution at the time the provisions were adopted, it would leave no room for reasoned adjudication of new practices that scientific and technological advancements or changed socio-economic circumstances bring about.¹³⁷

Fidelity to the Constitution requires judges to respect the framers' choice of rules or standards in the bill of rights. Instead, the Singapore judiciary has placed dispositive weight on the expectations of the constitutional framers in deciding whether an impugned legislation is constitutional. Such attempts to shackle the Constitution to the framers' original, specific interpretation of the text (as "hard originalism" would require) may indeed be inconsistent with their original intent of using vague, open-textured language to enact an enduring instrument with standards that allow future generations of lawmakers and judges to design and build over time through the processes of constitutional construction.¹³⁸

Therefore, it is evident that judicial recourse to "hard originalism" in Singapore is not mandated by the text or history of the country's supreme law. Rather, it is a consequence of the judiciary's deliberate choice to defer to the contemporary policy choices of the dominant People's Action Party (PAP) government, which has ruled Singapore without interruption since the nation's independence and has not taken kindly to robust judicial review.

2.9.3 System of Judicial Review in China

The first provision for judicial review in China appeared in the Constitution Draft of the Temple of Heaven of 1913. The power of interpretation of the future Constitution belonged to the legislature¹³⁹ a conclusion drawn from the French model of government in which the legislature has full authority to interpret its own statutes. The 1919 Constitution Draft adopted a system that entitled only the leaders of the legislature and judiciary to compose a special conference handling the task of

¹³⁷. Mark D. Greenberg & Harry ,*The Meaning of Original Meaning*, 86 Geo. I. J. 569, 580 (1998).

¹³⁸. *Id.* at. 815.

Articles 112 & 113 of the Constitution of China.

interpretation¹⁴⁰. Although the Constitution of 1923 still followed the principle of parliamentary supremacy with minor revision¹⁴¹ it established that the Highest Court of Justice had the authority to pass judgment on conflicts between national law and provincial law.¹⁴²

The 1925 Constitution Draft seemed to move a step toward the creation of a special constitutional court whose members included a chief justice, four other justices of the Supreme Court and four other persons nominated and elected by the legislature.¹⁴³ By explicitly providing in article 171 of the current Chinese Constitution that "laws that are in conflict with the Constitution shall be null and void," the principle of judicial review is firmly established. Article 173 vests the power of constitutional interpretation in the Judicial Yuan. In addition, Article 78 reiterates that "the Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders."

Since the National Government was guided by the Kuomintang during the political tutelage period, the Central Executive Committee of the Party had the final say on those conflicts between statutes and the "Provisional Constitution during the Period of Political Tutelage".¹⁴⁴

However, it failed to decide whether the Supreme Court or another specialized court which it would create within the Judicial Yuan was to assume the task. Since the Judicial Yuan is the highest organ of the state and is charged with civil, criminal and administrative cases, it may appear that the American model of judicial review was followed. A specialized tribunal is thereby created above and outside the regular court structure. Accordingly, the Chinese Constitution not only recognizes the principle of judicial review, but also establishes a special court to pass judgment on constitutional questions.

2.9.4 Judicial Review in Pakistan

Like India and the US, Pakistan has a federal constitution, which distributes powers between the centre and the provinces. Under Article 142 of the Constitution of

¹⁴⁰Article 101 of the Constitution of China.

By relaxing the quorum for passing a decision from two-thirds presence and three-fourths concurrence to two-thirds presence and concurrence provided in article 141.

¹⁴²Article 28 of the Constitution of China.

¹⁴³Article 94 of the Constitution of China.

¹⁴⁴Article 85 of the Constitution of China.

Pakistan, the federal legislature or parliament can make laws on subjects enumerated in the federal legislative list and the concurrent legislative list. Similarly, provincial legislatures are competent to legislate on subjects falling within their sphere of powers. If we go by the book, neither parliament nor a provincial legislature can encroach upon the other's legislative powers¹⁴⁵.

The Constitution of Pakistan also places some restrictions on the powers of both federal and provincial legislatures. In the first place, no law can be made which is in conflict with any of the fundamental rights granted by the constitution to the citizens. In this respect, Article 8 of the constitution states “Any law, or any custom or usage having the force of law in so far as it is inconsistent with the rights conferred by this Chapter [Chapter 1], shall, to the extent of such inconsistency, be void”.¹⁴⁶

It is from these restrictions on the legislative competence of parliament that the power of judicial review follows. The superior judiciary can invalidate an act of parliament that is beyond its legislative competence for any of the four reasons mentioned in preceding paragraphs. In other words, parliament in Pakistan is not sovereign. Rather its powers are restricted by some written provisions of the constitution and if these powers are over-stepped, the judiciary can be moved to get the grievances of the aggrieved party redressed.

The Constitution of Pakistan, like India and USA, does not confer the power of judicial review on the judiciary in express terms. The constitution does not state that a high court or the Supreme Court can strike down a law passed by parliament or a provincial assembly. What the constitution confers on the superior judiciary is the power to interpret the constitution. It is from this function of the judiciary that the power of judicial review follows.

Articles 238 and 239 of the Constitution of Pakistan, 1973, vest the Constitution amendment power almost exclusively in parliament. The two houses of parliament can amend any provision of the constitution by a two-third majority and subject to the assent of the president.

¹⁴⁵*The power of judicial review: scope and limits* - DAWN.COM, www.dawn.com/news/881082, visited on 27/7/17.

¹⁴⁶*Ibid.*

While giving parliament the power to alter the Constitution, Article 239 uses the word “amend”. The lexical meaning of the word “amend” is to make minor improvements in a document through addition or deletion. This clearly means that any amendment to the constitution has to be within its basic framework, otherwise it will not be minor. Thus parliament can introduce minor changes to the constitution; it cannot re-write or deface the constitution by changing its essential character. It is ultimately for the courts to adjudicate whether any constitutional amendment conforms to the fundamental character of the constitution, as this involves interpretation of the constitution. If the courts determine that a constitutional amendment has the effect of defacing the constitution, they can ask parliament to undo the amendment for being ultra vires to the Constitution.¹⁴⁷

Though the courts have the power of judicial review, the same cannot be exercised in an arbitrary fashion. If the law-making power of parliament is not unlimited, the courts' power to review the laws passed by parliament is also not unlimited. Like other organs of the state, the judiciary derives its powers from the constitution and the judges are as much under the constitution as anyone else. They can interpret and invalidate laws but they cannot themselves assume the law making function; nor can they confer that function on any person or institution other than the federal or provincial legislatures. Nor can the courts make constitutional what is manifestly unconstitutional. Sovereignty is located neither in parliament nor in the judiciary but in the constitution itself.

2.9.5 System of Judicial Review in Bangladesh

The Constitution of Bangladesh, which is founded on the spirit of its great struggle for independence, guarantees the independence of the judiciary as well as the judges and magistrates¹⁴⁸. The Prime Minister is the Chief Executive of the government, while the President is the ceremonial head of the state. The President acts mainly on the advice of the Prime Minister¹⁴⁹. The Constitution provides that the judges of the Supreme Court will be appointed by the President in consultation with the Chief

Ibid.

Art. 94 (4) and Art.116A of the Constitution of Peoples Republic of Bangladesh. ¹⁴⁹*Ibid*
Art.48 (3).

Justice¹⁵⁰. Similarly the power of promotion, posting, leave and discipline of the judges of the subordinate judiciary and judicial magistrates are vested with the President and exercised by him in consultation with the Supreme Court¹⁵¹. Annual budget for the Supreme Court and the sanction for human resources, equipment and transports are processed from the executive organ of the state. Sometimes special budgetary allocation becomes necessary for the judiciary. Interaction or occasional dialogue between the Chief Justice and the Chief Executive has been proved to be helpful to settle above issues smoothly and justly.

The rule of law is a basic feature of the constitution of Bangladesh. It has been pledged in the preamble to the constitution of Bangladesh that "It shall be fundamental aim of the state to realise through the democratic process a socialist society, free from exploitation- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political economic and social, will be secured for all citizens." An independent, capable and proactive judiciary is indispensable for the protection and advancement of democracy and rule of law. In Bangladesh, the Judiciary, one of the three organs of the state, plays an important role for advancement of democracy and Human Rights. In *Masder Hossain case*¹⁵², the Supreme Court issued 12 (twelve) directions inter alia declaring that the judicial service is a service of the Republic within the meaning of Article 152(1) of the Constitution, but it is a functionally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services. As per the direction, government separated judiciary from executive by making necessary rules and also set-up Judicial Service Commission for appointment of judges of the subordinate courts in the judicial service.

Article 26 of the Constitution makes all laws inconsistent with fundamental rights void to the extent of such inconsistency and further enjoins upon the state not to make any law inconsistent with fundamental rights. Article 102 of the Constitution vested the High Court Division with the competence of judicial review of administrative or legislative actions. The principle that only the 'persons aggrieved' can initiate a legal

Ibid Art.95 (1).

¹⁵¹*Ibid*, Article 116.

¹⁵²*Secretary, Ministry of Finance v. Mr. Md. MasdarHossain*, 2000 BLD (AD) 104 29

action in all matters including the matters of great public concern virtually keeps the public functionaries beyond judicial scrutiny . This inaction of the judiciary may erode people’s trust and confidence in the competence of the judiciary. In the above backdrop, the concept of Public Interest litigation (PIL) was formally recognized by the Supreme Court of Bangladesh in the case of *Dr. Mohiuddin Farooque*¹⁵³.

2.10 Judicial Review in India, USA, UK: Comparison

The scope of judicial review in India is not as wide as in USA. The American Supreme Court can declare any law unconstitutional on the ground of its not being in “due process of law”, but the Indian Supreme Court has no such power. In India, outside the limitation imposed on the legislative powers, Parliament and State legislature are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature. Another reason is because the Indian Supreme Court has consistently refused to declare legislative enactments invalid on the ground that they violate the natural, social or political rights of citizens, unless it could be shown that such injustice was expressly prohibited by the Constitution.

In India, there are specific and extensive provisions of judicial review in the Constitution of India such as Article 13, 32, 131-136, 143, 226, 227, 246, 372. Though the term “judicial review” is not mentioned in these Articles but it is implicit in these Articles. Whereas Constitution United States of America doesn’t have any specific provision for judicial review, Article III, IV, V incorporates judicial power of the Court, and constitutional supremacy and all the laws are subject to Constitution, therefore, it is implicit in nature. Judicial review in United States of America is the formulation by court.

In United Kingdom, there is no written Constitution, therefore the scope of judicial review is very limited in nature. Earlier there was absence of judicial review in United Kingdom, but after the expansion of this doctrine, it now becomes exist very broadly. Parliamentary Sovereignty is still in existence in United Kingdom and although this principle was absolute and indisputable a hundred years ago, it is no longer absolute

¹⁵³*Dr. MohiuddinFarooque v. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others*, 49 DLR (AD)(1997) 1

in today's modern British law. Indeed within the emerging new constitutional system in the United Kingdom, the courts may review legislation at least in certain extreme circumstances.

The doctrine of Separation of Powers which is a dominant feature of the American Constitution, had helped the Supreme Court a great deal in this connection. In Canada, Australia and India the existence of a parliamentary government, which ensures the responsibility of the executive to the legislature, minimizes the possibilities of conflict between the various agencies of the government. However, the position of the judiciary in India is more or less the same and is similar, to a great extent, to that in the United States regarding constitutional interpretation.

American system established an independent judiciary, supreme in its decisions regarding constitutional matters. The American Constitution prohibits the legislative absolutism of a majority which might become the master of the Constitution, the judge of its meaning and application. Condition prevailing in India were such that it adopted some modified form of the American pattern to suit Indian needs. There were three important problems which faced the Indian constitutionalist emergence of an all India-judicature and this is a hall-mark in India constitutional history because of the valuable role that has been played by the Federal Court in the field of constitutional advancement in India.

2.11 A Sum Up

To conclude, it can be said that due to the impact of judicial review the power of Courts has been strengthened in the present scenario. The doctrine of Judicial Review of United States of America is really the pioneer of Judicial Review in other Constitutions of the world which evolved after the 18th century and in India also it has been a matter of great inspiration.

In India the concept of judicial review is founded on the rule of law which is the swollen with pride heritage of the ancient Indian culture and society and the scope of judicial review is wider in India as compared to United States of America. Because the Constitution of United States of America is very concise in nature and it is the most rigid Constitution in the world. Whereas Indian Constitution are rigid as well as flexible in nature, it has detailed provisions and it is wealthiest Constitution in the world. The words and expressions used in the Indian Constitution are specific and exact.

The analysis of the Constitutional evolution in India, America, Canada and Australia reveals enormous powers of the court to review the constitutionality of the legislative Acts. In India, prior to the Government of India Act of 1935, the state was unitary and as such the constitutional documents imposed restrictions in framing laws in violation of the mandates of the English Parliament. The position of the law-making body was that of a subordinate legislature. There were other restrictions also in the pre-1935 Constitutional document. Federalism was introduced by the Government of India Act of 1935, though the Indian legislature remained a subordinate legislature even under this constitutional document and had no jurisdiction to frame laws in conflict with the English Parliamentary mandates. The legislative violations regarding distribution of powers and delegated legislation and certain other constitutional restrictions were the main topics of judicial interference. The Constitution of India of 1950 necessitated a massive field of judicial review. Legislative violations regarding fundamental rights, distribution of powers, delegated legislations, as well as other constitutional restrictions have occasioned enormous activities for judicial review.

Doctrine of judicial review has become very dynamic concept now. In various countries judiciary is performing as the guardian of the Constitution by using the power of judicial review. In India, courts are very strictly scrutinized the validity of law or any administrative actions if they inconsistent and illegal in nature. In India and United States of America , there are various constitutional limitations implicitly and also explicitly, which incorporates limitations to the law making power of Legislature , such as legislature cannot go beyond its power to make law and cannot violate the fundamental rights which is the basic structure of the Constitution.

Although the American practice of judging the constitutionality of laws by regular courts has been followed by a number of countries, but an alternative system was also established in many countries like France and Australia. With the creation of a Constitutional Court that specializes in this function. There were several reasons for this structural change. Since the principle of stare decisis is not a part of the civil law system, at least in theory, courts are not generally bound even by the decisions of the highest court. Thus, there may theoretically exist a conflict among courts on the question of whether a statute is constitutional. Furthermore, the existence of a separate administrative court independent of the regular courts which occasionally had to apply the same statutes as the ordinary court aggravated the possible contradiction

among judicial organs. This is a significant development from the establishment of the system of judicial review, because it presents an alternative means of guarding the constitution. China has also adopted this alternative approach.

The position in Canada, Australia and India is much different from that of the United States or Switzerland. In these federations the judges of the federal judiciary are appointed by the federal executive as in the U.S. but there is no necessity of an approval by the federal legislature like the power exercised by American Senate. In fact, in these countries there is no chance of a friction between the federal executive and the legislature on this matter, as they have a parliamentary system of government which ensures harmony between the executive and the legislature.

With respect to principles of legislative supremacy and separation of powers divergence; the gist of the principle of separation of powers is “checks and balances”. In other words, in order to establish and maintain a balance among all powers (legislative, executive and judiciary), not only should no power/branch of state be more powerful than any other power/branch, but also, each branch must have a check on the other branches. Accordingly, within the jurisdictions which are based on the separation of powers, in principle judicial review plays a very crucial role. However, since a number of jurisdictions which are based on the principle of legislative supremacy became aware of the potential pitfalls of unbounded legislative and executive branches owing to the painful lessons derived from history, judicial review have started to become one of the backbones of the rule of law in these systems as well.

Unlike the Constitution of the United States, which gave rights in unqualified terms and left it to the courts to define their limits and legitimize restrictions on them, the Constitution of India enumerated the rights as well as the restrictions. The makers of the Indian Constitution were apprehensive of the wider role assumed by the Supreme Court of the United States through interpretation of the ‘due process’ clause of the Fifth Amendment to the constitution of the United States. They purposely avoided the use of the words ‘due process of law’ so as not to allow the courts to invalidate laws that might be disliked by the judges. The debates in the Constituent Assembly show that the maker’s admirers of the Westminster model of democracy and wanted the courts in India to interpret the Constitution so as to cause minimum interference with the legislature. Many Indian leaders who had made sacrifices for national independence were of the view that the legislature should be supreme and the courts

should merely act as umpires to ensure that the parties played according to the rules of the games. The courts were supposed to interpret the Constitution not in terms of what it should be but in terms of what it is. The courts need not be concerned about what the effect of an interpretation would be but should state what the law is.

In America, though there is conspicuous absence of provisions for judicial review in the federal constitution, judicial review has been in practice since the beginning of the colonial rule; and the American judges and lawyers with the cooperation of the American people have evolved and developed the doctrine of judicial review to a great magnitude. By judicial decisions various objective standards of judicial limitations for judicial review have been evolved and affirmed. Canada and Australia are the offspring's of America in respect of constitutional evolution and in the adoption of the doctrine of judicial review. In these countries also, the violation of federal principles in law-making and of other constitutional restrictions, engaged the attention of the courts, and judicial review of legislative Acts became a fundamental feature of the constitutional jurisprudence.

In England, the courts have expanded their power through the process of interpretation. They have imposed greater restrictions on the executive by subjecting more and more of its actions to the principles of natural justice, critically scrutinizing the exercise of discretionary powers, and narrowly construing the ouster clauses that made the decisions of the administrative authorities or tribunals final and conclusive. Although courts in England cannot declare an act of Parliament ultra vires, they have subjected the administrative action to searching judicial vigilance. This is also judicial activism.

Thus, it can be said that, there should be more expansion of judicial review in all the countries in the world because it creates democracy in the minds of the people as the basic feature of the judicial review is to protect the individual rights, therefore there is a need of expansion of judicial review. Moreover to strengthen judicial review means to strengthen the liberty and freedom of individual.

CHAPTER 3

JUDICIAL REVIEW OF LEGISLATIVE ACTION IN INDIA: A TOOL TO UPHOLD SUPREMACY OF THE CONSTITUTION

3.1 An Overview

The Constitution of India is basically a federal Constitution and is marked by the traditional characteristics of a federal system. Namely, Supremacy of the Constitution and division of powers between the Union and the States, existence of an independent judiciary and a rigid procedure for amendment of the Constitution. The Indian Constitution has conferred various powers and duties upon the three wings of the State i.e. the Legislature, Executive and the Judiciary. Based upon the principle of separation of powers. The Legislative Powers are exercised by the Parliament and the State Legislatures. The Executive Powers are exercised by the President and the State Governments at the Central and State Level respectively. Though they also exercise Legislative Powers. The same are actually exercised by the Council of Ministers in their name.

The judicial powers are exercised by the Courts with the Apex Court being the highest Court in the hierarchy followed by the High Courts and the Subordinate Courts. One of the distinctive features of our Constitution is that while the Legislature and the Executive cannot supervise or review the decisions of the court, the higher Courts can review the decisions of the Executive and test the legality and validity of the laws passed by the legislature. In exercise of their power of judicial review. It will not be out of context to say that the higher Courts have been conferred with the power as well as a duty to uphold the Constitution and to ensure that the other organs of the State function within the limits prescribed for them under the Constitution.

Judicial review is the authority of the Courts to declare void the acts of the legislature and executive. If they are found to be in violation of the provisions of the Constitution. Judicial Review said Khanna, J. in the *Fundamental Rights*

case¹, “has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statutes are found to be violative of any of the Articles of constitution which is the touchstone for the validity of all laws the Supreme Court and the High Courts are empowered to strike down the said provisions”². It is a power which is inherently found in a federal constitution as the judiciary has the final power to interpret the constitution.

The doctrine of judicial review was for the first time propounded by the Supreme Court of America. Originally, the United States Constitution did not contain an express provision for judicial review. Even though there was no express power of judicial review, it was propounded as a judicial dictum by Chief Justice Marshall in *Marbury v. Madison*³ in the following words:-

“Certainly all those who had framed the written Constitutions contemplate them as forming the fundamental and paramount law of the nations, and consequently the theory of every such Government must be that an act of the legislature, repugnant to the Constitution, is void.”

The Constitution of India, unlike the U. S. Constitution, expressly provides for judicial review in Article 13(1) by declaring all laws in force, immediately before the commencement of the Constitution to be void, to the extent of their inconsistency with the provisions of Part III of the constitution dealing with fundamental rights and Article 13(2) by declaring that the state shall not make any law which takes away or abridges the fundamental rights and that any law to that extent shall be void. The definitions of “State”, “law” and “laws in force” are wide enough to convert not only the legislative but also executive action.

“Law” however, would not include an amendment to the Constitution as is made clear by Article 13(4). Parliament can therefore, amend the Constitution of India including the fundamental rights, so long as the basic structure is not affected, as

¹*Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; (1973) 4 SCC 225
Ibid.
(1803)1 Cranch 137, 2 L. Ed. 60

laid down in *Keshavananda Bharati v. State of Kerala*⁴. It has also been held in this case that Judicial Review is the “basic feature” of the Indian constitution and, therefore, it cannot be damaged or destroyed by amending the Constitution under Article 368 of the constitution.

In Part XI of the constitution, there is a clear distribution of the legislative powers between the Union and the State. A combined reading of Articles 245 and 246 would empower exclusively the Parliament to make laws with respect to matters enumerated in the Union list (List 1 in Schedule VII); and the legislature of and State to make laws for such State with respect to matters enumerated in the State list (List II). Parliament and State Legislatures have both the power to enact laws, subject to territorial restriction, with respect to matters enumerated in the Concurrent list (List III). This provision is subject to Article 162 relating to the executive power of the States provide that the executive power shall extend to matters with respect to which Parliament and the State legislatures have, respectively, power to make laws. Thus the provisions of Part XI and Articles 76 and 162 together define the limits of legislative and executive power in terms of competency which shall come in the orbit of judicial review.

The judiciary in India is made up of the Supreme Court of India, the High court’s in the States and the subordinate judiciary consisting of District and Sessions Judges, Courts of the subordinate judge, magistrates and massifs etc, but the power of judicial review lies only with the Supreme Court of India and the High Courts of the States.

3.2 Doctrine of Separation of Powers: An Essence of Democracy

The doctrine of separation of powers contemplates the idea that the governmental functions must be based on a tripartite division of legislature, executive and judiciary. The three organs should be separate, distinct and sovereign in its own sphere so that one does not trespass the territory of the other. Aristotle who first perceived and saw that there is a specialization of function in each Constitution developed this doctrine. Later other theorists like Montesquieu, John Locke and James Harrington described these functions as legislative, executive and judicial. All the theories that were forwarded by these political thinkers in relation to the

⁴*Supra* n.1.

doctrine of separation of powers were on a basic presumption that the liberties of the people should be protected from the tyrannical and despotic rulers when all the powers are vested and exercised by the very same persons.

The value of the doctrine lies in the fact that it seeks to preserve the human liberty by avoiding the concentration of powers in one person or body of persons. It also emphasizes that the persons entrusted with power in any one of the three branches – executive, legislative and judiciary shall not be permitted to encroach upon the powers confided to the others.

The framers of the U.S. Constitution have strictly adhered to this doctrine of separation of powers. But, in actual practice it has been seen that this rigidity in the form of watertight compartments is not possible. Therefore, functionally the constitutional provisions are premised on the principle of checks and balances. In *William Marbury v. James Madison*⁵, the U.S Supreme Court offered a new dimension to the doctrine of Separation of Powers.

The framers of the Indian Constitution did not recognize the doctrine of separation of powers in a rigid sense. Unlike the American Constitution, this doctrine has not been strictly applied in the Indian Constitution. It cannot be explicitly seen but can be witnessed through the differentiation made in the discharge of functions by the different branches of the government in the Constitution. This doctrine is not completely alien to our Constitution. As we retrospect, relevant classic jurisprudence like *Ram Jawaya v. State of Punjab*⁶ clearly elucidates this principle. Chief Justice Mukherjea in the instant case said:

*“It can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way”.*⁷

⁵*Supra* n.3.
AIR 1955 SC 549

⁷*Ibid.*

Thus, it can be inferred from the above that these organs of the government are allowed to exercise their functions but within certain limits. These limits are silver lined constitutionally and the same also guarantees limitable encroachments.

The doctrine of strict separation of powers has been considerably modified in the recent years. The theory could not prevent the vesting of rule-making powers in the courts. In *United States v. Nixon*,⁸ the doctrine of separation of powers was invoked to deny judicial control over the President in the assertion of executive privilege to refuse certain tapes and records sought for the purpose of criminal trial. The claim of total immunity failed. The court unanimously denied the President's right to make a final, unreviewable claim of executive privilege. It said, "Neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can an absolute, unqualified presidential privilege of immunity sustain from judicial process under all circumstances".⁹

In Great Britain, which formed the model for Montesquieu theory of the separation of powers, the principles has never been accorded a constitutional status, nor has it ever been theoretically enshrined. The executive is formed by the majority party in the House of Commons, which thus both controls the government and is, in turn, under its direction.

The doctrine of separation of powers is an inseparable part of the evolution of democracy. Democracy dictates a system in which every citizen can, without fear of retribution, breathe, express himself, and pursue his or her interests. It enables him to live a life of his choice to the extent he does not encroach upon the rights of the other people. It is in this context that it can be presupposed that a system of balances and counter balances exists among the three organs of the government to ensure a strong nurtured democratic system. The Legislature, the Judiciary and the Executive are the pillars of democracy. No democracy indeed contemplates conferment of absolute power in any single authority. As in the words of Lord Acton: "*Power corrupts and absolute power tends to corrupt absolutely*".

418 U.S. 683 (1974)

⁹*Ibid.*

Therefore the system of checks and balances is one of the most salient features of our constitutional scheme. The three organs can practically not be segregated into three watertight compartments due to their interdependence on each other to ensure efficacious governance. They have to work in accordance and in consonance to achieve a meaningful sustenance and purposeful progress of citizens. Though, minimum encroachment is always desirable.

3.2.1 Doctrine of Separation of Powers Work as a System of Checks and Balances in India

In India, the doctrine of separation of powers in its absolute rigidity is not inferable from the provisions of the Constitution. The Indian Constitution has, in fact, made no such provision as to the separation of functions among the three organs of the state. It merely states that the executive power of the union shall be vested in the President. But the constitution also contains a provision for a council of Ministers with the Prime Minister at the head to aid and advise the President and the President is bound to accept the advice of the Council of Ministers.¹⁰ A proviso to clause (1) of Article 74 added by the Constitution (44th Amendment) Act, 1978, may be extracted thus: “The President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.” Under this proviso the President has, no doubt, the power to require the Council of Ministers to reconsider the advice tendered to him, but if the same is binding on him. Under Article 75(1) though the president is authorized to appoint the Prime Minister, it does not follow that he can select a Prime Minister of his own choice. His choice is confined to the leader of the party-in-majority in the House of the People. Other ministers are to be appointed by him on the advice of the Prime Minister. Though the ministers hold office during the pleasure of the President,¹¹ the Prime Minister virtually holds office till he commands the confidence of the House, as other ministers hold office till they enjoy the confidence of the Prime Minister.

Article 74 (1) of Constitution of India.

¹¹Article 75 (2) of Constitution of India.

Though the Indian Constitution allocates executive powers to the President and Governors under Article 53 (1) and Article 154 (1) of the Constitution of India, they are also empowered with certain legislative powers under Articles 123, 213 and 356 and certain judicial powers under Articles 103 and 192. Similarly the legislature exercises certain judicial functions under Articles 105 and 194 and judiciary exercises few legislative and executive functions under Articles 145, 146, 227 and 229. However the judiciary is made separate from the executive in the public services of the State under Article 50 of the Constitution.

The doctrine of separation of powers, so far as Indian Constitution is concerned, reveals an artistic blending and an adroit admixture of judicial and executive functions.¹² Separation sought to be achieved by our Constitution is not absolutely or completely separate. The only vitality of the doctrine of separation of powers is that one organ of the state should not assume the essential functions of the other. Hinting on the nature of separation of powers brought about by our Constitution, the Supreme Court in *Ram Jawaya Kapur v. State of Punjab*¹³ observed: “The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity, but the functions of the different part or branches of government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another,” To the same extent if the observation of justice Das in *Ram Krishna Dalmia v. Justice Tendokar*,¹⁴ when he opined: the Constitution does not express existence of separation of powers and it is true that division of powers of the government into legislative, executive and judiciary is implicit in the Constitution but the doctrine does not form an essential basis or foundation-stone of the constitution framework as it does in the United States of America. The American doctrine of well-defined separation of legislative and judicial power has no application in India.¹⁵

¹²*Kesavananda Bharati v. State of Kerala*, Supra n.1.

¹³*Supra n.6.*
AIR 1955 SC 549 at p. 556

¹⁵*Jayanti Lal v. S.M. Ram*, AIR 1964 SC 649; *Chandra Mohan v. State of U.P.* AIR 1966 SC 1987

Re-stressing the same view the Supreme Court of India, in *Indira Nehru Gandhi v. Raj Narain*¹⁶ Further remarked that the Indian Constitution, like the American or Australian Constitution, does not recognize the doctrine of separation of powers. It is in a broad sense only. Expressing his views Ray C. J. observed that the doctrine of separation of powers will not apply while Parliament exercised the constituent power through the Constitution to the various departments or heads. In the hands of constituent authority there is no demarcation or separation of powers. Hence, according to him, the constituent power is independent of the doctrine of separation of powers.

The doctrine of separation of powers in its classical sense is not applicable to any modern government. It does not mean that it has no relevance in the world of today. The logic behind the doctrine is still valid. The rationale underlying the doctrine has been that if all power is concentrated in one and the same organ, there would arise the danger that it may enact tyrannical laws, execute them in a despotic manner and interpret them in an arbitrary fashion without any external control. Speaking about the relevance of the doctrine Chandrachud J. in *Indira Nehru Gandhi v. Raj Narain*¹⁷ also observed that the political usefulness of the principle of separation of powers is clearly recognized today. No constitution can survive without a conscious adherence to its checks and balances.

3.2.2 Power of Judicial Review and Doctrine of Separation of Power in India

Separation of power is the essential feature of the Democratic Republic established under our Constitution by division of powers between the three important wings of the State, i.e., the Parliament and State Legislatures, the Executive and the Judiciary. However there is absence of specific provisions in the Constitution exclusively vesting legislative powers in the legislature and judicial powers in the judiciary was noticed in *Delhi Laws case*¹⁸ in 1951, but the essence of doctrine of separation of powers and of constitutional limitation was accepted as a feature of basic structure of the Constitution in *Indira Gandhi v. Raj Narain*¹⁹. Judicial review and activism functions of the judiciary is an

¹⁶AIR 1975 SC 1590

¹⁷*Id.*
1951 SCR 747

¹⁹*Supra* n.16.

important element of our system of justice to keep a check on the legislature who are the law makers of the land, so that they do not exceed their powers and work within the allowances that the constitution has made for them. The separation of the judiciary from the other organs though is taken very seriously so that the commonman's liberty can in no circumstances be compromised and a fair remedy is available to any individual citizen of the state. Thus the Indian Constitution, which is an extremely carefully planned document designed to uphold the integrity and liberty of every citizen, has not in its entirety embraced the doctrine of separation of powers but has indeed drawn a lot from the concept and kept it as a guiding principle.

The framers of our Constitution drafted it so meticulously that it provides for an independent and impartial Judiciary as the interpreter of the Constitution and as custodian of the rights of the citizens through the process of judicial review. This mandates the judiciary to interpret the laws but not to make them. The scope of judicial review does not extend beyond enquiring whether an impugned legislation or an executive action falls within the competence of the Legislature or of the executive authority or is consistent with the Fundamental Rights guaranteed by the Constitution or with its other mandatory provisions.

In achieving the object independence of judiciary, the Indian Constitution has particularly relied on the American Constitution while rejecting the British pattern of conventions. In England, in spite of the independence of judiciary even the highest judiciary does not have the power to strike down a law enacted by the Parliament. In contradiction to this, the Constitution of India confers absolute powers on the High Court and the Supreme Court to strike down not only legislations brought about by the legislatures but also Acts passed by the Parliament and the peak of the judicial power reached when in *Kesavananda Bharati case*²⁰, the court held that the amending power enshrined in Article 368 of the Constitution could not be amended so as to affect the basic structure of the Constitution. It is doubtless true that independence of judiciary is a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the constitution.

²⁰*Supra* n.1.

The three organs have to exercise their functions keeping in mind certain constitutionally assigned encroachments. However according to Chief Justice Subba Rao in *Golak Nath v. State of Punjab*²¹“It [the Constitution] demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.No authority created under the Constitution is supreme; the Constitution is supreme and all the land”.

The Honorable Supreme Court has itself construed that the concept of Separation of powers is a “basic feature” of the Constitution. So if one encroaches the territory of the other it would be a clear violation of the basic structure of the Constitution and judiciary is not an exception to the same.

It is interesting to note that the Supreme Court has itself in *Kesavananda Bharati's case*²² held that separation of powers is part of the basic structure of the Constitution of India. This has been reiterated in many subsequent decisions of the Supreme Court including by a Bench of five judges in *Indira Gandhi v. Raj Narain*²³, where the Supreme Court while reiterating the principle of separation of powers has clearly held that neither of the three organs of the State, namely the Legislature, the Executive and the judiciary can take over the functions assigned to the other. Despite its own decisions in this regard, the charge is, as in the United States, that the Supreme Court of India has transgressed the limits of its constitutional power.

The perceived corruption of the political wing of the State as well as the apathy and indifference to the deprivation of basic rights of the people, has compelled judicial intervention in areas where otherwise the courts may not seek to step in.

The Supreme Court of India itself has declared that broad separation of powers exists under the Constitution. But obviously the concept has been treated by the court as flexible, for its vast powers to be exercised wherever and whenever public interest demands. One should remember that it is the members of the Bar who initiate public interest litigation after having investigated the facts thoroughly and by structuring the petition so that it falls within the permissible

²¹ AIR 1967 SC1643

²² *Supra* n.1.

²³ *Supra* n.16.

parameters of judicial intervention, while, judges exercise statesmanship in deciding when and to what extent they should utilize the jurisdiction conferred on the court by the Constitution in the larger public interest. Exercise of power by the Supreme Court notwithstanding the separation of powers between the three great departments of State is necessary and should continue as long as the other two wings of State do not discharge to the full, their constitutional obligations and duties.

3.3 Parliamentary Sovereignty vs. Limited Sovereignty

The concept of Parliamentary Sovereignty broadly means that Parliament has the right to make or unmake any law, and no person is allowed to override or set aside the law of Parliament. Acts of Parliament override the law of the judges²⁴. These ideas were set forth by A.V. Dicey. It has been said²⁵ that Dicey's concept lacks support from precedents, and is inherently fallacious because the nature of 'sovereign' power is contrary to the idea of the Parliament. A problem arises because Parliamentary Sovereignty entails the Parliament's ability to make or unmake whatever law without restriction. This necessarily entails that Parliament is not bound by the Rule of Law, and it can exercise power arbitrarily. Parliament can both override judicial interpretation, and even provide that an act is not subject to judicial interpretation.

In the United Kingdom, the parliament is supreme and the supreme judiciary still forms a part of the legislature. However, the judges there have liberty to give decisions without fear or favour on matters coming to them. Not only due to the constraints of a federal structure, the fathers of the American constitution also had a very strong faith in the judiciary hence, an independent judiciary was established in that country. They were convinced that if any fetters are placed on the independence of judiciary, the rights and liberties of people might be endangered. If experience is any guide, the Supreme Court has invariably shown a high degree of independence in awarding judgements, many of them going against the government the powers of colonial and early American courts

²⁴A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, 10th ed., 1959, pp. 39-40.

Geoffrey de Q Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty" (1985) 59 *Australian Law Journal*, pp. 276-284.

followed the pattern set in Britain. Theories of parliamentary/legislative sovereignty ensured that courts remained incapable of limiting the power of the sovereign. Within a modern legal system, enacted laws remain in force until they are repealed or amended, unless they are declared when enacted to have a limited life. It is inherent in the nature of a legislature that it should be free to make new laws. The rise of popular sovereignty, however, brought a new function for the courts; the power of judicial review. Over time, judicial review metamorphosed into the judicial supremacy enjoyed by the United States Supreme Court and its state court counterparts. This tradition has been diffused gradually in many of the political systems in the world.

Albert Venn Dicey commented briefly with identifying the approach to statutory interpretation which he argued was the corollary of the doctrine of the sovereignty of parliament. Calling the legal doctrine of the sovereignty of parliament the “dominant characteristic” of British political institutions, he argued that Parliament—Queen, Lords, and Commons “acting together” had the right to “make or unmake any law whatever”, and “no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”²⁶

The idea of the sovereignty of Parliament was long seen as the core of democratic practice. The superior position of the popularly elected legislature and its corollary of majority rule have been central principles for democratic revolutionaries since the notion was appended to the unwritten English constitution.²⁷ At that time, the threat to liberty was monarchical power, and the subjugation of monarchical power to popular control was the primary goal. The resulting doctrine was that Parliament had “the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”²⁸

In the continental tradition, the intellectual underpinning of parliamentary sovereignty was provided by the Rousseauian concept of the general will. The

²⁶A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., Macmillan and Co. Ltd., London, 1959, pp. 39-40.

²⁷Jack Rakove, “*The Origins of Judicial Review: A Plea for New Contexts*”, *Stanford Law Review*, Vol. 49, 1997, p.1031-1052.

²⁸Albert V. Dicey, *The Law of the Constitution*, 8th ed., Macmillan and Co. Ltd., London, 1915, pp. 3-4.

people were supreme, and their general will as expressed through their publican representatives could not be challenged. This theory combined with the regressive position of the judicial parlements in the French Revolution, led to a long tradition of distrust of judges in France.²⁹

It was natural that the early proponents of democracy supported parliamentary sovereignty. They saw threats to liberty from the traditional sources: the ancient regime, the monarchy, and the church. Once these formidable obstacles to popular power had been overcome, theorists could hardly justify limitations on the people's will, the sole legitimate source of power. As democratic practice spread, however, new threats emerged. In particular, Europe's experience under democratically elected fascist regimes in World War II led many new democracies to recognize a new, internal threat to democracy. No political institution, even a democratically legitimate one, ought to be able to suppress basic liberties.

Post-war constitutional drafting efforts focused on two concerns: first, the enunciation of basic rights to delimit a zone of autonomy for individuals, which the state should not be allowed to abridge; and second, the establishment of special constitutional courts to safeguard and protect these rights. These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be counter-majoritarian, able to protect the substantive values of democracy from procedurally legitimate elected bodies.

Although the post-war constitutional drafting choices in Europe dealt parliamentary sovereignty a blow, the idea retained force in terms of political practice. More often than not, the idea was used by democratic regimes. Marxist theory was naturally compatible with parliamentary sovereignty and incompatible with notions of constitutional, limited government. Similarly, new nations in Africa and Asia reacting to colonialism often dressed their regimes in the clothes of popular sovereignty, though oligarchy or autocracy was more often the result.

Today, in the wake of a global "wave" of democratization, parliamentary sovereignty is a waning idea, battered by the legacy of its affiliation with

²⁹Mauro Cappelletti, *Judicial Review in the Contemporary World*, Princeton University Press, London, 1996, pp.33–34.

liberalism. Judicial review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be an anathema. From France to South Africa to Israel, parliamentary sovereignty has faded away. We are in the midst of a “global expansion of judicial power,” and the most visible and important power of judges is that of judicial review³⁰.

Even in Britain, the homeland of parliamentary sovereignty and the birth place of constitutional government, there have been significant incursions into parliamentary rule. There have been two chief mechanisms, one international and the other domestic. The first mechanism is the integration of Britain into the Council of Europe and the European Union (EU), which has meant that supranational law courts are now regularly reviewing British legislation for compatibility with international obligations. The domestic subordination of legislation of the British Parliament to European law was established when the House of Lords misapplied a parliamentary statute in response to the European Court of Justice’s (ECJ) *Factortame* decision of 1991³¹. More recently, the incorporation of the European Convention of Human Rights into United Kingdom domestic law by the Human Rights Act 1998 has led to greater.

India is a democracy which has adopted the Westminster system or the cabinet system of parliamentary democracy. But, unlike England, the Parliament or the Legislatures are not supreme. On the other hand, the Indian Constitution is a quasi-federal one and there is a broad distribution of powers between the three great organs of State, the Legislature, the Executive, and the Judiciary.

Limited sovereignty is the predominant feature of the modern world. Unlimited sovereignty leads to despotism. It also generates tyranny; Quest for limitation of sovereignty is the essential pursuit of the Constitutional jurists. The limitation of sovereignty is the main objective of rational man, and it is necessary to search for the principles of constitutional limitation³². The modern democratic constitution engrafts the fundamental aspects of limited sovereignty. The constitutional is a charter of defined and limited powers.

³⁰Neal Tate & Thorsten Vallinder, *The Global Expansion of Judicial Power*, New York University Press, NY, 1995, p. 57.

Josef Drexler, *British Supremacy of Parliament after Factortame*, Cambridge University Press, London, 1999, p. 164.

R. H. S. Crossman, *Government and Governed*, P 71, Chatto & Windus, London, 1964.

In England, the Magna Carta of 1215 A.D. gave for the first time the idea of limited government. It established that the King's power can be exercised only according to the established custom and law. Chief Justice Coke in 1610 in *Bonham's case*³³ urged that the law against common right and reason is void. The petition of Rights of 1628 and the Bill of Rights of 1689 effectively recognized the doctrine of Limitation of Powers. John Locke, who flourished in the 17th Century (1632-1704), preached the doctrine of limitation of the legislative and executive powers. He said, "though the legislative whether placed in one or more, whether it be always in being or only by intervals, though it be the Supreme power in every common-wealth; yet, first, it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people... Their power in the utmost bounds of it is limited to the public good of the society."³⁴ Locke also pleaded that.... "The end of law is not to abolish or restrain, but to preserve and enlarge freedom... where there is no law there is no freedom".³⁵ Locke's thinking and philosophy dominated the constitutional thoughts of England and America in the century but in England the influence of Locke's concept of limitation of powers remained confined to executive actions alone, whereas in the United States of America the doctrine of Limitation of Power dominated the legislative field. The Bill of Rights of the American Constitution in the shape of the first ten amendments and Fourteenth Amendment of 1868, regarding the 'Due Process' and the 'Equal Protection' Clauses are the instances of the evolution of the concept of limitation of powers which owe much of their credit to the constitutional concept of Locke.

In the democratic state the court is the essential organ for maintaining the fundamental object of the Constitution and for keeping the legislature within the limits assigned to its authority by the Constitution, for saving the people from the dangers of democratic tyranny and for materialising the aim of the Constitution by establishing a harmonious and cohesive society based on ideal common

(1610) 8 Co. Rep. 113b at 118a

John Locke, *Two Treatises of the Civil Government*, Chap. XI of the Extent of Legislative Power, From the Great legal Philosophers, edited by Clarence Morris, University of Pennsylvania Press, Philadelphia, 1963, PP 153-154.

Locke, *Two Treatises of Civil Government*, Quoted by Alan Barth in his Book 'Heritage of Liberty, McGraw Hill Book Company, New York, 1965, p.54.

morality. In this way the Court is a real participant in the living stream of national life.

3.3.1 Concept of Popular Sovereignty: Basis of Judicial Review of Legislative Acts in India

The original concept of sovereignty was of a unitary State. The people of ancient India had also the same concept. Even the great European legal philosophers, such as Plato (427-347 B.C.) and Aristotle (384-322), had the same idea. Bodin (1530-1596), who was considered to be an enlightened and independent thinker in the age of intellectual sterility³⁶, Hobbes (1588-1679) and Austin, also dealt with the concept of sovereignty. But their ideas were crude. In their views, sovereignty contained three characteristics: (i) Sovereignty is essential with a State; (ii) Sovereignty is indivisible, and (iii) Sovereignty is unlimited. They had a unitary State in their mind, and their concept of sovereignty was developed in the context of a unitary State. Regarding the location of sovereignty, they were not clear. The modern concept of federation was unknown. Jethrow Brown, who was the interpreter of Austin, said that the State is a Corporation. Thus, for the first time, he introduced the concept of federalism.

Federalism took root in America in a more practical and workable form. Federalism is not the offspring of political science, but it is mostly the product of growing economic and social diversities. The original concept of federalism was to provide peace and security to the people; its modern concept is to secure economic, social and cultural ameliorations. As Williams S. Livingston remarks: "The essential nature of federalism is to be sought for not in the shadings of legal and constitutional terminology, but in the forces economic, social political, cultural that have made the outward forms of federalism necessary"³⁷.

American federalism was the result of the direct economic and social forces which brought all the sovereign states into one-co-operative tie. Another cause of the evolution of American federalism was the integration of the independent sovereign states into a strong texture of political unity. As Morris R. Cohen

³⁶ Chester C. Maxey, *Political Philosophies*, The Macmillan Company, New York, 1948, p.162.
³⁷ William, S. Livingston, *Federalism and Constitutional Changes*, Clarendon Press, Oxford, 1956, p.1.

remarks – “Vigorous forces contended for a strong Central Government, equally powerful groups insisted upon decentralized sovereignty. The solution was reconciliation of these sovereignties into federalism³⁸. In Judicial review the Supreme Court of America has always tried to amplify the federal power keeping in view the reconciliation of sovereignties.

In India also, political forces combined with social and economic urges, led to the creation of a federal state in 1934, which took more practical and effective shape under the Constitution of India of 1950.

As about the evolution of the location of Sovereignty, the Parliamentary sovereignty is a subsequent evolution. The original concept is of popular sovereignty. Even the king of the monarch was to obey the wishes of the people. The modern thinkers have dealt with the nature as well as the location of sovereignty, which are the foundations of judicial review.

The English doctrine of Parliamentary supremacy was superseded in America by the doctrine of popular sovereignty. In America the doctrine of popular sovereignty had its foundation in the Declaration of Independence of 1776 and it culminated in the Preamble of the constitution on which the doctrine of popular sovereignty was adopted. The American judges and jurists observe- “The sovereignty of a State does not reside in the persons who fill the different departments of government, but in the people from whom the government remunerates, and who may change it at their discretion. Sovereignty then in the country abides with the constituency and not with the agent.³⁹” Willis points out – “Who then, in the United States is sovereign? It is the people. The people not as Rousseau suggested without determinate forms for the exercise of sovereignty; not as citizens of the United States, nor as Citizens of the various States, but the whole people as organized in government in express and adjust their will, either directly or through representatives.⁴⁰

In the Indian Constitution also the concept of popular sovereignty has been adopted India started constitutional agitation to gain popular sovereignty and

Morris R. Cohen, *American Thought*, Edited with a Foreword by Felix S. Cohen, The Free Press, Glencoe, Illinois, 1954, p.125.

Spoooner v. McConell (C. C. Ohio 1838) 337 at 347

Hugh Evander Willis, *Constitutional Law of the United States*, The Principle Press, Bloomindgom, Inc., 1936, p.52.

ultimately it succeeded. Pandit Jawhar Lal Nehru while moving the Objective Resolution in the Constituent Assembly on December 13, 1946 said, “all power and authority of the sovereign independent India, its constituent part and organs of Government are derived from the people.”⁴¹ Justice Beg of the Allahabad High court has expounded the concept of popular sovereignty with reference to the Preamble of the Indian Constitution. “The idea of sovereignty involves freedom from all foreign control or domination. The idea of democracy involves freedom from all internal control or domination. Both the ideas combined together reassert the sovereignty and Paramount of the people’s will over everything”.⁴² Justice William O’Douglas of the Supreme Court of America on comparing the Constitutional concepts of India and the United States of America says “India and the United States both recognize that the people are the basis of all sovereignty.”⁴³

The legislature holds exclusive power of legislation and excess in delegation of legislative powers to the executive becomes a matter of judicial review.

Judicial review with reference to the concept of sovereignty has various phases of evolution. Before the introduction of federalism in America, judicial review was confined to arbitrary and unjust legislation as propounded by Chief Justice Coke in England. In the colonial period, the legislation was challenged in the colonial courts as well as in the Privy Council in appeal on the ground that the impugned legislations were against the sentiment and wishes of the people. When Marshall established the system of judicial review, his concept of judicial review was founded on the doctrine of constitutional supremacy and protection and amplification of the federal powers. Thus introduction of federal element in judicial review is a later evolution as federalism itself was a subsequent invention. In the case of federal sovereignty, the question of Union-State relation regarding the distribution of powers becomes a predominant feature which necessitates judicial intervention.

⁴¹Jawahar Lal Nehru’s Speeches, Vol. 1 (1946-1949), The Publications Division, Government of India, Delhi, 1958, p.6.

⁴²*Ramanandan v. State*, AIR 1959 All 101 at P 188, Para 65.

William O Douglas, From Marshall to Mukherjea, The Tagore Law Lectures delivered in July 1955, Eastern Law house Ltd., Calcutta, 1956, p.6.

For the purpose of judicial review of legislative Acts it is necessary to ascertain the location and nature of Sovereignty in a particular constituting. Judicial review is permissible only where the State entertains the Concept of popular Sovereignty and also where the nature of Sovereignty is federal. Where popular Sovereignty prevails, even in the absence of federalism, judicial review is a natural event for determination of the violation of the fundamental rights guaranteed in the constitution and of other constitutional restrictions imposed on the legislature.

In federal Sovereignty, there is distribution of legislative powers between the Union and the State legislature, and encroachment of the legislative power by either is a constitutional conflict to be decided by the court. Judicial review is the proper institution to effectuate the constitutional arrangement regarding location and nature of Sovereignty and the concept of Sovereignty has practice significance.

The Constitution has its foundations on ethical considerations, high public morality and social, economic and political urges. The Constitution prescribes rights, duties and functions of the different governmental organs and limits their powers; and each organ of the government, apart from constitutional compulsion, has moral obligation to obey the limitations and restrictions assigned in the Constitution. A good and virtuous Constitution having moral foundations protects individual freedom and liberty, creates a balance between the individual interest and the social needs and produces good legislations, good rulers and good citizens.

In a modern democracy the court is the essential organ to maintain the fundamental objects of the Constitution. The court keeps the legislators and other governmental authorities within bounds and limits of powers prescribed in the Constitution and thus it helps the citizens in the vindication of justice and restoration of their violated rights guaranteed in the Constitution.

The most predominating condition of judicial review is the concept of popular sovereignty and constitutional supremacy. Where parliamentary sovereignty prevails, as in England, there is no scope of judicial review. The Basic English Constitutional concept is that the people are the source of all powers, and they seized all essential constitutional powers from the monarch and reposed them in

Parliament. At the time of law-making the whole people of England are supposed to be present in Parliament and as such each parliamentary enactment is necessary the verdict of the whole people which can be changed and repealed only by the verdict of the whole people which can be changed and repealed only by the verdict of the whole people by another Parliamentary enactment. But in India, as in America, the concept of popular sovereignty prevails which means that the legislature is the mere agent of the sovereignty prevails which means that the legislative is the mere agent of the sovereign people and as such any enactment by the agent of the people is liable to be scrutinized in the court of law to ascertain if the impugned legislative enactment is against the mandate of the people incorporated in the Constitution. The popular sovereignty and the constitutional supremacy are the fundamental features of the American democracy and India has adopted the same system in its republican Constitution of 1950. As such judicial review is the dominant feature of the Indian Constitutional system also.

Judicial review is the process applied by the court to determine the constitutionality of legislative Act, ordinance or custom having the force of law if enacted or having come into existence against the constitutional directions, intentions, prohibitions and limitations. The court has right to declare such law, ordinance or custom void and to refuse its enforcement. The legislature has to work under constitutional limitations. The legislature may not be able to decipher its own lapses free from bias and as such it is the constitutional policy that the court being an independent and impartial body is the best legal authority to scrutinize the validity of any legislative Act.

With regard to the violation of fundamental rights guaranteed in the Constitution of India a citizen has right to go directly to the Supreme Court under Art. 32, but in case of a violation of the constitutional directions and prohibitions regarding distribution of powers, of delegation of essential legislative powers to the executive or of constitutional violations of some other kind there is a conspicuous absence of a provision in the Constitution of India to go directly to the Supreme Court. The constitutional amendment to remedy this defect appears to be expedient and necessary. There should be some provision in

the Constitution to enable a citizen to go direct to the Supreme Court in these matters also.

The chapter of Fundamental Rights has to be reorganized and re-written by bringing into light certain other fundamental rights which could not be assimilated and visualized when the Constitution was being enacted. But so long as it is not done, the judiciary in interpreting the Chapter of Fundamental Rights has to take into consideration that part III is not exhaustive and there are constitutional silences also in regard to such rights. It would be open to the Judiciary to ascertain and determine if there are any other fundamental rights which, though, have not been explicitly guaranteed yet by implication they would be deemed to have been so.

3.3.2 Contradiction between Parliamentary Sovereignty and Judicial Review in India

The contradiction between the principles of parliamentary sovereignty and judicial review that is embedded in India's constitution has been a source of major controversy over the years. After the courts overturned state laws redistributing land from zamindare states on the grounds that the laws violated the zamindars' Fundamental Rights, Parliament passed the first (1951), fourth(1955), and seventeenth amendments (1964) to protect its authority to implement land redistribution. The Supreme Court countered these amendments in 1967 when it ruled in the *Golaknath v. State of Punjab*⁴⁴ case that Parliament did not have the power to abrogate the Fundamental Rights, including the provisions on private property. On February 1, 1970, the Supreme Court invalidated the government-sponsored Bank Nationalization Bill that had been passed by Parliament in August 1969. The Supreme Court also rejected as unconstitutional a presidential order of September 7, 1970, that abolished the titles, privileges, and privy purses of the former rulers of India's old princely states⁴⁵.

In reaction to Supreme Court decisions, in 1971, Parliament passed the Twenty-fourth Amendment empowering it to amend any provision of the constitution, including the Fundamental Rights; the twenty-fifth Amendment, making legislative decisions concerning proper land compensation nonjustifiable, and the

⁴⁴*Supra* n.21.

⁴⁵Prakash Talwar, *Human Rights*, Isha Books, Delhi, 2006, p.107.

twenty-sixth Amendment, which added a constitutional article abolishing princely privileges and privy purses. On April 24, 1973, the Supreme Court responded to the parliamentary offensive by ruling in the *Kesavananda Bharati v. State of Kerala*⁴⁶ case that, although these amendments were constitutional, the court still reserved for itself the discretion not to reject any constitutional amendments passed by Parliament by declaring that the amendments cannot change the constitution's "basic structure."⁴⁷

During the 1975-77 Emergency, Parliament passed the forty-second Amendment in January 1977, which essentially abrogated the *Kesavananda* ruling by preventing the Supreme Court from reviewing any constitutional amendment with the exception of procedural issues concerning ratification. The forty-second Amendment's fifty-nine clauses stripped the Supreme Court of many of its powers and moved the political system toward parliamentary sovereignty. However, the forty-third and forty-fourth amendments, passed by the Janta government after the defeat of Indira Gandhi in March 1977, reversed these changes. In the *Minerva Mills case*⁴⁸ of 1980, the Supreme Court reaffirmed its authority to protect the basic structure of the constitution. However, in the Judges Transfer case on December 31, 1981, the Supreme Court upheld the government's authority to dismiss temporary judges and transfer high court justices without the consent of the chief justice⁴⁹.

In 1991 the first-ever impeachment motion against a Supreme Court judge was signed by 108 members of Parliament. A year later, a high-profile inquiry found Associate Justice V. Ramaswamy "guilty of wilful and gross misuses of office and moral turpitude by using public funds for private purposes and reckless disregard of statutory rules" while serving as chief justice of Punjab and Haryana High Court. Despite this strong indictment, Ramaswamy survived parliamentary impeachment proceedings and remained on the Supreme Court after only 196 members of Parliament, less than the required two-thirds majority, voted for his ouster.

⁴⁶*Supra* n.1.

⁴⁷*Id.*

⁴⁸AIR 1980 SC 1789

⁴⁹Showick Thorpe & Edgar Thorpe, *The Pearson General Studies Manual 2009*, Dorling Kindersley (India) Pvt. Ltd., Delhi, 2009, p. 355.

Moreover, Parliament and the Supreme Court of India are poised for a confrontation over the issue of expulsion of 11 members of parliament (MPs) involved in cash-for-question scam⁵⁰. The legal-constitutional question pertains to the exclusive jurisdiction of Parliament over its authority to define its privileges and manner to protect and maintain it. The phenomenon of the legislature versus the judiciary is not new to Indian democracy. Indira Gandhi made a series of attempts through 24th, 25th and 42nd constitutional amendments to establish supremacy of parliament over the judiciary. She even tried to demoralise the highest judiciary by appointing a junior judge as the chief justice superseding senior judges. The matter could be settled with the enunciation of the 'basic feature doctrine' in the *Kesavananda Bharati case*⁵¹ of 1973. The kernel of this judgement is that the Indian constitution has certain basic features, which hold a transcendental position and which cannot be altered by either Parliament or Supreme Court⁵². This judgement was able to establish supremacy of the constitution but only with respect to its 'basic features.'

The other vibrant and dynamic democracies of the world have also gone through the process of confrontation between the legislature and the judiciary. However, they have settled it in the process of constitutional development.

Britain, a classic case of a parliamentary system, easily established legislative supremacy. Parliament is not only supreme vis-à-vis other organs of government but it is supreme vis-à-vis constitution as well. In the British model, the legislative supremacy is also established by the fact that the constitution is unwritten and the one chamber of the legislature, House of Lords, acts as the highest judiciary of the land. The federal constitution of the United States is organised on the principle of supremacy of the constitution. Supreme Court in India, therefore, enjoys absolute and extensive power of judicial review. No law of the land is beyond judicial scrutiny⁵³.

Ibid.

Supra n.1.

⁵²“Stung: 11 MPs Take Cash to Ask Questions in Parliament”, *The Times of India*, New Delhi, 12 December 2005

⁵³Ashok Desai, “Interventions”, in Pran Chopra, *The Supreme Court versus the Constitution: A Challenge to Federalism*, Sage Publication Pvt. Ltd., New Delhi, 2006, p. 218.

3.3.3 Constitutional Supremacy Prevails Over Parliamentary Supremacy in India

The framers of the Constitution of 1950 were very much conscious of the doctrine of constitutional limitations and its creative influences and impact on the constitutional working. In Part III of the constitution, fundamental rights have been guaranteed to the citizens of India. In the domain of the division of power also, the Union and the State legislatures have to operate and function under the limitations and restrictions imposed by the Constitution. Any violation of these limitations and restrictions in framing the laws by the legislative department of the government render such laws unconstitutional and void. The doctrine of judicial review owes its origin to the doctrine of the limitation of constitutional powers. Limitation on powers is the fundamental virtue of democracy and the majority rule.

Indian constitution is typical because of the adoption of parliamentary and federal features simultaneously. Parliamentary form of government hints at legislative supremacy. But the federal nature of the constitution makes it imperative that the highest judiciary is able to exercise the power of judicial review. The roots of the present problem also lie in the design of the Indian constitution.

On December 12, 2005, eleven MPs, ten from the Lok Sabha and one from the Rajya Sabha belonging to mainstream political parties (six from the Bharatiya Janata Party (BJP), three from the Bahujan Samaj Party (BSP), and one each from the Congress and the Rashtriya Janata Dal) were shown in a sting operation on a private TV channel (Aaj Tak) being paid for raising a question in parliament.

Parliament responded quickly by expelling all the eleven MPs who figured in the sting operation. The Lok Sabha constituted a special (enquiry) committee and the Rajya Sabha referred the matter to the ethics committee of the house.

On the report of the special committee of the Lok Sabha and ethics committee of the Rajya Sabha, both the houses expelled the tainted members and terminated their membership by a motion of each house. The motion was passed on the last day of the winter session, December 23, 2005, amidst a walk out by the BJP, the main opposition party in the Lok Sabha. The BJP already in trouble because of leadership crisis, factional fighting, ideological vacillation, and its vitiating relations with the Rashtriya Swayamsevak Sangh was deeply disturbed. Six out

of eleven MPs belonged to the BJP and two of them were ministers in the erstwhile BJP-led national democratic government the centre.

One expelled member from the BSP, *Raja Ram Pal*⁵⁴ challenged the decision of the Lok Sabha speaker in the Supreme Court on two grounds: procedural and legal. His expulsion resolution was not carried on the report of the Privileges Committee of the Lok Sabha. His expulsion was not based on any of the grounds of disqualification specifically mentioned in Article 102 of the constitution and section 8 of the Representation of the People's Act 1951. The Supreme Court served a notice on the Lok Sabha speaker on January 16, 2006. The court also referred the matter to a constitutional bench of five judges.

The Lok Sabha speaker, Somnath Chatterjee called an all-party meeting on January 20, 2006. It was unanimously decided in the meeting that it was the privilege of the house to take disciplinary action against its own members. The expulsion from the house was very much within that disciplinary action. It was further held that the Speaker of the Lok Sabha was the sole custodian of the rights and privileges of the house and, hence, not answerable to the judiciary for his role in that capacity⁵⁵.

The BJP in the meeting favoured that the Speaker should not appear personally before the Court but should send his representative to present his views before the highest court. The then speaker, Chatterjee, later on briefed the media, 'Even if I go there, that cannot lead to the honourable court to assume or to exercise the power in respect of those matters exclusively conferred on Parliament.'⁵⁶

He also clarified that 'the Constitution was clear on the jurisdictions of the pillars of democracy' and suggested, 'Let us keep within our lakshman rekha.' The Supreme Court seems in a mood to interpret the powers, privileges and immunities of parliament that remain un-codified so far. On the other hand, Parliament insists that it being the sole custodian of its rights and privileges it is within its right to define its privileges and immunities. The whole episode has certainly triggered a new kind of situation that has serious implications of which two are legal-constitutional. First pertains to immunities of the legislature from judicial intervention in its proceedings. Second relates to defining powers and

⁵⁴ *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*, (2007)3 SCC 184

⁵⁵ *Ibid.*

⁵⁶ Vinay Kumar, "Don't Accept Court Notice: All-Party Meet", *The Hindu*, New Delhi, 21 January 2006.

privileges of the legislature and its members. Is Parliament the sole interpreter of its powers and privileges? Or, is this power of parliament subject to judicial scrutiny?

Articles 105 and 122 of the Indian constitution clearly restrict the judiciary from intervention in the business of the legislature. Article 122 (1) states, ‘The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.’ Article 122 (2) explains, ‘No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.’

The provisions of the Chapter IV of Part V of our Constitution dealing with Union Judiciary provides for a close relationship between the Judiciary and Legislature. Article 122 of the Indian Constitution provides that the Court shall not call validity of any proceedings in Parliament in question on the ground of any alleged irregularity of procedure. And Article 212 provides that the Court should not enquire into the proceedings of the Legislature. But certain judicial anomaly has been felt in the recent past. The most prominent being the famous *Jagdambika Pal case*⁵⁷ of 1998 involving the Uttar Pradesh Assembly and the *Jharkhand Assembly case*⁵⁸ of 2005. The Interim Order of the Supreme Court in both the cases is a clear violation of the principle of separation of powers between the Judiciary and the Legislature. The judiciary blames Legislature for not doing anything worthwhile over the past three decades, whereas Legislature accuses Judiciary of doing the job of the legislature.

Article 105 (2) gives judicial immunities to the conduct and behaviour of any member of Parliament: ‘No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee therefore, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.’ Article 194(2) grants the same immunities to the members of the state legislative assemblies.

⁵⁷1998 (2) SCALE 83

⁵⁸2005 (3) JCR 448 Jhr.

The second issue pertains to the powers and privileges of the legislature and its members. Article 105 explains the powers and privileges of Parliament and its members; and Article 194 replicates the same provision for the legislative assembly and its members. Article 105 (1) gives freedom of speech in Parliament and Article 105 (2) gives immunity to freedom of speech and freedom to vote in the house and its committees from judicial proceedings. But other rights and privileges of the house and its members are left un-codified.

Article 105 (3) reads ‘In other respects, the powers, privileges and immunities of each House, shall be such as may from time to time be defined by Parliament by law, and, until, so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution Forty-fourth Amendment Act 1978.’ Before this amendment, it was provided that powers, privileges, and immunities of Parliament and its member shall be those of the House of Commons as it was before the commencement of the Indian constitution.

The root of the present controversy lies in the above two issues and related provisions of the Constitution. The BSP MP has challenged in the Supreme Court the power of the house to terminate his membership on the grounds other than that provided in Article 102 and section 8 of the representation of the People's Act 1951. The Lok Sabha insists that its disciplinary jurisdiction over its member has constitutional immunities from judicial intervention as explained in the Articles 105 (2) and 122 of the Indian constitution. Judicial precedents on the issue of parliamentary privileges and judicial immunities to proceedings of the legislature suggest divided opinion.

In *P.V. Narasimha Rao v. State (CBI)*⁵⁹, the Supreme Court took the position as per Article 105 (2), ‘The bribe-taker MPs who have voted in Parliament against the no-confidence motion are entitled to protection of Article 105(2) and are not answerable in a court of law for alleged conspiracy and agreement.’

However, ‘The bribe-takers could be proceeded against by Parliament itself. ‘This judgement clearly established that parliament is the sole arbitrator of its business and proceedings and the judiciary cannot come in this matter. This judgement has not been superseded by another judgement reversing the position.

⁵⁹(1998) 4 SCC 626

The judicial interpretation of powers and privileges of the legislature and its members has not been consistent. *In re special reference no. (1) 1964*⁶⁰, the Supreme Court observed that the legislature in India unlike the House of Commons does not enjoy the power to regulate its own constitution. Hence, the Indian legislature does not have the same powers and privileges as enjoyed by the House of Commons.

3.4 Judicial Review of Constitutional Amendments- Check on Legislative Power

3.4.1. Need of Power of Amendment of the Constitution

An amendment is defined as a formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specifically, a change made by addition, deletion, or correction; especially, an alteration in wording⁶¹. Most constitutions declare the primacy of popular sovereignty and proclaim that ultimate power resides with ‘the people’ through the democratic process. At the same time, in keeping with the notion of limiting democratic government, most constitutions also describe what the legislature, the representative of the people, cannot do⁶². By definition, democracy is antithetical to the concept of inalienable rights. The amending process helps maintain the delicate balance between democracy and limited government.

Amendments are often described as the ‘pressure valve’ of the Constitution. Most Constitutions today have provisions of being amended in one way or the other, but that was not always the case. In fact, it has been said that the idea of incorporating within a constitution a provision for its own amendment was largely an invention of the Constitutional Convention in Philadelphia⁶³. It is well known that now there exists a standard of testing the rigidity or otherwise of a Constitution on the basis of ease of amending power. There are perils in leaning too closely to either side. If it is too difficult to change the Constitution, the people may become frustrated and resort to extra-legal behaviour. If on the other

⁶⁰AIR 1965 SC 745

⁶¹Black’s Law Dictionary (Bryan A. Garner et al ed., 2004).

⁶²Katz Elai, *On Amending Constitutions: The Legality and Legitimacy of constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251 (1996).

⁶³*Ibid*

hand, it is too easy to change, the Constitution's status may merely equal that of any simple statute and the Constitution's values will not rise above other more ephemeral political decisions⁶⁴. Hence a cautious approach is mandated and usually the amendment procedure is not so much used to right a wrong, than to modify the existing provisions in accordance with the changing times.

Even before the Indian Constitution came into being, in *T.H. Vakil v. Bombay Presidency Radio Club Ltd*⁶⁵, Blagden J. made certain pertinent observations regarding the scope of the term 'amendment' which affirms the abovementioned understanding of the concept:

'I understand the general rule on the point to be this: first, that amendments must be germane to the subject-matter of the proposition and, secondly, that they must not be, in substance direct negative of it. If, for example, a resolution were that a particular piece of business be now considered, it would be in substance a direct negative to move that it be considered years hence.'

Presently, the procedure of amendment and amending power is enshrined under Article 368 of the Indian Constitution. An elaborate understanding of this procedure is not needed here except to observe that amendments in India require a special majority. As the procedure is different from the regular legislative process it is more difficult to make amendments in India as compared to say a country like the UK where the absence of a written constitution allows for parliamentary supremacy and a simple amending process. On the other hand, it is easier than in a country like the USA where certain changes cannot be affected through the ordinary amending process laid down in Article V of the American Constitution.

Judicial Review of Constitutional amendments is not generally permissible except on procedural grounds or to prevent the violation of the express limitations mentioned in the Constitution itself. Before 1967 even the Indian Supreme Court had held that it had no power to strike down constitutional amendments on substantive grounds and therefore could not exercise power of

⁶⁴*Ibid.*

⁶⁵(1945) 47 BOMLR 428

judicial review in this respect. It was only after the *Golaknath's*⁶⁶ decision in 1967 that the Supreme Court assumed the power of Judicial Review of constitutional amendments. Whether the power of judicial review ought to be extended to constitutional amendments or not can be decided by dispassionately examining the relevant provisions of the Constitution.

3.4.2 Review of Amending Power an Implied Limitation on Sovereignty of Parliament in India

Though India follows the Parliamentary form of democracy, it is the constitution which is supreme. Therefore, not just legislation, but even a constitutional amendment which seeks to change the “basic structure” of the constitution can be called in question for review before the courts⁶⁷.

The Constitution of India provides for a distinctive amending process as compared to the leading Constitutions of the World. It may be described as partly flexible and partly rigid. The framers of the Constitutions have provided differing degree of rigidity for different Articles, according to their significance and importance in the Constitution, with the result that there are three different modes provided in the Constitution for the amendment. In case of *Shankari Prasad Singh Deo v. Union of India*⁶⁸, the Supreme Court has observed that “now the Constitution provides for three classes of amendments of its provisions. First, those that can be affected by bare majority such as that required for the passing of an ordinary law. The amendments contemplated in Article 4, 169 and 240 falls within this class and they are specifically excluded from the purview of Article

Secondly, those that can be affected by a special majority as laid down in Article 368. All constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of that House Present and voting; and thirdly those that require, in addition to the special majority above mentioned, ratification by resolutions passed by not less than one-half of the States. This class comprises amendments

⁶⁶*Supra* n.21.

⁶⁷. *Kesavananda Bharati v. The State of Kerala* , *Supra* 1.
AIR 1951 SC 455

which seek to make any change in the provisions referred to in proviso to Article 368.”

The first case on amendability of the Constitution was *Shankari Prasad v. Union of India*⁶⁹, wherein the validity of the Constitution 1st Amendment Act, 1951 was challenged which sought to curtail the right to property guaranteed by Article 31. Thus was posed a conflict between Article 13 and 368 raising a basic question whether the Fundamental Rights were amendable so as to dilute or take away fundamental right through a constitutional amendment. The Court limited the scope of Article 13 and held that an amending law passed under Article 368 did not fall within the purview of Article 13. Article 13 refers to a ‘legislative’ law i.e. an ordinary law made by the legislature, but not the ‘constituent’ law i.e. a law made to amend the Constitution. Thus, it drew a distinction between ordinary law made in the exercise of legislative power and constitutional law made to the exercise of constituent power. While fundamental rights could not be invaded by the former they could be validly curtailed by the later by introducing alterations in the Constitution itself. Thus, the Court held that Parliament could by following the ‘Procedure’ laid down in Article 368 amend any fundamental right.

Following the verdict of *Shankari Prasad’s Case*⁷⁰ for next 13 years, the question of amenability of Fundamental Rights remained dormant. However, in 1964, the matter again came up before the court in *Sajjan Singh v. State of Rajasthan*⁷¹. Here question was raised about the validity of Constitutional 17th Amendment Act, 1964 which introduced agrarian reforms. With this Amendment was passed number of statutes affecting property rights and were placed in the IXth Schedule. They were sought to be immunized from judicial review. It was therefore argued that exclusion of judicial review affected Article 226 and therefore such an amendment could not be validity made without following the special procedure prescribed for the amendment of entrenched provisions. By majority of 3:2, the Court ruled that the pith and the substance of the amendment were only to introduce agrarian reforms and that Article 226 was affected only incidentally. The Court maintained the difference between the ordinary law and

⁶⁹*Ibid.*

⁷⁰*Ibid.*

AIR 1965 SC 845

the constituent power and the relation between Article 13 and Article 368 which has earlier been drawn in *Shankari Prasad's Case*⁷² and further held that the words “amendment of the Constitution” means amendment of all the provisions of the constitution. Gajendragadkar C.J, said that if the Constitution Makers intended to exclude the fundamental rights from the scope of the amending power they would have made a clear provision in this behalf.

Until 1967, the Supreme Court had been holding that no part of the Constitution was amendable and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of Article 368, amend any provision of the Constitution, including the Fundamental Rights and Article 368. However, the question whether any of the fundamental rights could be abridged or taken away by in the exercise of Article 368 was gain raised in the significant case of *Golaknath v. State of Punjab*⁷³. In this case, the Constitutional Validity of 17th Amendment Act which inserted certain State Acts in IXth Schedule was once again challenged. The matter was referred to Bench of 11 judges. The majority in *Golaknath case*⁷⁴ was worried with the large number of amendments which were introduced on account of the judicial verdict in *Shankari Prasad*⁷⁵ and *Sajjan Singh*⁷⁶. Thus, the majority view was conditioned by fear that our democracy would soon turn into totalitarian regime, if fundamental rights were amended so often. Thus, the Supreme Court overruling the earlier cases held that fundamental rights were non-amendable and inviolable by constitutional amendment process set out in Article 368. A new and noteworthy line of thought was adopted by majority to arrive at this conclusion. Relying on the earlier wordings of the marginal note to Article 368, the majority ruled that this Article prescribes merely the procedure for amendment and that the power to do so must be located under Article 248. On this line then, an amendment to the Constitution would obviously being a law within Article 13 and would thus be subject to Article 13(2). The majority however, refused to give the retrospective effect to this new view but rather adopted the Doctrine of Prospective Overruling. However, the five minority Judges delivered three separate opinions and upheld

Supra n.68.

Supra n. 21.

⁷⁴*Id.*

Supra n.68.

Supra n.71.

the power of Parliament to amend fundamental rights. Their fear was that the Constitution would become static if no such powers were conceded to Parliaments. The minority view held that the word 'law' in Article 13(2) referred to only ordinary law and not constitutional law amendment. According to them, Article 368 deals with not only the procedure of amending the Constitution but also contains the power to amend the Constitution⁷⁷.

The 24th and 25th Amendment Acts were challenged before the Court in celebrated case of *Keshvanand Bharti v. State of Kerala*⁷⁸ which is popularly known as Fundamental Rights Case. In this case, the petitioners challenged the validity of the Kerala Land Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the IXth Schedule by 29th Amendment Act. The petitioner was also permitted to challenge the validity of 24th, 25th and 29th Amendment. The question involved was as to what was the extent of the amending power conferred by Article 368 of the Constitution? A special 13 Judges Bench was constituted and 11 opinions were delivered. It was held that power to amend Constitution is to be found in Article 368 itself. Justice Hegde and Justice Mukherjee found it difficult to believe that the constitution-makers had left the important power to amend the Constitution hidden in Parliament's residuary power. The views endorsed in *Sajjan Singh*⁷⁹ and *Shankari Prasad Case*⁸⁰ was again endorsed and therefore to this extent *Golaknath's Case*⁸¹ was overruled. Further, the distinction between ordinary law and Constitutional law was once again recognized. Thus, Article 368 conferred power to abridge Fundamental Rights as well. Again in this regard *Golaknath's Case* was overruled. The majority held that Article 368 even before 24th Amendment contained the power as well as the procedure of amendment.

The most important and significant verdict was evolved that Article 368 confer power on Parliament to amend not only the Fundamental Right but any other Part of the Constitution. Though it recognized the Parliaments power to amend any provisions of Constitution, yet this power was not absolute and unlimited. It was

⁷⁷ *Ibid.*

⁷⁸ *Supra n.1.*

⁷⁹ *Supra n.71.*

⁸⁰ *Supra n.68.*

Supra n.21.

now made subject to one qualification that it cannot be employed to destroy or emasculate “the Basic Structure of the Constitution”. A Constitutional amendment which offends the basic structure of the Constitution in ultra-virus. Thus was evolved the all-important, Doctrine of Basic Structure of Constitution, which serves as limitation on Constituent Power of Parliament⁸².

This case has been characterized as “one of the milestones in the history of jurisprudence”. The basic philosophy underlying the doctrine of non-amenability of the basic features of the Constitution, evolved by the majority has been beautifully explained by Justice Hegde and justice Mukherjee as follows:

*“Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroy.”*⁸³

In this seminal case, the Court held the Supremacy of the Constitution, Separation of Powers, Republican and Democratic form of Government, Federal character of Constitution, Secular character, the Unity and Integrity of the nation, parliamentary system, etc... to be the basic feature of the Constitution. These features, however, have been mentioned as only illustrative and the list is not by any means exhaustive. It is for Court to decide from time to time what constituted the Basic Structure. In course of time, the doctrine of basic structure of the Constitution has become very well entrenched in India. Since this celebrated case, this doctrine has been applied in plethora of cases which creates a mark of judicial creativity.

⁸²*Supra n.78.*

⁸³*Ibid.*

The next occasion wherein the Supreme Court successfully applied this doctrine was in *Indira Gandhi v. Raj Narain*⁸⁴. The validity of 39th Amendment Act was challenged which sought to place the elections of Prime Minister and speaker beyond the pale of judicial review. The Allahabad High Court declared Election of Indira Gandhi as void but the 39th Amendment Act sought to give itself an overriding effect and validated the elections of Prime Minister and the Speaker retrospectively. The Court reaffirmed the Doctrine of Basic Structure and held the Amendment Act to be violative of the Basic Structure as it violated the free and fair election which was an essential postulate of democracy which in turn was a part of the basic structure of the Constitution and therefore void. The Supreme Court thus added Rule of Law, Judicial Review and Democracy which implies free and fair elections as Basic Structure.

One year later in 1976, Article 368 was again amended by the 42nd Amendment Act which sought to ensure that a constitutional amendment may not be challenged before any court on any ground whatsoever. To achieve this objective, two clauses were added in Article 368. During this period till 1984, there were many attempts to amend the Constitution however, the doctrine of basic structure has proved to be a shield to protect and preserve certain fundamental values inherent in the Constitution.

Scope and extent of doctrine of basic structure was again considered by Court in *Minerva Mills v. Union of India*⁸⁵. The Court ruled that balance between Part III and Part IV is an aspect of Basic Structure. In this case, the Constitution Bench of the Supreme Court has invalidated clause (4) and (5) of Article 368 on the ground that these provisions, introduced by the 42nd Amendment Act, 1976 sought to exclude judicial review, which was one of the basic features of the Indian Constitution. Thus, the Court reiterated this doctrine of Basic Structure under Article 368 and that Parliament cannot so amend the Constitution as to damage the basic or essential feature of the Constitution and that now it rests on firm foundation in India.

In the realm of doctrine of basic structure of the Constitution, these features have not been explicit defined by the Judiciary. However the following are termed as

⁸⁴*Supra n.16.*

⁸⁵*Supra n.48.*

of the basic features of the Constitution such as supremacy of the Constitution; rule of law; the principle of separation of powers; objectives specified in the preamble to the constitution; judicial review; Article 32 and 226; federalism; secularism; the sovereign, democratic, republican structure; freedom and dignity of the individual; unity and integrity of the nation; the principle of equality-not every feature of equality but the quintessence of equal justice; the 'essence' of other fundamental rights in Part III; the concept of social and economic justice-to build a welfare state: part IV in to; the balance between fundamental right and directive principles; the parliamentary system of government; the principles of free and fair elections; limitations upon the amending power conferred by Article 368; independence of the judiciary; effective access to justice; independent and efficient judicial system; powers of the Supreme Court under Article 32, 136, 141, 142; legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act.

A question of great importance as regards the amending power was once again considered by the Supreme Court in *A K Roy v. Union of India*⁸⁶. The 44th Amendment Act was inserted which made several modification in Article 22 liberalizing its provision but the same have not yet been effectuated. By the majority of 3:2, the Court sustained the validity of 44th Amendment and held that the powers to issue notification to bring into force the provisions of a constitutional amendment "it is the constituent power of the Parliament because it does not carry with it the power to amend the Constitution in any manner". Parliament can therefore vest in an outside agency the power to compel the Government to do that which lies in its discretion to do when it considers it opportune to do so. If the Parliament considers that the executive has betrayed its trust by not bringing the amendment into force, it can censure the executive.

Another significant development was regarding the interpretation of Non Obstante Clauses. Since some of the provisions of the Constitution have non obstinate clauses i.e. "Notwithstanding anything in the Constitution..." to that effect, question was raised whether such a non-obstante clause comes in the way to test the provision against the touchstone of violation of the basic features of the Constitution. The Supreme Court has answered that in spite of such a clause,

⁸⁶AIR 1982 SC 710

the principle that no constitutional amendment can be made so as to damage any basic feature of the Constitution will prevail.

In *S.P. Sampat Kumar v. Union of India*⁸⁷, the Constitutional validity of Article 323 A and the provisions of Administrative Tribunals Act, 1985 was challenged on the ground that the Act by excluding the jurisdiction of the High Court under Article 226 & feature of the Constitution. The Supreme Court upheld the validity of Article 323A and the Act as the necessary changes suggested by the Court were incorporated in the Administrative Tribunal Act. It held that the Act has excluded the judicial review of High Court in service matters under Articles 226

227, but as it has not excluded judicial review of the Supreme Court under Articles 32 & 136, the Act is valid. The amendment does not affect basic structure of the Constitution as it has vested the power of judicial review in an alternative institutional mechanism.

In another landmark judgment in *L. Chandra Kumar v. Union of India*⁸⁸, the Supreme Court has unanimously while reconsidering *Sampath Kumar's Case*⁸⁹, has struck down clause 2 (d) of Article 323 A and clause 3 (d) of Article 323 B which provided for the exclusion of the jurisdiction of the High Court under Article 226 and 227 and the Supreme Court under Article 32 of the Constitution as unconstitutional and invalid as they damage held that power of judicial review over legislative action vested in the high court under Article 226 and the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution and formed part of its basic structure. Ordinarily, therefore, the power of the high Courts and the Supreme Court to test the constitutional validity of legislations cannot be ousted or excluded. Following the *Keshavnanda Bharti's Case*⁹⁰, the Court declared unconstitutional clause 2(d) of article 323 A and Clause 3(d) of Article 323 B of the Constitution, to the extent that they excluded the jurisdiction of the High Court under Articles 226 and the Supreme Court under Article 32 of the Constitution.

AIR 1987 SC 386
⁸⁸AIR 1997 SC 1125
Supra n.88.
Supra n.1.

In the year 2007, in case of *M Nagraj v. Union of India*⁹¹, a 5 Judge Bench of the Supreme Court has explained the basic feature theory again in detail as “Basic Structure are systematic principles underlying and connecting provisions of the Constitution. They give coherence and durability to Constitution. These Principles are part of Constitutional law even in not expressly stated. This Doctrine has essentially developed from the German Constitution. It is not based on literal words. These principles are part of constitutional law even in not expressly stated. Theory of basic structure is based on the concept of Constitutional identity. The main object behind the theory is continuity and within that continuity of identity.” In this case, the petitioners challenged the Constitutional validity of the Constitution (77th Amendment Act, introducing Article 16 (4A) nullifying number of decisions the 81st Amendment Act 2000 introducing Article 16 (4B) introducing promotion in reservation also which was stopped in *Indra Swney’s Case*⁹² and 82nd Amendment Act 2000 introducing proviso to Article 355 which emphasizes the importance of maintaining efficiency in administration and the 85th Amendment Act, 2001 adding words – with consequential seniority in Article 16 (4A) nullifying decisions in *Ajit Singh’s case*⁹³ on the ground that they violate basic feature of the Constitution. However, a five judge bench of the Supreme Court held that these amendment do not violate the basic feature of the Constitution. They are enabling provisions and only apply to SC and ST. they do not obliterate constitutional requirement, such as 50% ceiling limit in reservation, creamy layer rule and post based roster sub classification between other backward classes on one hand any scheduled tribes on the other. They do not alter structure of equality codes, therefore, they are not beyond amending power of Parliament. The power to amend the Constitution is an enumerated power in the Constitution and therefore, its limitation, if any must be found in the Constitution itself.

Another development in this area was in relation to IXth Schedule and power of Judicial Review. It is permissible for the legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31-B but subject to the right of citizen to assail it on the enlarged judicial review concept. If the law that

⁹¹AIR 2007 SC 71
AIR 1993 SC 447

⁹³AIR 1996 SC 1189

abrogates or abridges rights guaranteed by Part III of the Constitution violates the basic structure doctrine, whether by amendment of any Article of Part III or by an insertion in the IXth Schedule, such law will have to be invalidated in exercise of judicial review power of the court. The legislature cannot grant fictional immunities and exclude the examination of the IXth Schedule law by the court after the enunciation of the basic structure doctrine. All amendments to the Constitution by which the IXth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14 and 19; Article 14 and 15 read with Articles 16 (4), (4A), (4B); Articles 20 and 32, etc and the principles underlying them. This means laws included in the IXth Schedule by constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental rights taken away pertain to the basic structure or if the law infringes the essence of any such fundamental rights. Parliament cannot increase the amending power by the amendment and destroy and damage the fundamentals of the Constitution. Article 368 does not vest such a power in Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. If the constituent power under Article 368 cannot be made unlimited, it follows that Article 31 B cannot be so used as to confer unlimited power. Article 31-B cannot go beyond the limited amending power contained in Article 368. The power to amend the Ninth Schedule flows from Article 368 which has to be compatible with the limits on the power of amendment. This limit came after the decision of celebrated case of *Keshvananda Bharti*⁹⁴, after which Article 31 B despite its wide language cannot confer unlimited or unregulated immunity. In *I.R. Coelho v. State of Tamil Nadu*⁹⁵, the validity of Central and State laws put in IXth Schedule was challenged. The Court said that the validity of any IXth Scheduled has been upheld by the Apex Court and would not be open to challenge it again, but if the law held to be violative of fundamental rights incorporated in the IXth Schedule after *Keshvananda Bharti*'s Judgment will be open to challenge on the ground that they destroy or damage the basic feature of Constitution.

Supra n.l.

⁹⁵AIR 2007 SC 861

The doctrine of basic structure as evolved by the judiciary illustrates the judicial creativity and the policy making role of the Supreme Court of a very high order. Now, this doctrine sought to protect and preserve the basic features of the Constitution against the unfettered amending power. This doctrine made to felt convinced that certain ideals and values embedded in the Constitution will be preserved and not destroyed by any process of constitutional amendment.

The role of the judiciary under the Constitution is a pious trust reposed by the people. The Constitution and the democratic polity there under shall not survive, the day judiciary fails to justify the said trust. If the judiciary fails, the Constitution fails and the people might opt for some other alternative. In view of the role of the Judiciary in the context of the Constitution it is fallacious to say that the legislatures alone are answerable to the people regarding the functioning of the judiciary. It is rather the judiciary which screens the functioning of the Executive and the legislatures through the judicial process.

3.5. Power of Legislature to Overrule a Judicial Decision by a New Legislation

Whether the legislature has the competence to enact a new law or amend an existing law so as to nullify or render ineffective a judgment of the Court. Article 141 of the Constitution provides that the law declared by the Supreme Court shall be binding on all the Courts within the territory of India. Article 141 therefore incorporates the principle of Stare Desists. Further Article 144 of the Constitution declares that all authorities civil and judicial in the territory of India shall act in aid of the Supreme Court. The law declared by the Supreme Court is binding on all the Courts. Though Article 141 refers to only “Court” and not to the other organs of the State. But by virtue of Article 144 the authorities have to act in the aid of the Supreme Court and not disobey or overrule the decisions of the Supreme Court. Though Article 144 does not use the words Executive or the Legislature. However the term “authorities” referred to in Article 144, is enough to point out the intention of the Constitution framers that the other organs of the State have to work in harmony with the Supreme Court and as such abide by its decisions.

In one of the earliest case dealing with this aspect, the Apex Court in *Mahal Chand Sethia v. State of West Bengal*⁹⁶, pointed out that a legislature cannot declare a judgment of the Court to be of no effect. It was held “A Court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the legislature of it infringed the rights enshrined in Part III of the Constitution. Needless to add, it can strike down or declare invalid any act or direction of a State Government which is not authorized by law. The position of a legislature is however different. It cannot declare any decision of a Court of law to be void or of no effect.

In *P. Sambamurthy v. State of A.P.*⁹⁷ the Apex Court held that it is a basic principle of rule of law that the exercise of power by the Executive or any other authority must not only be conditioned by the Constitution. But must also be in accordance with law and the power of judicial review is vested by the Constitution with a view to ensure that the law is observed and there is compliance with the requirement of law on the part of the Executive and other authorities. It is through the power of judicial review conferred on a Constitutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Not if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it. It would sound the death knell of the rule of law. The rule of law would cease to have any meaning because then it would be open to the State Government to defy the law and yet to get away with it.”

In *Keshavananda Bharti v. State of Kerala*⁹⁸, rule of law was held to be a part of the basic structure of the Constitution. The concept of rule has been in turreted by various authors in different concepts. But in my opinion. It means that everyone is bound by the Constitution. The Government or its instrumentalities cannot do anything which is either against the Constitution or violates its basic structure. Judiciary’s independence being a basic structure of the Constitution cannot be undermined by passing a legislation to render ineffective a judgment or order of

⁹⁶1969 UJC (SC) 616

⁹⁷AIR 1987 SC 663

⁹⁸*Supra, n.1.*

the Court or asking anybody not to obey the orders of the Court. As the Apex Court in *Municipal Corporation of the City of Ahmadabad v. New Shrock Spg. And Wvg. Co. Limited*⁹⁹, observed that “no legislature in this country has the power to ask instrumentalities of the State to disobey or disregard the decisions given by Courts.

The question regarding the competence of the legislative to set aside the orders of the Court also came up for consideration before the Apex Court in *Indian Aluminum Co. v. State of Kerala*¹⁰⁰. In this case the State Legislature had passed a validating act or renders valid the collection of tax declared earlier by the Court to be invalid. The Apex Court laid down various propositions for the purpose of maintaining a balance of separation of powers.

The case of *People’s Union for Civil Liberties v. Union of India*¹⁰¹, is one of the latest cases, which depict the zeal of the legislature to overrule and nullify the judgment delivered by the Apex Court. The brief facts were that the Apex Court. The brief facts were that the Apex Court in *Union of India. v. Association for Democratic Reforms*¹⁰² had given certain direction to the Election Commission to call for information on Affidavit from each candidate seeking election to the Parliament or a State Legislature regarding the past antecedents of the candidate, pendency of criminal cases including confessions. Acquittal or discharge if any. Assets of the candidate both movable and immovable. Liabilities if any and the educational qualification of the candidate.

In order to render ineffective the aforesaid directions given by the Apex Court. The Central Government brought the Representation of People (Amendment) Ordinance 2002 which was later on repealed by the Representation of the People (Third Amendment) Act, 2002. Section 33-B of the Act in particular provided that notwithstanding anything contained in any judgment decree or order of either instruction issued by the election commission no candidate shall be liable to disrespect of his election. Which is not required to be disclosed or furnished under this Act or the Rules made.

⁹⁹AIR 1970 SC 1292

¹⁰⁰AIR 1996 SC 1431

¹⁰¹AIR 2003 SC 2363

¹⁰²AIR 2002 SC 2112

The aforesaid amendments were challenged in a writ petition under Art. 32 of the Constitution before the Apex Court and Section 33-B was held to be unconstitutional. Concurring judgments delivered by the learned Judges of the Apex Court. Justice M.B. Shah specifically held “the legislature can change the basis on which a decision is rendered by this Court and change the law in general. However, this power can be exercised subject to Constitutional provision. Particularly legislative competence and if is violative of fundamental rights enshrined in Part III of the Constitution such law would be void as provided under Art. 13 of the Constitution.

Unlike the problem faced by the United States in *Marbury v. Madison*¹⁰³, express provision was made in the Constitution of India whereby laws inconsistent with the basic or fundamental rights were declared void.¹⁰⁴ The distribution of legislative power between the State and the Centre¹⁰⁵ would require the Court to pronounce upon issues of legislative competence and consequently to declare as void laws which were beyond the competence of Parliament or of one among the 30 State legislatures in the country. The Constitution vested the Supreme Court with original jurisdiction to enforce the fundamental rights by issuing writs¹⁰⁶ with the extent of jurisdiction remaining broadly undefined and hence left to the judgment of the Court. As a result, the interpretation of the Court, from the early years of the Constitution, in regard to its own powers, vis-à-vis the two other organs of the State, resulted in friction.

The early years of the Supreme Court, as is well-known, were years of conflict. Very many judgments, particularly on land reforms, were neutralized by Parliament by amending the Constitution. So much so, that in *Golaknath's case*¹⁰⁷, the Supreme Court ruled that Article 368 of the Constitution only provided for the procedure for amending the Constitution and was not an independent source of power. The amendments to the Constitution had no higher status than that of any other law made by Parliament and to the extent that it encroached on Fundamental Rights, it would have to be declared void by reason

¹⁰³*Supra n.3.*
Article 13 of the Constitution of India.
Article 245 and 246 of the Constitution of India.
Article 32 of the Constitution of India.

¹⁰⁷*Supra n.21.*

of its judgment would be to invalidate all the past amendments to the Constitution, and consequently invalidate all the land reform and nationalisation laws which had been passed by Parliament, the chaotic consequences were avoided by the Court by adopting the principle of prospective overruling.

The *Kesavananda Bharati case*¹⁰⁸, rendered immutable the Constitution in regard to its basic features, so that, the Constitution stood frozen in perpetuity, without the elected representatives of the people being able to alter it to bring about social reforms, of a nature which would affect the basic structure of the constitution, to meet the changing needs of society.

The constitution had vested exclusive power of judicial review in the superior courts that is High Courts and the Supreme Court of India. The Indian Supreme Court in this regard has said:

*“Judicial review is an incident of and flows from this concept of the fundamental and the higher law being the touchstone of the limits of the powers of the various organs of the State which derive power and authority under the constitution and that the judicial wing is the interpreter of the constitution and, therefore, of the limits of the authority of the different organs of the State. In a federal set up the Judiciary becomes the guardian of the constitution. The interpretation of the Constitution as a legal instrument and its obligation is the function of the courts. “It is emphatically the province and duty of the judicial department to say what the law is.”*¹⁰⁹

The legal position regarding the power of Supreme Court and High Courts to the judicial review the legislative action was well decided with the decision of the seven Judges Constitution Bench of the Apex Court in *L. Chandra Kumar v. Union of India*¹¹⁰. In this case, the question arose regarding the Constitutional validity of Arts. 323A (2)(d) and Art. 323(B)(3)(d) of the Constitution. Which empowered the Parliament and the State Legislature to totally exclude the jurisdiction of all Courts except that of the Supreme Court under Art? 136 of the

¹⁰⁸*Supra n.1.*

¹⁰⁹*Sub-Committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699*

¹¹⁰*Supra n.88.*

Constitution. In respect of disputes and complaints referred in Art. 323A (1) or 323B (2) of the Constitution.

The power to test the Constitutional validity of legislation and this power is a part of the basic structure of the constitution. The courts not only see as to whether the legislation in question is within the legislative competence of the legislature concerned or not but also see whether impugned legislation has contravened any provision of the Constitution or not. It would not be irrelevant to say that this power being a basic structure of the Constitution cannot be taken away even by an amendment of the Constitution.

3.6. Fundamental Rights: A Limitation on the Power of Legislature in India

The Constitution of the United States of America is regarded as one of the oldest democratic written constitutions in the world. It is well known that it has overwhelmingly influenced the constitutions of a great number of countries, particularly those of Asian countries.¹¹¹ India is no exception in this respect. Though India adopted the Westminster type of Government, yet since England has no written constitution, the members of Indian Constituent Assembly, particularly Shri B.N. Rau, the Constitutional Adviser to the Assembly and Sir Alladi Krishnaswamy Ayyar, in an effort to evolve comprehensive written constitution for India, relied heavily on the Constitution of the U.S.A. In fact, Shri Rau did have frequent deliberations with important American politicians, judges and academicians like President H. Truman, Justice Felix Frankfurter and Judge Learned Hand, to a name a few.¹¹² Consequently, the federal form of government, the provision of an indissoluble second House i.e., Rajya Sabha, the Directive Principles of State Policy developed on the doctrine of Police Powers, the Fundamental Rights on the model of American Bill of Rights and the judicial review in the form of Article 13 of the Constitution of India, are some of the important matters indicating direct influence¹¹³ of the constitution of the United States of America on the Indian Constitution.

. See Ed. Lawrence Ward Beer , *Constitutionalism in Asia* , University of California Press ,1979.

. A.G. Noorani, '*A Bulwark of Liberty*', The Span, June, 1983.

. Prof. P.K. Tripathi, '*Perspective on the American influence on the Indian Constitution*'
henonline.org/HOL/PDE Searchable? Collection. p. 59. Assessed on 2/7/17.

In *V.G. Rows case*¹¹⁴, the Apex Court has been conferred by the Constitution the duty to act as the protector of the fundamental rights of the citizens and this power too is an inbuilt of the power of judicial review. The Higher Courts can judicially review the legislations and the Executive decisions to determine as to whether the constitutional provisions and the fundamental rights in particular might have been infringed or not by the legislature or the Executive. Re-affirming its power to test the validity of legislations, the Apex Court *in special reference No. 1 of 1964*¹¹⁵, held “whether or not there is distinct and rigid separation of powers, there is no doubt that the constitution has entrusted the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens when a statute is challenged on the ground that it has been passed by a legislature without authority or has otherwise constitutionally trespassed on fundamental rights. It is for the Courts to decide whether the law passed by the legislature is valid or not.” It was also held that adjudication of such a dispute is entrusted solely and exclusively to the judicature of this country.

The power to ensure that a law passed by the legislature is in accordance with the provisions of the Constitution, is vested only with the High Courts and the Supreme Court and for this reason the judicial review of legislations becomes very relevant and it is further relevant so far conformity of the legislations with the provisions contained in Part III of the Constitution is concerned.

The legal position in this respect was highlighted by the Apex Court in *State of Madras v. V G. Row*¹¹⁶, in express terms. It was held “our Constitution contains express provisions for judicial review of legislations to its conformity with the Constitution like as in America. Where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted ‘due process’ clause in the fifth and fourteenth Amendments. If then the Courts in this country face up to such important and none too easy task. It is not out of any desire to till at legislative authority in a crusader spirit but in discharge of duty plainly laid upon them by the Constitution. This is especially

¹¹⁴AIR 1952 SC 196

¹¹⁵*Supra n.60.*

¹¹⁶*Supra n.112.*

true as regards the fundamental rights as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment. It cannot desert its own duty to determine finally the Constitutionality of an impugned statute.”

Article 32, which itself is a fundamental right, empowers the Supreme Court to issue directs or orders or writs, including writs in the nature of habeas corpus, mandamus prohibition, quo warrant and cautionary for the enforcement of any of the fundamental right. Article 226 on the other hand also empowers the High Courts to issue the above writs. But the difference in the phraseology of the Articles 32 and 226 bring out the marked difference in the nature and purpose of the right conferred by these Articles whereas the right guaranteed by Article 32 can be exercised for the enforcement of fundamental rights only, the right conferred by Article 226 can exercised not only for the enforcement of fundamental rights but for “any other purpose”. The powers of the High courts are in addition to the power vested in the Supreme Courts and not in derogation thereof. They can be directed also against the Union Government, provided the cause of action arises within the State concerned. The power of the High Court’s cannot be suspended during emergency as in the case of Article 32. Article 32 itself being a fundamental right, the remedy cannot be curtailed by any procedural provisions. In *A. K. Goplan v. State of Madras*¹¹⁷, Section 14 of the Preventive Detention Act, 1950, preventing the detent from disclosing to the Court, the grounds of detention was held violative of Article 32 and struck down as unconstitutional.

The rule of res judicata based upon public policy also operates in the sphere of judicial review. If a question has been once decided by the Supreme Court under Article 32, the same question cannot be reopened again under Article 226. *Jagannath Baksh Singh v. State of U.P.*¹¹⁸. In *Daryao v. State of U.P.*¹¹⁹, it was held that where the matter had been ‘heard’ and ‘decided’ by the High Court under Article 226, the writ under Article 32 is barred by the rule of res judicata and could not be entertained. But there is an important exception to this rule of

¹¹⁷AIR 1950 SC 27

¹¹⁸AIR 1962 SC 1563
AIR 1961 SC 1457

res judicata. In *Gulam Sarvar v. Union of India*¹²⁰, the court held that the rule of res judicata is not applicable in the writ from the High Court; he may file a petition for the same writ under Article 32.

3.6.1 Procedure Established by Law- Restraint on Judicial Power

The doctrine of judicial review though not specifically mentioned even in the constitution of the U.S.A., came to influence the Indian constitutionalism in a big way. It is regarded as the outstanding American contribution to the world polity.¹²¹ In fact, the ‘due process’ clause of the 5th and later of the 14th Amendment of the U.S. constitution bears the seeds of the doctrine of judicial review, which has, therefore, been mainly regarded as a judicial surveillance of the legislatures.¹²² As is well known, even in the U.S.A., its application has not been free from practical and even theoretical difficulties. This fact deterred the framers of the Indian Constitution from incorporating it in the Indian statute book. It was, therefore, subjected to very keen discussion and faced tough resistance at practically every stage of its journey to the Draft Constitution in the Constituent Assembly. Shri B.N. Rau and Shri A.K. Ayyar had pointed out that the ‘due process’ clause has spawned a great deal of litigation in the United States; it had led to a great deal of uncertainty regarding the standards of constitutional behavior and would, if adopted in India, pose a threat to the validity of social welfare legislations.¹²³ Consequently, the supporters of ‘due process’ clause were made to content with its diluted version in the form of ‘according to the procedure established by law’ in Article 21 of the Indian Constitution.

The 5th Amendment (1791) of the U.S. Constitution says: “No person shall be deprived of life, liberty or property without due process of law”. This momentous phrase has nearly for two centuries shaped the constitutional history of the U.S.A. and shown a remarkable capacity for adoption.¹²⁴ De facto, the ‘due process’ clause in the American jurisprudence has proved a handmaid of the

¹²⁰AIR 1967 SC 1335

□Ä□Ä□ Prof. Tripathi, *supra n.65*, p. 59.

□Ä□Ä□ .A.G. Noorani, ‘The Enduring Guarantec’ in the Span, Feb., 1983.

□Ä□Ä□ B. Siva Rao, ‘The Framing of India’s Constitution-A study’, Indian Institute of Public Administration, N.M.Tripathi Pvt. Ltd., Bombay, p. 232-235.

□Ä□Ä□ A.G. Noorani, *supra n. 122*.

American judiciary and its fight against the powerful executive there and inter alia this is the clause which gave the power of judicial review to the American judges.

Picked up from here, the American constitution makers, realizing the value of life and personal liberty, included it in the first instance, in the Bill of Rights as the Fifth Amendment. Since this amendment was only available against the federal government, it was later adopted *mutatis mutandis* as the 14th Amendment in 1868 so as to make it applicable against the States also. Built up against the background of a catena of compendious case law,¹²⁵ and supported by genuinely activist judges' like Cardozo, Brandeis, Holmes, "this veritable revolution in due process...enabled the Supreme Court of the United States to test legislation – federal or State-on the touchstone of reasonableness and strike down unreasonable restrictions upon property rights and civil liberties".¹²⁶

History of the 'due process' clause under the Indian Constitution can be traced to the debates of the Constituent Assembly, when the group led by Dr. Ambedkar wanted to introduce this doctrine in the Indian polity, but another group led by Dr. Alladi Krishnaswamy Ayyar pointed out the fallacy of following blindly the American constitutionalism, which because of its indefinite import and uncertain meaning, had by then given rise to serious conflicts between the judiciary and the executive. The Constituent Assembly, therefore, after a heated discussion, remained content with its diffused form as contained in Article 21 modeled on the pattern of the Article 31 of the Japanese Constitution. To assuage further the feelings of the favorites of 'due process' clause, the framers introduced Articles 20 and 22 to accommodate the conundrums of the said American doctrine.

However, before finalizing Article 21, two important variations were made in it. The first is the prefix 'personal' added to the word 'liberty', which was intentionally done to circumscribe the scope of 'liberty', which in American jurisprudence means anything and everything necessary for the 'pursuit of happiness', but in the Indian Constitution Article 19 was already framed to take

¹²⁵*Barron vs. Baltimore*, (1833) 7 Pet 243; *Slaughter House Cases*, (1873) 16 Wal 36; *Smyth vs. Ames*, (1898) 169 US 466.

G.V. Subba Rao et al, '*Revolution in due process*', AIR 1980 (Journ). 44.

care of the offshoots of liberty. The other vital variation is the absence of the word 'due' in the Article, which word is the very life and soul of the American doctrine.

Article 21 has a very chequered history under the Indian constitutional law. *Gopalan v State of Madras*¹²⁷ is the first case, wherein the 'due process' clause was pressed into service, where only Justice Fazal Ali, in a minority judgment, tried to read this doctrine in Article 21. But the majority led by Kania C.J., held that 'law' in Article 21 is 'lex' and not 'jus' and pleaded that the absence of the word 'due' in Article 21 precluded the court to go into the reasonableness of the law enacted by a competent legislature. Not only that, Article 19 was excluded for application to cases under Articles 21 and 22. In *K.K. Kochuni*¹²⁸ a feeble attempt was made by Justice K. Subba Rao to agree with the views of Fazal Ali J., in *Gopalan*. And yet another bold attempt to recognize the 'due process' clause was again frustrated in the case of *Municipal Committee, Amritsar v. State of Punjab*¹²⁹, wherein Justice Shah reiterated *Gopalan* and observed as follows:

“The courts in India have no authority to declare a statute invalid on the ground that it violates the due process clause of law. Under our constitution the test of due process of law cannot be applied to the statutes enacted by the Parliament or the State legislatures”.

But in the *Bank Nationalization*¹³⁰ case Justice Shah of the Supreme Court realised from his position taken earlier in the foresaid case and the rule of exclusion of Article 19 with regard to the cases under Articles 21 and 31 was rejected. It was emphasized that while considering the reasonableness of the restrictions imposed by law, it is the view of the Supreme Court that is conclusive and not the will of the legislature. So ultimately Article 19, coupled with Article 14, was virtually regarded as the 'due process' clause of the Indian Constitution which supplemented and supported the procedure in Article 21. Thus virtually after every decade or so the due process clause kept on knocking at the doors of the Indian Supreme Court. But ultimately it was left to *Maneka*

¹²⁷*Supra n.117.*

¹²⁸AIR 1960 SC 1080
AIR 1969 SC 1100

¹³⁰*R.C. Cooper v. Union of India*, (1970) SCR 530

*Gandhi v Union of India*¹³¹ to herald the era of ‘due process’ jurisprudence in the Indian constitutionalism and this doctrine descended on the Indian scene with such a bang that it almost revolutionized the whole set-up relating to Articles 14, 19, 21 and 22.

Starting from *Maneka Gandhi*¹³² and *Nandini Satpathi*,¹³³ representing the ‘social and political elites’ of Indian society, down to *Moti Ram*¹³⁴ -the poor rural mason, and *Hussainara*,¹³⁵ the illiterate under-trial, the Indian Supreme Court fired with the unprecedented zeal of social justice, which to some extent, has so far been based on only economic standards, handed down judgments which have rejoiced one and all. While *Maneka Gandhi* has enlarged the right to personal liberty and enriched the procedure, releasing it from *Gopalan*, *Nandini Satpathi* proved that the ‘constitutional silence’ against self-incrimination envisaged in Article 20(3) and the ‘statutory silence’ provided in Section 161(3) of the Criminal Procedure Code is available even to a suspect held in custody under the omnipotent Indian police, even before he is branded as an accused. It is being seriously felt in some quarters that the clear and unambiguous result as evolved from the police jurisprudence under the Indian conditions of poverty and illiteracy is that contrary to the universal legal promise that ‘everybody is innocent till proved otherwise’, the Indian police allegedly seems to proceed with the presumption that everybody is guilty, till proved otherwise. Extending Article 21 to *Sunil Batra*¹³⁶ the Supreme Court held that even a life convict does not lose all his fundamental rights. In fact *Sunil Batra* is a logical corollary of *Bhanudas*¹³⁷ and *shambhunath sarkar*,¹³⁸ where in the former case Desai J., observed that conviction does not degrade a person into a non-person. Thus even persons convicted and condemned to death have the liberty to be within the sights and sounds of other inmates of the jail-the normal rules and regulations of the prisons notwithstanding. Justice Iyer, when extending the doctrine of due process through Article 21, he observed:

AIR 1978 SC 597

¹³²*Ibid.*

¹³³*Nandini Satpathi v. P.L. Dani*, AIR 1978 SC 1026

¹³⁴*Moti Ram v. State of M.P.*, AIR 1978 SC 1594

¹³⁵*Hussainara Khatoon v. State of Bihar*, AIR 1980 SC

470 ¹³⁶*Sunil Batra v. Delhi Administration*, (1978) 4 SCC

494 ¹³⁷*Union of India v. Bhanudas*, AIR 1977 SC 1027

¹³⁸*Shambhunath Sarkar v. State of West Bengal*, AIR 1973 SC 1425

*“Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and worth of human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence.”*¹³⁹

The crusade led by Iyer and Bhagwati JJ., of reading ‘due process in Article 21 of the Indian Constitution continues to be unabated. In a spirited act of judicial activism the Indian Supreme Court in a recent case of *Mithu v State of Punjab*¹⁴⁰ declared Section 303 of the Indian Penal Code as unconstitutional because it prescribes a mandatory death penalty without providing for a fair opportunity of hearing to the offender and a reasonable and just procedure. Attacking the pre-determined sentence ordained and the lack of due procedure in Section 302 IPC. The court said:

*“The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of conscience are the hallmarks of justice. The mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to circumstances which led to the commission of the crime, is a relic of ancient history”.*¹⁴¹

Similar powerful pronouncements of the Supreme Court in the recent pass have amply demonstrated that by extending the concomitants and contours of Article 21, the highest tribunal of India has shown immense judicial creativity in energizing the dormant ‘due process’ jurisprudence in the Indian Constitution.

In *Sunil Batra v. Delhi Administration*,¹⁴² Justice Krishna Iyer said that though our constitution did not have a ‘due process’ clause as in the American Constitution, the same consequence ensued after the decisions in the *Bank*

¹³⁹*Ibid.*
AIR 1983 SC 473

¹⁴¹*Ibid.*
Supra n.136.

*Nationalization case*¹⁴³ and *Maneka Gandhi case*¹⁴⁴. In *Sunil Batra*¹⁴⁵ Desai J., also observed as follows:-

*“The word ‘law’ in the expression ‘procedure established by law’ in Article 21 has been interpreted to mean in Maneka Gandhi case that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary it would be violative of Article 14...”*¹⁴⁶

A little earlier in *Bachan Singh v State of Punjab*¹⁴⁷ upholding the constitutional validity of death penalty, Justice Sarkaria, speaking for the majority echoed the same views with greater force and pointed out that if Article 21 is understood in accordance with the interpretation put upon it in *Maneka Gandhi’s case*¹⁴⁸, it will read to say that:

*“No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.”*¹⁴⁹

Looking to the catena of cases since *Maneka Gandhi* the Supreme Court became very forthright in the interpretation of Article 21, which led Chandrachud C.J., speaking for the majority, in *Mithu v State of Punjab*¹⁵⁰ to say as follows about the relation of the legislative vis-s-vis judiciary with regard to the procedure:

*“These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it; that is for the legislature to provide the punishment and for the punishment and for the courts to impose it”.*¹⁵¹

Supra n.130.

Supra n.131.

¹⁴⁵*Id.*n.142.

Ibid.

AIR 1980 SC 898

¹⁴⁸*Id.*n.144.

Id. n.147.

¹⁵⁰*Supra* n.140.

¹⁵¹*Ibid.*

The Chief Justice further clarified and said that just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the court to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable.

The Indian judiciary is clear and the day does not seem to be far away when the 'law' in Article 21 will also be treated as 'reasonable law', through the self-same lately growing 'due process' jurisprudence.

3.7. Power to Review the Ninth Schedule of the Constitution

The Ninth Schedule was included in the Indian Constitution by the Constitution (First Amendment) Act, 1951, along with Article 31B. It provides that none of the Acts and Regulations included in the Ninth Schedule to the Constitution shall be deemed to be void on the ground that they are inconsistent with any of the rights conferred by Part III of the Constitution. In effect, the sole purpose of the Ninth Schedule read with Article 31B is to save the Acts passed by the legislature from the power of judicial review of the courts. Recently, on 11-1-2007 in *I.R.Coelho (Dead) by LRs v. State of Tamil Nadu*¹⁵², the Nine-Judge bench headed by Justice Y.K. Sabharwal, C.J.I., after a reference being made to it by a five-judge bench has unanimously pronounced upon the constitutional validity of the Ninth-Schedule laws that, in the post-1973 they are open to attack for causing the infraction which affects the basic structure of the Constitution. Such laws will not get the protection of the Ninth Schedule for escaping the judicial scrutiny and are open to challenge in the courts of law. It is an unanimous judgment of the nine judge bench of the Supreme Court of India, wherein the court is confronted with a very important yet not very easy task of determining the nature and character of the protection provided by Article 31B of the made after 24th April 1973, the date on which the judgment was pronounced in the famous *Kesavananda Bharti's case*¹⁵³ propounding the doctrine of Basic structure of the Constitution to test the validity of constitutional amendments. The judgment in this case put an end to the politico-legal controversy by holding the Parliament's amending power subject to judicial Review in line with Kesavananda Bharti's

¹⁵²*Supra* n.95.

¹⁵³*Supra* n.1.

decision that the violation of Doctrine of Basic Structure will never be tolerated. The judgment upholds the right of the judicial review and the supremacy of judiciary in interpreting laws¹⁵⁴.

Ever since the First Amendment, the Ninth Schedule has been relied upon to amend the constitution multiple times over. The 4th amendment inserted six acts to the 9th schedule. The 17th amendment added 44 more acts. The 29th amendment brought in two acts from Kerala. In 1975 Indira Gandhi's infamous abuse of executive power leading up to emergency saw the 39th amendment adding certain central enactments.

Originally, sixty-four laws were added to the Ninth Schedule. It was again amended by the 4th and 17th Constitution, (Amendment) Acts 1955 and 1964 respectively by which certain more Acts added to the Ninth Schedule. The Constitution (29th Amendment) Act, 1972, added Kerala Land Reforms Acts, 1969 and the Kerala Land Reforms Act, 1971, to the Ninth Schedule. The validity of this amendment was upheld by the Supreme Court in *Kesavananda Bharati*¹⁵⁵.

The fundamental question discussed by the Supreme Court in *I.R.Coelho*¹⁵⁶ is whether on and after 24th April, 1973 when basic structure doctrine was propounded, it is permissible for parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so, what is its effect on the power of judicial review of the Court? The order of reference was made by a Constitution Bench of Five Judges is reported in *I.R. Coelho (Dead) by LRs v. State of Tamil Nadu*¹⁵⁷. The Gudalur Janman Estates (Abolition and Conversion into Ryotwari), Act, 1969 (the Janman Act), in so far as it vested forest lands in the Janman estates in the State of Tamil Nadu because this was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution. Section 2 of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgment by the State of West Bengal was dismissed. By the

¹⁵⁴*Supra* n.152.

Kesavananda Bharati v. State of Kerala, *Supra* n.1. ¹⁵⁶*I. R. Coelho (Dead) LRs v. State of T. N.*, *Supra* n.95. ¹⁵⁷*Supra* n.95.

Constitution (Thirty-Fourth Amendment) Act, the Janman Act, in its entirety was inserted in the ninth Schedule. These insertions were the subject matter of challenge before a Five Judges Bench. It rests on two counts (1) judicial review is a basic feature of the Constitution; to insert in the Ninth Schedule an Act which, or part of which, has been struck down as unconstitutional in exercise of the power of judicial review, is to destroy or damage the basic structure of the Constitution. (2) To insert in the Ninth Schedule after 24.4.1973, an Act which, or part of which, has been struck down as being violative of the fundamental rights conferred by Part III of the Constitution is to destroy or damage its basic structure. These insertions were the subject matter of challenge before a Five Judge Bench. The contention urged before the Constitution Bench was that the statutes, inclusive of the portions thereof which had been struck down, could not have been validly inserted in the Ninth Schedule. The five-judge Constitution Bench observed that, according to *Waman Rao v. Union of India*¹⁵⁸ amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule was amended from time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the Constituent Power of Parliament since they damage the basic or essential features of the Constitution or its basic structure.

The decision in *Minerva Mills*¹⁵⁹ and *Maharao Sahib Shri Bhim Singhji*¹⁶⁰ were also noted and it was observed that the judgment in *Waman Rao*¹⁶¹ needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which or a part of which, is or has been found by Supreme Court to be violative of one or more of the fundamental rights conferred by Articles 14, 19, and 21 can be included in the Ninth Schedule or whether it is only constitutional amendment amending the Ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of

¹⁵⁸(1981) 2 SCC 362

¹⁵⁹*Supra* n. 48.

¹⁶⁰AIR 1985 SC 1650

¹⁶¹*Supra* n. 159.

nine judges. This is how the matters have been placed before Supreme Court's nine judge bench.

The main thrust of the argument of the petitioners is that post-1973, it is impermissible to immunize Ninth Schedule laws from judicial review by making Part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Article 368, is the thrust of the contention. The contention proceeds that since fundamental rights form a part of basic structure and thus laws inserted into Ninth Schedule when tested on the ground of basic structures shall have to be examined on the fundamental rights test.¹⁶²

The key question however is whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights. According to the petitioners, the consequence of the evolution of the principles of basic structure is that, Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Article 31B. Assuming that such immunity can be conferred, its constitutional validity would have to be adjudged by applying the direct impact and effect test which means the form of an amendment is not relevant, its consequence would be determinative factor.¹⁶³

On the other hand, the contention urged on behalf of the respondents is that the validity of Ninth Schedule legislations can only be tested on the touch-stone of basic structure doctrine as decided by majority in *Kesavananda Bharti's case*¹⁶⁴ which also upheld the Constitution 29th Amendment unconditionally and thus there can be no question of judicial review of such legislations on the ground of violation of fundamental rights chapter. The protective umbrella provided by Article 31B, and, therefore, the challenge can only be based on the ground of basic structure doctrine¹⁶⁵. Legislation of other constitutional provisions. This would also show, that there is no exclusion of judicial review and consequently, there is no violation of the basic structure doctrine. The contention is that there is no judicial review in absolute terms and Article 31B only restricts that judicial

¹⁶²*I. R. Coelho (Dead) LRs v. State of T. N.*, Supra n. 95 at 877.

¹⁶³*Ibid.*

¹⁶⁴*Supra* n.1.

¹⁶⁵*Ibid.*

review power. It is contended that after the doctrine of basic structure which came to be established in *Kesavananda Bharti's case*¹⁶⁶, it is only that kind of judicial review whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. Giving immunity of Part

to the Ninth Schedule laws from judicial review does not abrogate judicial review from the Constitution. Judicial review remains with the court but with its exclusion over Ninth Schedule laws to which Part III ceases to apply. The contention is that the majority in *Kesavananda Bharti's case*¹⁶⁷ held that there is no embargo with regard to amending any of the fundamental rights in Part III subject to basic structure theory and therefore the petitioners are not right in the contention that in the said case the majority held that the fundamental rights form part of the basic structure and cannot be amended. The further contention is that if Fundamental Rights can be amended, which is the effect of *Kesvananda Bharti's case*¹⁶⁸ overruling *Golak Nath's case*¹⁶⁹, then fundamentals rights cannot be said to be the part of the basic structure, unless the nature of the amendment is such which destroys the nature and character of the Constitution. It is contended that the test for judicially reviewing the Ninth Schedule laws cannot be on the basis of mere infringement of the rights guaranteed under Part III of the Constitution. The correct test is whether such laws damage or destroy that part of fundamental rights which form part of the basic structure. Thus, it is contended that judicial review of Ninth Schedule laws is not completely barred. The only area where such laws get immunity is from the infraction of rights guaranteed under Part III of the Constitution.

To answer this question the court first examined the judgement in *Keavananda Bharati*¹⁷⁰, particularly with reference to 29th Amendment. Khanna, J. was of the view that 29th Amendment Act did not suffer from any infirmity and as such was valid. Thus, while upholding the 29th Amendment Act, there was no mention of the test that is to be applied to the legislations inserted in the Ninth Schedule. The implications that the respondents seek to draw from the above was that this amounts to an unconditional upholding of the legislations in the Ninth Schedule.

¹⁶⁶*Supra n.1.*

¹⁶⁷*Id.*

¹⁶⁹*Id.*
¹⁶⁹*Supra n.21.*

¹⁷⁰*Supra n.1.*

However, Khanna, J. in *Indira Gandhi* made it clear that he never opined *Kesavananda Bharati* that the fundamental rights were outside the purview of the basic structure. According to him, what has been laid down in that judgment is that no article of the Constitution is immune from amendatory process because of the fact that it relates to a fundamental right and is contained in the Part III of the Constitution. Thus, after this clarification, it is not possible to read the decision of Khanna, J. in *Kesavananda Bharati*¹⁷¹ so as to exclude fundamental rights from the purview of the basic structure, the inevitable consequence is that the 29th Amendment even if treated as unconditionally valid is of no consequence on the point in issue before the court. The problem was solved in *Minerva Mills* by the Supreme Court by holding that Acts inserted in the Ninth Schedule were not unconditionally valid but would have to stand the test of fundamental rights.

The court in *I.R. Coelho*¹⁷², after discussing the above cases, was of the opinion that rights and freedom created by the fundamental rights chapter could be taken away or destroyed by amendment of relevant article, but subject to limitation of basic structure doctrine. It may reduce the efficacy of Article 31B but that is inevitable in view of the progress the laws have made post-*Kesavananda Bharati*, which has limited the power of Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure. Part III is amendable subject to basic structure doctrine. It is permissible for the legislature to, amend the Ninth Schedule and grant a law the protection in terms of Article 31B but subject to the right of citizen to assail it on the concept of enlarged judicial review. The legislature cannot grant fictional immunities and exclude the examination of Ninth Schedule law by the Court after the enunciation of the basic structure doctrine. The constitutional amendments are subject to limitations and if the question of limitations is to be decided by Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitation cannot vest in one organ. The validity to the limitation on the rights in Part III

¹⁷¹*Id.*

¹⁷²*Supra n.95.*

can only be examined by another independent organ, namely, the judiciary. The doctrine of basic structure as a principle has now become an axiom. The power to amend the Constitution is subject to the aforesaid axiom¹⁷³.

After the judgment of Supreme Court in this case it is now well settled principle that any law placed under Ninth Schedule after April 24, 1973, are subject to scrutiny of Court's if they violated fundamental rights and thus put the check on the misuse of the provision of the Ninth Schedule by the legislative.

3.8. A Sum up

A legal view of national constitutions is that of a supreme law of the land, a fundamental normative fountain from which all the other secondary norms such as statutory laws, executive orders, and ordinances are derived. When these secondary norms fail to conform to the constitution, various judicial bodies (courts or special constitutional tribunals) are urged to declare the impugned laws as unconstitutional. The term of judicial or constitutional review applies to this procedure only¹⁷⁴. Thus, Judicial Review basically is an aspect of judicial power of the state which is exercised by the courts to determine the validity of a rule of law or an action of any agency of the state. In the legal systems of modern democracies it has very wide connotations. The judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and also they try to provide every citizen what has been promised by Constitution. All this is possible because of the power of judicial review.

India is fortunate enough to have a constitution in which the fundamental rights are enshrined and which has appointed an independent judiciary as guardian of the constitution and protector of the citizen's liberties against the forces of authoritarianism. In a true form of democracy, the rule of a fearless independent and impartial judiciary is indispensable and cannot be over-emphasized. Judicial review of legislation is a result of two of the most fundamental features of Indian constitution. The first is the two-tier system of law with the constitution as the Supreme law and other legislation being the ordinary law which is valid only in

¹⁷³*Id.*

¹⁷⁴The Blackwell Encyclopedia of Political Institutions, 1987, p. 142.

so far as is consistent with the constitution. The Second is the separation of the legislative, the executive and the judicial powers.

In India, we follow a separation of functions and not of Separation of powers. And hence, we don't abide by the principle in its rigidity. Though in India strict separation of powers like in American sense is not followed but, the principle of 'checks and balances', exists as a part of this doctrine. Therefore, none of the three organs can usurp the essential functions of the organs, which constitute a part of the 'basic structure' doctrine so much so that, not even by amending the Constitution and if any such amendment is made, the court will strike it down as unconstitutional.

Further pointing out the relevance of the power of the judiciary to pronounce upon the validity of laws. The Apex Court in *Minerva Mills v. Union of India*¹⁷⁵ held that "our Constitution is founded on a nice balance of power amongst the three organs of the State namely the Executive the Legislature and the Judiciary. It is the function of the Judges to pronounce on the validity of laws, if the Courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies is a writ in water. A controlled Constitution will become uncontrolled."

The judicial review power does in no way makes the Supreme Court supreme as against Parliament. This power is an essential feature of our federal system. It is the duty of the Court to uphold the Constitution, and to owe "true faith and allegiance to the Constitution". It is undertaken not out of any desire to tilt at legislative authority in a crusader's spirit, but in a discharge of the duty plainly laid upon the Court by the Constitution. Judicial Review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive.

The concept of popular sovereignty and federalism go together. In both the phases of the constitutional philosophy, legislative idealism has no place and the legislature has to face judicial scrutiny. This is why the doctrine of judicial review has occupied such a predominant position in democratic federal states like India and America. The impact of the concept of popular sovereignty is apparent

¹⁷⁵*Supra n.48.*

and the governance of such countries cannot be worked out with balance in the absence of judicial review.

The doctrine of sovereignty of Parliament is associated with the British Parliament while the principle of judicial supremacy with that of the American Supreme Court. Just as the Indian parliamentary system differs from the British system, the scope of judicial review power of the Supreme Court in India is narrower than that of what exists in US. This is because the American Constitution provides for 'due process of law' against that of 'procedure established by law' contained in the Indian Constitution (Article 21). Therefore, the framers of the Indian Constitution have preferred a proper synthesis between the British principle of parliamentary sovereignty and the American principle of judicial supremacy. The Supreme Court, on the one hand, can declare the parliamentary laws as unconstitutional through its power of judicial review.

The Parliament, on the other hand, can amend the major portion of the Constitution through its constituent power. The amending power of the Parliament under the Indian Constitution is the main area which has led to most serious disagreements between the Parliament and Judiciary, the conflict involving Parliamentary Supremacy on one hand and the Judicial review of the scope and extent of the power and the manner in which such power is to be exercised on the other.

Often lack of political will becomes the reasons for repealing even a successful legislation. Repealing of legislation or enacting a new law merely to render ineffective a judgment of the Court can be very dangerous/harmful for the democratic set up of our country. If the higher Courts point out a defect in an existing legislation. It is proper for the legislature to cure such defects. However, the practice of repealing a legislation merely for the purpose of pleasing any particular class of persons. Is neither going to serve any good our legal system or to the society.

The issue of parliamentary versus judicial supremacy has been a subject of heated scholarly debate over the last few years. It has exercised the minds of legislators, jurists, politicians and non-professionals as well through-out the world. The supporters of absolute independence of judiciary argue that in the

absence of an impartial, independent and sovereign judiciary, democracy cannot succeed. In contrast to this view, supporters of parliamentary supremacy pursue the concept that judicial supremacy which is expressed in the form of judicial review, is incompatible with a democratic government because the importance of majority rule lags behind by the few unelected judges who are not directly accountable to people.

What is crucial to note here is that it has turned into a competition between the legislature and the Judiciary as to which of the two is supreme. While this seemingly never ending tussle is in continuance, it is the individuals, the citizens of this very nation for whom these two separate organs have been instituted who are getting side lined. The people of this country are living in the shadows of ambiguity and uncertainty because at the end of the day, it's the people who are forced to bear the brunt of the clash.

The evolution of the Doctrine of Basic Structure in *Kesavananda Bharati v. State of Kerala* proved to be pivotal point. This Doctrine is of prime importance as it prevents the Parliament from having unconditional and unrestrained power. A certainty that has manifested out of this tussle between Parliament and the judiciary is that all laws and constitutional amendments are subject to judicial review and the laws that transgress the basic structure are prone to be struck down by the Supreme Court. The *Coelho* case held that laws and constitutional amendments that altered the basic structure of the constitution, by violating fundamental rights, could be invalidated. This decision of apex court in *Coelho* can be viewed as a victory for fundamental rights.

Thus, it is imperative for the Parliament and the Judiciary to work in harmonious construction and not be at each other's throat and only then will the citizens be able to recognize their rights and these two institutions would be able to reflect and serve justice in its essence.

CHAPTER 4

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IS AN INTEGRAL PART OF CONSTITUTIONAL SCHEME OF INDIA

4.1 An Overview

Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of this century. In India, the doctrine of judicial review is the basic feature of Indian Constitution. Judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. Judicial review is the touchstone of the Constitution. The Supreme Court and High Courts are the ultimate interpreters of the Constitution. It is, therefore, their duty to find out the extent and limits of the power of coordinate branches, viz. executive and legislature and to see that they do not transgress their limits. This is indeed a delicate task assigned to the judiciary by the Constitution. Judicial review is thus the touchstone and essence of the rule of law.

The power of judicial review is an integral part of Indian Constitutional system and without it, there will be no government laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. In judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or order is made. A court of law is not exercising appellate power and it cannot substitute its opinion for the opinion of the authority deciding the matter.

It is a cardinal principle of Indian Constitution that no one howsoever highly placed and no authority lofty can claim to be the sole judge of its power under the Constitution. The rule of law requires that the exercise power by the legislature or by the judiciary or by the government or by any other authority must be conditioned by the Constitution. Judicial review is thus the touchstone and repository of the supreme law of the land. In recent times, judicial review of

administrative action has become extensive and expansive. The traditional limitations have vanished and the sphere of judicial scrutiny is being expanded. Under the old theory, the courts used to exercise power only in cases of absence or excess or abuse of power. As the State activities have become pervasive and giant public corporations have come in existence, the stake of public exchequer justifies larger public audit and judicial control.

The scope of judicial review in India is not as wide as in USA. The American Supreme Court can declare any law unconstitutional on the ground of its not being in “due process of law”, but the Indian Supreme Court has no such power. In India, outside the limitation imposed on the legislative powers, Parliament and State legislature are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature. Another reason is because the Indian Supreme Court has consistently refused to declare legislative enactments invalid on the ground that they violate the natural, social or political rights of citizens, unless it could be shown that such injustice was expressly prohibited by the Constitution.

Judicial Review, a concept of Rule of Law, is the check and balance mechanism to maintain the separation of powers. Separation of power has rooted the scope of Judicial Review. It is a great weapon in the hands of the courts to hold unconstitutional and unenforceable any law and order which is inconsistent or in conflict with the basic law of the land. The two principal basis of judicial review of administrative actions are “Theory of Limited Government” and “Supremacy of constitution” with the requirement that ordinary law must conform to the Constitutional law.

4.2 Rule of Law: Basis of Judicial Review of Administrative Actions

It is the duty of the judiciary to keep different organs of the state within the limits power conferred upon them by the constitution. The legitimacy of judicial review is based in the Rule of Law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked.

Dicey has given three meanings of the rule of law. According to him, “It means in the first place, the absolute supremacy or predominance of regular laws as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogatives or even of wide discretionary authority on the part of the Government. Englishmen are ruled by the law and by the law alone a man may be punished for a breach of law but he can be punished for nothing else... no man’s punishable or can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”¹ Further Dicey writes, “It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. Dicey continues that, “Not only that with us no man is above the law but (what is a different thing) that here everyman. Whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”² Prof. Dicey while elaborating the equality of all before law. Say, “With us every official, from the Prime Minister to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen”.

Thirdly, according to Dicey, the Rule of Law may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries, naturally form part of the constitutional code, are not the sources but the consequences of the rights of individuals as defined and enforced by the courts.... It means that the main principle of the constitution, such as the right to personal or of public meeting, has been set up on the foundation of the old common law and not as things derived from any general Constitution Theory. Rights in brief, do not flow from the constitution but from judicial decisions as in the famous Wilkes, case³.

The Doctrine of Judicial Review is embodied in the Constitution and the subject can approach High Court and Supreme Court for the enforcement of fundamental

E.C.S. Wade, *Dicey: Introduction to the Study of the Constitution*, 10th edition, London, Macmillan, 1959, p.188.

²*Ibid.*

³.N.R.Madhava Menon, *Constitutional Institutions and the maintenance of Rule of Law; Rule of Law in a Free Society*, (ed.) N.R.Madhava Menon, Oxford University Press, 2008, p.41-42.

right guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action is mala fide, the same can be quashed by the ordinary courts of law. All the rules, regulations, ordinances, by-laws, notifications, customs and usages are “laws” within the meaning of Article 13⁴ of the Constitution and if they are inconsistent with or contrary to any of the provisions thereof, they can be declared ultra vires by the Supreme Court and by the High Courts. Judicial review of administrative action aims to protect citizens from abuse of power by any branch of State.

All administrative authorities are subject to the rule of law. Normally, their decisions are subject to statutory and departmental appeals, revisions or review. These authorities form a large part of our legal system directly administering law to persons with whom they are dealing. However, other defects occur in the exercise of their powers which are incapable of remedy by the statutory and departmental appeals. A supervisory power to correct such defects has, therefore, been vested in the High Courts. The power of the judicial and administrative superintendence of the High Courts over such authorities was first conferred on the High Courts by section 107 of the Government of India Act, 1919. When this Act was repealed by the Government of India Act, 1935, section 224 of the latter Act continued the administrative superintendence but expressly took away the power of judicial superintendence of the High Courts. The reason, perhaps, was that the power of judicial superintendence had not been expressly conferred on the High Courts by section 107 of the former Act but was implied in the High Courts by judicial construction of section 107. The effect of these judicial decisions was negative by section 224(2) of the latter Act. However, the judicial superintendence in addition to the administrative one of the High Courts over all the courts and tribunals in their respective territorial jurisdiction was re-established by article 227 of the Constitution of India.⁵

The immediate reason for the enactment of article 226 was the need for a machinery to enforce fundamental rights. The infringement of the fundamental rights may be caused not only by executive action but by the exercise of

Article 13 (2) of the Constitution of India.

See Municipal Corporation of Delhi v. M/S Tyagi Anand and Company (P) Ltd., I.L.R. (1972) 1 Delhi 804.

legislative power. Article 227 could not be invoked to correct the latter. But the scope of article 226 was broadened to include not only the enforcement of fundamental rights but also the upholding of other rights and correction of other wrongs. Articles 226 and 227, therefore, form a harmonious system together forming the power of judicial review of the High Courts.

Rule of Law has been held to be a basic feature of the Indian Constitution. In the Indian Constitution, Article 14 combines the English doctrine of the Rule of Law and the equal protection clause of the Fourteenth Amendment. Rule of law postulates the preservation of the spirit of law through the whole range of government. Because of its amorphous nature Sir Ivor Jennings called it an unruly horse⁶.

Soon after the Constitution came into force in 1950 in *A.K.Gopalan's case*⁷ the Supreme Court placed rather a narrow and restrictive interpretation upon article 21 of the Constitution. By a majority, it was held in this case that "... the procedure established by law" means procedure established by a law made by the State" and the court refused to infuse in that procedure the principles of natural justice. The court also arrived at the conclusion that article 21 excluded enjoyment of the freedoms guaranteed under Article 19.

*Gopalan's case*⁸ was decided soon after, the Constitution came into force, more than 49 years ago. The judgement was mainly based on the language of the Constitution and the requirements of the particular case before the court. The law has not remained static. The doctrine of exclusivity of fundamental rights as evolved in *Gopalan's case*⁹ was thrown overboard by the same Supreme Court, about two decades later in *Bank Nationalization case*¹⁰, and four years later in 1974, in *Hardhan Saha's case*¹¹, the supreme court judged the constitutionality of preventive detention with reference to article 19 also. Twenty eight years after the judgement in *Gopalan's case*¹², in 1978 the Supreme Court in *Maneka*

⁶M.N.Venkatachaliah,*Rule of Law and Judiciary ;Rule of Law in a Free Society*,(ed.) N.R.Madhava Menon, Oxford University Press,2008, p.123.

⁷.*Supra* n.6.

⁸*Id.*

Id.

R.C.Cooper v. U.O.I.,AIR 1970 SC 565

AIR 1974 SC 2154

¹²*Supra* n 6.

*Gandhi's case*¹³, pronounced that the procedure contemplated by article 21 must be 'right, just and fair' and not arbitrary; it must pass the test of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would be no procedure at all and the requirement of article 21 would not be satisfied. The courts have, thus, been making judicial intervention in cases concerning violation of human rights as an ongoing judicial process.

In the case of *Nilabati Behera v. State*¹⁴ the court crystallized the judicial right to compensation, which was further reiterated in *D. K. Basu v. State of W.B*¹⁵. In this the court went to the extent of saying that since compensation was being directed by the courts to be paid by the State, which has been held vicariously liable for the illegal acts of its officials, the reservation to clause 9(5) of ICCPR by the Government of India had lost its relevance. In fact, the sentencing policy of the judiciary in torture related cases, against erring officials in India, has become very strict.

4.3 Delegated Legislation: Inevitable for Welfare State

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation.

4.3.1 Need to have Delegated Legislation in Welfare State

The reasons as to why the Parliament alone cannot perform the jobs of legislation in this changed context are not far to seek. Apart from other considerations the inability of the Parliament to supply the necessary quantity and quality legislation to the society may be attributed to the following reasons:

¹³AIR 1978 SC 597

¹⁴AIR 1993 SC 1960

¹⁵(1997) 1 SCC 416

Certain emergency situations may arise which necessitate special measures. In such cases speedy and appropriate action is required. The Parliament cannot act quickly because of its

political nature and because of the time required by the Parliament to enact the law.

The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters. The Parliament cannot provide the society with the requisite quality and quantity of legislation because of lack of time. Most of the time of the Parliament is devoted to political matters, matters of policy and particularly foreign affairs.

Certain matters covered by delegated legislation are of a technical nature which require handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter.

"Parliaments" cannot obviously provide for such matters as the members are at best politicians and not experts in various spheres of life.

Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution. Accordingly various statutes contain a 'removal of difficulty clause' empowering the administration to remove such difficulties by exercising the powers of making rules and regulations. These clauses are always so worded that very wide powers are given to the administration.

iv)The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly. Experiments can be made and experience can be profitably utilized.

However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor, which promoted centralization. Delegated Legislation was considered a danger to the liberties of the people and a device to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands. But the tide of delegated legislation was high and these protests remained futile.

4.3.2 Nature and Scope of Delegated Legislation in India

Delegated legislation means legislation by authorities other than the Legislature, the former acting on express delegated authority and power from the later. Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if restored to within proper limits. The delegation should not, in any case, be unguided and uncontrolled.

Parliament and State Legislatures cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only a nonessential legislative function that can be delegated and the moot point always lies in the line of demarcation between the essential and nonessential legislative functions.

The essential legislative functions consist in making a law. It is to the legislature to formulate the legislative policy and delegate the formulation of details in implementing that policy. Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated authority cannot be precisely defined and each case has to be considered in its setting.

In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions. The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power.

Under the constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Articles 13(3)(a) of the Constitution of India lays down that law includes any ordinances, order bylaw, rule regulation, notification, etc. Which if found inviolation of fundamental rights

would be void. Besides, there are number of judicial pronouncements by the courts where they have justified delegated legislation¹⁶.

While commenting on indispensability of delegated legislation Justice Krishna Iyer, has rightly observed in the case of *Arvinder Singh v. State of Punjab*¹⁷, that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislature may not get off to a start if they must directly and comprehensively handle legislative business in their plenitude, proliferation and articularisation. Delegation of some part of legislative power becomes a compulsive necessity for viability.

4.3.3 Modes of Control over Delegated Legislation

The practice of conferring legislative powers upon administrative authorities though beneficial and necessary is also dangerous because of the possibility of abuse of powers and other attendant evils. There is consensus of opinion that proper precautions must be taken for ensuring proper exercise of such powers. Wider discretion is most likely to result in arbitrariness. The exercise of delegated legislative powers must be properly circumscribed and vigilantly scrutinized by the Court and Legislature is not by itself enough to ensure the advantage of the practice or to avoid the danger of its misuse. For the reason, there are certain other methods of control emerging in this field.

The control of delegated legislation in India is mainly of three of the following types: -

- Procedural
- Parliamentary;
- Judicial

Judicial control of administrative action can be divided into the following two classes: -

- Doctrine of ultra vires
- Use of prerogative writs.

¹⁶*In re Delhi Laws Act case*, AIR 1961 SC 332; *Vasantlal Magan Bhai v. State of Bombay*, AIR 1961 SC 4; *S. Avtar Singh v. State of Jammu and Kashmir*, AIR 1977 J&K 4

¹⁷AIR 1979 SC 321

4.4 Doctrine of Ultra-Vires: Jurisdictional Principle

The jurisdictional principle which determines the reviewability of an administrative action is often expressed as 'want or excess of jurisdiction; the underlying doctrine is known as 'ultra-vires'. Historically, the basis of judicial review in England is the doctrine of ultra-vires or excess of jurisdiction. The attempts by the courts to extend this narrow concept to the modern problems of the administrative process has introduced certain technicalities and artificialities in the law relating to judicial review. The courts take the position that writ jurisdiction is of a supervisory nature and cannot be equated with an appeal to the court from the body in question¹⁸.

Thus, the doctrine of ultra vires provides a half way basis of judicial review between review on appeal and no review at all. In an appeal the appellate authority not only quash the administrative decision, but can go into the merits of the decision of the authority appealed against and may substitute its own judgement in its place, while in the case of ultra vires the powers of the courts are limited only to quash the administrative decision if it is in excess of power of the authority, or directing to act according to law and courts keep away from examining the merits of the case. Thus, an appeal on a point of law or fact is wider in scope and court has a wider jurisdiction. Thus, the half way review, extent of which is not always clear, creates uncertainty about judicial intervention in administrative action¹⁹.

Sometimes, the courts may feel like intervening because they feel strongly about the injustice of the case before them, sometimes they are not sure of injustice and uphold the decision of the administration. Courts lack frankness to admit this clearly which leads them to state their conclusion in terms of artificial conceptualism and vague formulae. The result often manifests itself inconsistent decisions and judicial uncertainty.

On the whole, the judicial review of administrative action is undertaken with a view to ensuring that administrative agencies act according to their allocated jurisdiction and according to the principles of natural justice. The main ground for invalidating an administrative action is ultra vires. However, over the years, the courts have developed various grounds on which they could intervene, yet the

¹⁸Wade, *Administrative Law*, Oxford University Press, 1977, p. 40.

¹⁹*Ibid.*

law regarding judicial review of administrative action through writs is complicated, involved and deficient.

4.4.1 Doctrine of Ultra-Vires: Limited Application in India

The law, regarding the judicial review of administrative action in India was derived historically from the common law, the dominant feature of which was the enforcement of controls over the powers of public authorities through the ordinary court of law. Thus, from the earliest times, the proceedings instituted before borough courts were removable into the king's court at Westminster²⁰. The superior courts used to maintain a very tight control over the justices of the peace, who exercised a wide range of duties, including repairs of highways, bridges and other administrative matters. When most of the administrative powers of the justices of the peace were transferred to the local authorities in 1888, the courts maintained similar control over the latter. While exercising their control over the lower courts and tribunals, the courts claimed a right to determine the proper jurisdiction of the former and to keep them within their jurisdiction. In this process of review, there emerged the principle of jurisdiction, otherwise known as 'ultra-vires' which marked off an area in which the lower tribunals are absolute judges, but are not allowed to cross the wall.

The doctrine of ultra-vires, as explained by Lord Selborne L.C. in one case, ought to be reasonably, and not unreasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held ultra vires²¹.

As in England, so in India, the doctrine of ultra-vires has attained a high level of sophistication, so that the courts are enabled not merely to control actions which are obviously outside jurisdiction, but to examine the reasonableness, motives and relevancy of considerations. Courts have also exercised controls on various aspects of discretionary powers. Procedural errors are also held jurisdictional if the procedural requirement is mandatory as distinguished from directory.

²⁰Holdsworth, A History of English Law, Vol. 2(1936) pp. 395-405.

²¹*Attorney-General v. Great Eastern Railway Co.* (1880)5 AC 473 at 478

Administrative actions in India are subject to judicial review in cases of illegality, irrationality or procedural impropriety²². In state of *A.P. v. Me Dowell & Co*²³.the Apex Court while dealing with the administrative actions and judicial review, laid down that the scope of judicial review in case of administrative action is limited to three grounds: (i) unreasonableness which more appropriately be called irrationality; (ii) illegality; (iii) procedural impropriety.

The doctrine of ultra-vires is the principal instrument for judicial control of administrative authorities. It embraces all kinds of administrative acts done 'in excess of powers.' Otherwise known as 'jurisdictional principle'. However, in judicial review court does not sit as a court of appeal but merely review the manner in which the decision was made.

The Supreme Court in *Tata Cellular v. Union of India*²⁴, laid down that judicial review is concerned with reviewing not the merits of the decision but the decision making process itself. If a review of administrative decision is permitted, it will be substituting its own decision which itself may be fallible. The duty of the court is to confine itself to the question of legality. Its concern should be²⁵

Whether the decision-making authority exceeds its power;
committed an error of law;
committed a breach of the rules of natural justice;
reached a decision which no reasonable tribunal would have reached;
Abuse of its power.

The doctrine of ultra-vires is consistent with to some extent the concept of rule of law, therefore, the concept of ultra-vires is nowadays regarded by many as an inadequate rationale for judicial review. Thus, the preferred view is that the courts need not resort to fiction such as the intention of the parliament or the technicalities of 'jurisdictional facts' and 'error of law' but that rather the courts will intervene whenever there has been an unlawful exercise of power.

²²*Tata Cellular v. Union of India* (1994)6 SCC 651; AIR 1994 SCW 3344; *Pragoty Supply Co. & Co.-op. Society Ltd. v. State*, AIR 1996 Gau 17

²³AIR 1996 SC 1627

²⁴*Supra* n.22.

²⁵*Mansukhlal v. State* (1997)7 SCC 622

4.5. Use of Writs for Review of Administrative Action

In modern democratic countries, the administrative authorities are vested with vast discretionary powers. The exercise of those powers often becomes subjective in the absence of specific guidelines etc. Hence the need for a control of the discretionary powers is essential to ensure that 'Rule of Law' exist in all governmental actions. The judicial review of administrative actions in the form of writ jurisdiction is to ensure that the decisions taken by the authorities are legal, rational, proper, just, fair and reasonable. Safeguard of fundamental rights and assurance of natural justice are the most important components of writ jurisdictions.

Article 32 and 226 of the constitution of India has designed for the enforcement of fundamental rights and for a judicial review of administrative actions, in the form of writs. It is a constitutional remedy available to a person to bring his complaint or grievance against any administrative action to the notice of the court. Safeguard of fundamental rights and assurance of natural justice are the most important components of writ jurisdictions.

4.5.1 Origin of Writs in India

The origin of writs in India goes back to the Regulating Act, 1773 under which Supreme Court was established at Calcutta. The charter also established other High Courts and also gave them power to issue writs as successor to Supreme Court. The writ jurisdiction of these courts was limited to their original civil jurisdiction which they enjoyed under Section 45 of the Specific Relief Act, 1877.

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Writ jurisdiction is exercised by the Supreme Court and the High Courts. This power is conferred to Supreme Court by article 32 and to high courts by article 226. Article 32(1) guarantee a person the right to move the Supreme Court for the

enforcement of fundamental rights guaranteed by part III of the constitution. Article 32(2) empowers the Supreme Court to issue direction or orders or writs in the nature of Habeas Corpus, Certiorari, Prohibition, mandamus and Quo-warranto for the enforcement of fundamental rights. Article 226 empowers the state high courts to issue directions, orders or writs as mentioned above for the enforcement of fundamental rights and for 'any other purpose'. i.e., High courts can exercise the power of writs not only for the enforcement of fundamental rights but also for other legal rights.

Thus the constitution provides the discretionary remedies on the High Court and the Supreme Court. In the absence of the provisions of such remedies no one can enforce its rights given. Thus wherever there is a right there must be a remedy for it. Thus it should satisfy the maxim, 'ubi jus ibi remedium.' One of the principle makers of the constitution, Dr. Ambedkar has given the prime importance to Article 32 among all other articles from the Indian Constitution. He has referred that, "It is the very soul of the Constitution and the very heart of it, "It is the very soul of the Constitution and the very heart of it".

In *Devilal v. STO*²⁶, it has been marked that, "There can be no doubt that the Fundamental Rights, guaranteed to the citizens are a significant feature of our Constitution and the High Courts under Article 226 are bound to protect these Fundamental Rights." In *Daryao v. State of U.P.*²⁷ it was held that the right to obtain a writ must equally be a fundamental right when a petitioner presents the case. Thus, it cannot merely be considered as an individual's right to move the Supreme Court but it is also the duty and responsibility of the Supreme Court to protect the fundamental rights.

4.5.2 Principles of Exercise of Writs Jurisdiction in India

Writs are meant as prerogative remedies. The writ jurisdictions exercised by the Supreme Court under article 32 and by the high courts under article 226, for the enforcement of fundamental rights are mandatory and not discretionary. But the writ jurisdiction of high courts for 'any other purpose' is discretionary. In that sense the writ jurisdiction of high courts are of a very intrinsic nature. Hence high courts have the great responsibility of exercising this jurisdiction strictly in

²⁶AIR 1965 SC 1150

²⁷AIR 1961 SC 1457

accordance with judicial considerations and well established principles. When ordinary legal remedies seem inadequate, in exceptional cases, writs are applied. Following writs are used by our judiciary to review the administrative action:

4.5.2.1 Writ of Habeas Corpus

The meaning of the Latin phrase Habeas Corpus is 'have the body'. According to Article 21, "no person shall be deprived of his life or personal liberty except according to the procedure established by law". The writ of Habeas corpus is in the nature of an order directing a person who has detained another, to produce the latter before the court in order to examine the legality of the detention and to set him free if there is no legal justification for the detention. It is a process by which an individual who has been deprived of his personal liberty can test the validity of the act before a higher court. The objective of the writ of habeas corpus is to provide for a speedy judicial review of alleged unlawful restraint on liberty. It aims not at the punishment of the wrongdoer but to resume the release of the detainee. The writ of habeas corpus enables the immediate determination of the right of the appellant's freedom. In the writs of habeas corpus, the merits of the case or the moral justification for the imprisonment or detention are irrelevant. In *A.D.M. Jabalpur v. Shivakant Shukla*²⁸, it was observed that "the writ of Habeas Corpus is a process for securing the liberty of the subject by affording an effective means of immediate relief from unlawful or unjustifiable detention whether in prison or private custody. If there is no legal justification for that detention, then the party is ordered to be released."

4.5.2.2 Writ of Certiorari

The writ of Certiorari is generally issued against authorities exercising quasi-judicial functions. The Latin word Certiorari means 'to certify'. Certiorari can be defined as a judicial order of the supreme court or by the high courts to an inferior court or to any other authority that exercise judicial, quasi-judicial or administrative functions, to transmit to the court the records of proceedings pending with them for scrutiny and to decide the legality and validity of the order passed by them. Through this writ, the court quashes or declares invalid a decision taken by the concerned authority. Though it was meant as a supervisory

²⁸AIR 1976 SC 1207

jurisdiction over inferior courts originally, these remedy is extended to all authorities who issue similar functions.

The concept of natural justice and the requirement of fairness in actions, the scope of certiorari have been extended even to administrative decisions. An instance showing the certiorari powers was exercised by the Hon'ble Supreme court in *A. K. Kraipak v. Union of India*²⁹, where the selection was challenged on the ground of bias. The Supreme Court delineated the distinction between quasi judicial and administrative authority. The Supreme Court exercising the powers issued the writ of Certiorari for quashing the action. Certiorari is corrective in nature. This writ can be issued to any constitutional, statutory or non statutory body or any person who exercise powers affecting the rights of citizens.

4.5.2.3 Writ of Prohibition

The grounds for issuing the writs of certiorari and prohibition are generally the same. They have many common features too. The writ of prohibition is a judicial order issued to a constitutional, statutory or non statutory body or person if it exceeds its jurisdiction or it tries to exercise a jurisdiction not vested upon them. It is a general remedy for the control of judicial, quasi judicial and administrative decisions affecting the rights of persons.

The writ of Prohibition is issued by the court exercising the power and authorities from continuing the proceedings as basically such authority has no power or jurisdiction to decide the case. Prohibition is an extra ordinary prerogative writ of a preventive nature. The underlying principle is that 'prevention is better than cure.' In *East India Commercial Co. Ltd v. Collector of Customs*³⁰, a writ of prohibition is an order directed to an inferior Tribunal forbidding it from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land, statutory or otherwise.

²⁹AIR 1970 SC 170

³⁰AIR 1963 SC 1124

4.5.2.4 Writ of Mandamus

The writ of mandamus is a judicial remedy in the form of an order from the supreme court or high courts to any inferior court, government or any other public authority to carry out a 'public duty' entrusted upon them either by statute or by common law or to refrain from doing a specific act which that authority is bound to refrain from doing under the law. For the grant of the writ of mandamus there must be a public duty. The superior courts command an authority to perform a public duty or to non-perform an act which is against the law. The word meaning in Latin is 'we command'. The writ of mandamus is issued to any authority which enjoys judicial, quasi-judicial or administrative power. The main objective of this writ is to keep the public authorities within the purview of their jurisdiction while performing public duties. The writ of mandamus can be issued if the public authority vested with power abuses the power or acts mala fide to it.

4.5.2.5 Writ of Quo Warranto

The word meaning of 'Quo warranto' is 'by what authority'. It is a judicial order against a person who occupies a substantive public office without any legal authority. The person is asked to show by what authority he occupies the position or office. This writ is meant to oust persons, who are not legally qualified, from substantive public posts. The writ of Quo warranto is to confirm the right of citizens to hold public offices. In this writ the court or the judiciary reviews the action of the executive with regard to appointments made against statutory provisions, to public offices. It also aims to protect those persons who are deprived of their right to hold a public office.

In *University of Mysore v. Govinda Rao*³¹, the Supreme Court observed that the procedure of quo Warranto confers the jurisdiction and authority on the judiciary to control executive action in making the appointments to public offices against the relevant statutory provisions; it also protects a citizen being deprived of public office to which he may have a right.

³¹AIR 1965 SC497

4.6 Grounds of Judicial Review of Administrative Action in India

Outsourcing of legislative and adjudicatory powers to the administrative authorities as an imperative of modern system of governance has brought the law of judicial review of administrative action in prime focus. Law dealing with judicial review of administrative action is largely judge-induced and judge-led; consequently thickets of technicalities and inconsistencies surround it. Anyone who surveys the spectrum of judicial review finds that the fundamentals on which courts base their decisions include Rule of law, administrative efficiency, fairness and accountability. These fundamentals are necessary for making administrative action 'people-centric'. Courts have generally exhibited a sense of self-restraint where judicially manageable standards do not exist for judicial intervention³².

As a general rule, courts have no power to interfere with actions taken by administrative authorities in exercise of discretionary powers. But this does not mean that there is no power of court to control over the discretion of administration. In India, the court will interfere with the discretionary powers exercised by the administration in the basically on two grounds: i.e. failure to exercise discretion and excess or abuse of discretion.

The judicial review of administrative action can also be exercised on the following grounds:

Illegality: means that the decision maker must correctly understand the law that regulates his decision making power and must give effect to it. Sometime legislation allows the exercise of a wide and seemingly unrestrained discretion by the public body, or provides that a duty should be discharged in certain circumstances, but does not prescribe a particular process for determining whether those circumstances arise in an individual case. Here, illegality can occur where the action, failure to act or decision in question in question violate the public law principles set down by the courts for processes of this kind.

Irrationality: means that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person could have arrived at such a decision.

³²*EssarOilLtd.v.HalarVtkarshSamiti*, (2004)2SCC392

The benchmark decision on this principle of judicial review was made as long ago as 1948 in the *Wednesbury case*³³. It is important to note that this ground of review does not give judges much opportunity to review the merits of administrative decisions as the ground has a high threshold for judicial intervention which is rarely satisfied. The ground is directed at extremes of administrative behavior. Lord Greene in the *Wednesbury case*³⁴ stated that for review to be successful on this ground the administrative decision taken must be something so absurd that no sensible person could ever dream that it laid within the powers of the authority.

Procedural impropriety: means that the procedure for taking administrative decision and action must be fair, reasonable and just. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached. The case must be heard and decided by the person to whom it is delegated and not by another. The process to arrive at some decision must be followed as it is expressed in the statute. The rule of natural justice must be applied by the deciding authority.

Proportionality/Unreasonableness: means in any administrative decision and action the end and means relationship must be rational. In, *Ajai Hasia v. Khalid Mujib*³⁵, the Regional Engineering College made admissions on the ground that it was arbitrary and unreasonable because high percentage marks were allocated for oral test, and candidates were interviewed for very short time duration. The Court struck down the Rule prescribing high percentage of marks for oral test because allocation of one third of total marks for oral interview was plainly arbitrary and unreasonable and violative of Art. 14 of the Constitution.

In another case of *Air India v. Nargesh Meerza*³⁶, one of the Regulation of Air India provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage, if it took place within the four years of service or on first pregnancy, whichever is occurred earlier. The

[1948] 1KB 223 HL

Ibid.

³⁵AIR 1987 SC 487

³⁶AIR 1981 SC 1189

Supreme Court struck down the Air India and Indian Airlines Regulations on the retirement and pregnancy bar on the services of air hostess as unconstitutional on the ground that the condition laid down therein was entirely unreasonable and arbitrary.

These grounds of judicial review were developed by the Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*³⁷. Though these grounds of judicial review are not exhaustive and cannot be put in water tight compartments yet these provide sufficient base for the courts to exercise their review jurisdiction over administrative action in the interest of efficiency, fairness and accountability.

4.7 Natural justice: Limits on Discretionary Powers of Administrative Authorities

The concept of natural justice is very important in the modern Administrative Law for it provides a basis for judicial control of the procedure followed by adjudicatory bodies, but it is vague, and has no fixed connotation. In India, there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making power. There is, therefore, a bewildering variety of administrative procedure.

Sometimes the statute under which the administrative agency exercise power lays down the procedure which the administrative agency must follow but at times the administrative agency is left free to devise its own procedure. The question whether in particular case principles of natural justice have been contravened or not is a matter for the courts to decide from case to case³⁸. However, courts in India have always insisted that, the administrative agencies must follow a minimum of fair procedure. This minimum fair procedure refers to the principles of natural justice.

Natural justice meant many things of many writers, lawyers and system of law. It is a concept of changing content. However, this does not mean that at a given time no fixed principles of natural justice can be identified. The principles of natural justice through various decisions of courts can be easily ascertained,

³⁷1983 UKHL 6

³⁸*A.K. Roy v. UOI*, AIR 1982 SC 709

though their application in a given situation may depend on multifarious factors. It is not a bull in China shop or a Bee in one's bonnet³⁹.

Often the concept of natural justice is criticized as being an unruly horse. Replying to the criticism Lord Denning said, "With a good man in saddle, the unruly horse can be kept under control. It can jump over obstacles. It can leap fences put up by fiction and come down on the other side of justice"⁴⁰.

For some three or four hundred years, Anglo - American courts have actively applied two principles of natural justice. However, this reduction of the concept of natural justice to only two principles should not be allowed to obscure the fact that natural justice goes to "the very kernel of the problem of administrative justice"⁴¹. These two principles are:

Nemo in propria causa judex, esse debet - No one should be made a judge in his own cause, or the rule against bias.

Audi alteram partem - Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

These principles are the foundation on which the whole superstructure of judicial control of administrative action is based.

4.7.1 Rule against Bias

The first principle means that a person should not be a judge in his own cause that means a person interested in one of the parties to the dispute should not, even formally, take part, in the adjudicatory proceeding. 'Bias' means an operative prejudice, whether conscious or unconscious, in relation to a party or issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in a particular manner, so much so that it does not leave the mind open.

³⁹*Jt. Krishna Iyer in Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405; AIR 1978 SC 851*

⁴⁰*Enderby Town Football Club v. Football Association, (1971) Ch.D. 591*
H.W.R.Wade, *Administrative Law*, Oxford University Press, 1967, p. 154.

The basis of this principle is that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Actual existence of bias is not necessary. The test of bias is "real likelihood of bias". If, a reasonable man would think, on the basis, of the existing circumstances that he (i.e. adjudicator) is likely to be prejudiced, that is sufficient to quash the decision".⁴²

Bias may arise when the adjudicator has some interest in the subject matter of the proceedings before him. If the interest is pecuniary, disqualification arises howsoever small the interest may be. In case of other interest, it is necessary to consider whether there is a reasonable ground for assuming the likelihood of bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice.

The most important *A.K.Kraipak case*⁴³ may also be noted here. In a selection board for certain posts, a member was himself a candidate who was selected along with a few others. On a challenge by the candidates not selected, the Supreme Court quashed the list of successful candidates on the ground of bias in so far as a person personally interested in the matter sat on the selection committee. Similarly, selection of a candidate was quashed because his son-in-law was a member of the selection committee⁴⁴.

However in *G. N. Nayak v. Goa University*⁴⁵, where a senior officer expresses appreciation of the work of a junior in the confidential report. It does not amount to bias nor would it disqualify the senior officer from being a part of the Departmental promotion committee to consider the junior officer along with others for promotion. The Supreme Court has stated that every preference does not vitiate an action. "If, it is rational and unaccompanied by otherwise, it would not, vitiate a decision.

4.7.2 Rule of Fair Hearing

This is the second long arm of natural justice which protects the 'little man' from arbitrary administrative actions whenever his right to person or property is

⁴²*S. Parthsarathi v. State of A.P.*, AIR 1973 SC 2701: (1974)3 SCC 459, *Tata Cellular v. UOI*, AIR 1996 SC11, *Kumaon Mandal Vikas Nigam v. Girja Shankar Pant*, AIR 2001 SC 24

⁴³*Supra* n.29.

⁴⁴*D.K. Khanna v. UOI*, AIR 1973 HP 30

⁴⁵AIR 2002 SC 790

jeopardized. Thus one of the objectives of giving a hearing in application of the principles of natural justice is to see that an illegal action or decision does not take place. Any wrong order may adversely affect a person and it is essentially for this reason that a reasonable opportunity may have to be granted before passing an administrative order⁴⁶. That no one should be condemned unheard is an important maxim of civilized jurisprudence⁴⁷.

The development in India have been similar to those in England. The courts in India have realised the need to give a hearing to the effected person to the utmost limit. As the Supreme

Court has observed in *Mohinder Singh Gill v. Chief Election*

*Commissioner*⁴⁸. *To-day our jurisprudence, the advances made by natural justice for exceed old frontiers and if judicial creativity be lights penumbral areas it is only for improving the quality of government by injecting fair play into its wheels... Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity.*⁴⁹

The extension of the principle of natural justice i.e. right of hearing to the person affected by administrative process has been consummated by extension of the scope of quasi-judicial and natural justice as well as by discarding the distinction between "quasi-judicial" and "administrative" and invoking the concept of fairness in administrative action. Hearing has thus become norm, rather than an exception, in administrative process at the present day. It was in 1970, in *Kraipak case*⁵⁰ that the Supreme Court made a categorical statement that the distinction between quasi-judicial and administrative ought to be discarded for the purposes of giving a hearing to the affected party.

⁴⁶*BALCO Employees Union v. UOI*, (2002)2 SCC 333

⁴⁷*Board of Education v. Rice*, 1911 AC 179; *Local Govt. Board v. Arlidge*, 1915 AC 120; *North Bihar Agency v. State of Bihar*, AIR 1981 SC 1758; (1981)3 SCC 131

⁴⁸AIR 1985 SC 851

⁴⁹*Ibid.*

⁵⁰*Supra* n.29.

In *Hindustan Petroleum Corporation v. H.L. Trehan*⁵¹ the Supreme Court made it absolutely explicit that even when the authority has statutory power to take action without hearing it would be arbitrary to take action without hearing and thus violative of Article 14 of the constitution

The right of fair hearing does not necessarily include an oral hearing. What is essential is that the party affected should not be given sufficient opportunity to meet the case against him and this could be achieved by filing written representations. The party concerned should have adequate notice of the case against him which he has to meet, and that the party affected should be appraised of the evidence on which the case against him is based and be given opportunity to rebut these materials.

4.8. Doctrine of Legitimate Expectations

The concept of legitimate expectations consists of inculcating an expectation in the citizen that under certain rules and scheme, he would continue to enjoy certain benefits of which he would not be deprived unless there is some overriding public interest to deprive him of such an expectation. The term "legitimate expectation" was first used by Lord Denning in 1969 and from that time it has assumed the position of a significant doctrine of public law in almost all jurisdictions⁵².

In England, the term 'legitimate expectation' was first used by Lord Denning in *Schmidt v. Secretary of State for Home Affairs*⁵³, wherein the government had cut short the period already allowed to an alien to enter and stay in England, the court held that the person had legitimate expectation to stay in England which cannot be violated without following a procedure which is fair and reasonable.

In this manner Lord Denning used the term 'legitimate expectation' as an alternative expression to the word 'right'. The emerged concept of legitimate expectation in administrative law has now gained sufficient importance. It belongs to the domain of public law and is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term though they had suffered a civil consequences because their legitimate expectation has been violated.

⁵¹(1989) 1SCC 764

⁵²Clerk, *In Pursuit of Fair Justice*, AIR 1996 (J)11.

⁵³(1969)1 All ER 904(CA)

With the aforesaid back ground we shall now examine the extent to which the principle of legitimate expectation has been accepted in India. The capacity of the Apex Court to import legal doctrines and to plant them in a different soil and climate and to make them flourish and bear fruits is tremendous. The importation of the doctrine of legitimate expectation is recent. The first reference to the doctrine is found in *State of Kerala v. K.G. Madhavan Pillai*⁵⁴, in the instant case, the government had issued a sanction to open a new unaided school and to upgrade the existing ones. However, after 15 days a direction was issued to keep the sanction in abeyance. This order was challenged on the ground of violation of the principle of natural justice. The court held that the sanction order created legitimate expectation in the respondents which was violated by the second order without following the principles of natural justice which is sufficient to vitiate an administrative order.

The doctrine was further applied in *Scheduled Caste and Weaker Section Welfare Association v. State of Karnataka*⁵⁵, where the government had issued a notification notifying areas where slum clearance scheme will be introduced. However, the notification was subsequently amended and certain areas notified earlier were left out. The Supreme Court held that the earlier notification had raised legitimate expectation in the people living in an area which had been left out in a subsequent notification and hence legitimate expectation cannot be denied without a fair hearing.

Thus where a person has legitimate expectation to be treated in a particular way which falls short of an enforceable right, the administrative authority cannot deny him his legitimate expectation without a fair hearing. Legitimate expectation of fair hearing may arise by a promise or by an established practice.

Again in case of *Navjyoti Group Housing Society v. Union of India*⁵⁶ on the doctrine of legitimate expectation it has been held that person enjoying certain benefits/advantage under the old policy of the government derive a legitimate expectation even though they may not have any legal right under the private law in the context of its continuance. "The doctrine of legitimate expectation imposes in essence a duty on the public authority to act fairly by taking into consideration

⁵⁴AIR 1989 SC 49

⁵⁵(1991)2 SCC 604

⁵⁶AIR 1993 SC 155

all the relevant factors relating to such legitimate expectation that may have a number of different consequences is that the authority ought not to act to defeat the legitimate expectation without some overriding reasons of public policy to justify its doing so. Within the conspectus of fair dealing in the case of legitimate expectation, the reasonable opportunity to make representation by the parties likely to be affected by any change of consistent past policy came in. In a case of legitimate expectation if the authority proposes to defeat a person's legitimate expectation it should afford him an opportunity to make a representation in the matter.

The Supreme Court in the case of *Union of India v. Hindustan Development Corporation*⁵⁷, case it held that the principle of legitimate expectation gave the sufficient locus standi to seek judicial review and that the doctrine was confined mostly to a right to fair hearing before decision which resulted in negating a promise or withdrawing an undertaking was taken. It did not involve any crystallized right. The protection of such legitimate expectation did not require the fulfilment of expectation where the overriding public interest. In this case several English and Australian cases were referred to and conclusions were then reached⁵⁸.

In this case in the absence of any fixed procedure for fixing price and quantity for the supply of food grains, the Government adopted a dual pricing system (lower price for big suppliers and higher price for small suppliers) in the public interest in order to break the cartel. The court held that there is no denial of legitimate expectation as it is not based on any law, custom or past practice. The court said that it is not possible to give an exhaustive list wherein legitimate expectations arise but by and large they arise in promotion cases, though not guaranteed as a statutory right in cases of contracts, distribution of largess by the government and in somewhat similar situations⁵⁹.

Legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way. As a doctrine it

⁵⁷AIR 1994 SC 1988

⁵⁸*Id.* See also *P.T.R. Exports v. Union of India*, (1996)5 SCC 268

⁵⁹*Id.*

takes its place besides such principles as rules of natural justice, rule of law, non-arbitrariness, reasonableness, fairness promissory estoppel, fiduciary duty and, perhaps, proportionality to check the abuse of the exercise of administrative power.

4.9 Principle of Proportionality vs. Wednesbury Unreasonableness

The concept of “wednesbury unreasonableness” was developed in the case of *Associated Picture House v. Wednesbury Corporation*⁶⁰ and hence the name “wednesbury unreasonableness”. It simply means that administrative discretion should be exercised reasonably. Accordingly, a person entrusted with discretion must direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the subject he has to consider. If he does not obey those rules he can be said to be acting unreasonably⁶¹. Lord Diplock beautifully sums up “wednesbury unreasonableness” as a principle that applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it⁶². Quite obviously the concept of wednesbury unreasonableness is extremely vague and is not capable of objective evaluation. Hence wednesbury unreasonableness cannot be defined in the form of standard tests for universal application.

4.9.1 Application of Doctrine of Proportionality in India

The doctrine of promissory estoppel⁶³ is an “equitable principle evolved by the courts for doing justice”.⁶⁴ The classical definition of proportionality has been given by none other than Lord Diplock when his Lordship rather ponderously stated “you must not use a steam hammer to crack a nut if a nut cracker would do”⁶⁵ Thus proportionality broadly requires that government action must be no

⁶⁰ *Supra* n.33.

⁶¹ *Ibid.*, pp.682, 683

⁶² *Council of Civil Service Unions. v. Minister for the Civil Services*, *Supra* n.37 at951

⁶³ For a general discussion on the doctrine of promissory estoppels see, Spencer, Bower and Turner, *Estoppel by Representation* Butterworths, London, 3rd Edition 1977,pp. 366-401; I.C. Saxena, *The Twilight of Promissory Estoppel in India*, 16, *JILI.*, p. 187

⁶⁴ *M.P. Sugar Mills v. State of Uttar Pradesh*, AIR 1979 SC 621 at p. 632. *This doctrine is also called as equitable estoppels, quasi estoppels, new estoppels and estoppel.*

⁶⁵ *R v. Goldsmith* (1983) 1 WLR 151, p. 155

more intrusive than is necessary to meet an important public purpose⁶⁶. However the greatest advantage of proportionality as a tool of judicial review is its ability to provide objective criteria for analysis. It is possible to apply this doctrine to the facts of a case through the use of various tests.

Lord Diplock even while giving the tripartite classification admits that proportionality in the future would be an additional ground of review⁶⁷. However, today most authors accept proportionality as an additional head of judicial review within the concept of irrationality. Thus proportionality and Wednesbury unreasonableness is seen as the two aspects of irrationality. Initially proportionality was only a competitor with wednesbury unreasonableness but because of the high degree of objectivity associated with proportionality and the vast improvements that the concept has undergone in the last decade and a half, it is seeking to totally replace Wednesbury unreasonableness as the only sub-head of review under the concept of irrationality.

The Indian Supreme Court consciously considered the application of the concept of proportionality for the first time in the case of *Union of India v. G. Ganayutham*⁶⁸. In that case the Supreme Court after extensively reviewing the law relating to wednesbury unreasonableness and proportionality prevailing in England held that the „wednesbury“ unreasonableness will be the guiding principle in India, so long as fundamental rights are not involved. However the court refrained from deciding whether the doctrine of proportionality is to be applied with respect to those cases involving infringement of fundamental rights. Subsequently came the historic decision of the Supreme Court in *Omkumar v. Union of India*⁶⁹. It was in this case that the Supreme Court accepted the application of proportionality doctrine in India. However, strangely enough the Supreme Court in this case suddenly discovered that Indian courts had ever since 1950 regularly applied the doctrine of proportionality while dealing with the validity of legislative actions in relation to legislations infringing the fundamental freedom enumerated in Article 19 (1) of the Constitution of India.

⁶⁶John Adler, *General Principles of Constitutional and Administrative law*, 4th ed., 2002, p. 385.

⁶⁷*Supra n.37* at 950.

⁶⁸(1997) 7 SCC 463
AIR 2000 SC 3689

According to the Supreme Court the Indian courts had in the past in numerous occasions the opportunity to consider whether the restrictions were disproportionate to the situation and were not the least restrictive of the choices⁷⁰. The same is the position with respect to legislations that impinge Article 14 (as discriminatory), and Article 21 of the Constitution of India⁷¹. With respect to the application of the doctrine of proportionality in administrative action in India, the Supreme Court after extensively reviewing the position in England came to a similar conclusion. The Supreme Court found that administrative action in India affecting fundamental freedoms (Article 19 and Article 21) have always been tested on the anvil of proportionality, even though it has not been expressly stated that the principle that is applied is the proportionality principle⁷². Thus the court categorically held that the doctrine of proportionality is applicable to judicial review of administrative action that is violative of Article 19 and Article 21 of the Constitution of India.

However even after a decade since the decision in *Omkumar's case*⁷³, no further progress has been made. The law regarding proportionality in India remains at what has been stated in *Omkumar's case*. The only advancement could be the vague observation in a few subsequent judgments that the doctrine of unreasonableness is giving way to the doctrine of proportionality⁷⁴.

Thus, in India, under the current state of law, as declared by the Supreme Court, proportionality review with respect to administrative action has only limited scope. This is because, in India much of the administrative action is challenged before the courts primarily on the ground of arbitrariness and this can be challenged only on the ground of wednesbury unreasonableness. Thus in reality the decision in *Omkumar's case* has not significantly enhanced the scope of judicial review in India.

No reason as such is given by the Supreme Court in *Omkumar's case*⁷⁵ as to why doctrine of wednesbury unreasonableness alone should be applied to challenges under the head of arbitrariness. However there can be at least two

⁷⁰*Id.* at p. 3697.

⁷¹*Id.* at p.3698.

⁷²*Id.* at p.3702.

⁷³*Supra* n.68.

⁷⁴*Indian Airlines Ltd. v. Praba D. Kanan* AIR 2007 SC 548; *State of U.P. v. Sheo Shankar Lal Srivastava* (2006) 3 SCC 276

⁷⁵*Ibid* n.72.

reasons for this. First of all, the Supreme Court was simply accepting a similar classification in England by which proportionality review was applicable only when convention rights were involved and wednesbury principle alone was applicable when non convention rights were involved⁷⁶. Secondly, just like Lord Lowry⁷⁷ the Supreme Court may have feared a docket explosion when the threshold of review is lowered.

Proportionality is fast replacing wednesbury reasonableness which the Supreme Court itself has observed in a large number of recent cases. After all there is nothing wrong in a modern democratic society if the court examines whether the decision maker has fairly balanced the priorities while coming to a decision. At any rate, the intensity of proportionality review is variable depending upon the subject matter and the nature of rights involved.

4.10 Exercise of Administrative Discretion and the Doctrine of Promissory Estoppel in India

The administration in a welfare state has to tackle various problems for which generally no guidance is be provided by the statute or the Constitution. Therefore, the administration may make policies, schemes, give opinions, assurances, and promises regarding the manner of exercise of its discretion in these areas. Sometimes relying on the representation contained in the policies, schemes, opinion, assurances and promises a person changes his position by investing a huge sum of money or by taking a particular course of action which he would not have otherwise taken. In such situations the crucial question which arises is whether the administration has an absolute discretion to disregard the representation made by it earlier, arbitrarily or at its whim? While dealing with such situations the courts are faced with one of the general principles of administrative law, that the administration cannot fetter its future exercise of discretion.⁷⁸ This principle, it is submitted, has come into existence in the interest of maintaining flexibility and expediency in the exercise of executive functions. However, equally important is the consideration of justice to the concerned

⁷⁶ *Id.*
⁷⁷ *Brind v. Secretary of State for the Home Department*, (1991) 1 All ER 720 at p. 723.
⁷⁸ . Jain and Jain, *Principles of Administrative Law*, N.M. Tripathi, Bombay, 3rd Edition, 1979, pp. 515-518.

individual. If administration is allowed to be unjust to an individual by disregarding its own earlier promise or representation, a general feeling of distrust and insecurity may be generated towards it which can never be in the interest of good administration. It is in such situations where the doctrine of promissory estoppels has been applied by the courts in India.

4.10.1 Application of Doctrine against the Government

The Government is stopped in equity from going back on its representation relying on which a person has changed his position to his detriment. *Collector of Bombay v. Bombay Municipal Corporation*⁷⁹ seems to be the first case after Independence where the doctrine of promissory estoppels was applied against the Government by Chandrasekhara Aiyer, J., one of the majority judges of the Supreme Court, in 1951. The facts giving rise to this case were that Bombay Government asked the Bombay Municipal Corporation to remove the old market from a certain site and vacate it and granted to it another site by a resolution. In the same resolution it was mentioned that “the Government do not consider that any rent should be charged to the Municipality.” The Municipal Corporation gave up the old site and spent a sum of about Rs. 17 lakhs in erecting and maintaining markets on the new site. Subsequently the Collector of Bombay assessed the new site to land revenue. This was challenged by the Municipal Corporation. The High Court of Bombay held in favor of the Municipal Corporation. On an appeal by Collector of Bombay to the Supreme Court, the majority judges held that the Government was not under the circumstances of the case entitled to assess the land revenue on the land in question, because the Municipal Corporation had taken possession of the land in terms of the Government resolution and had continued in such possession openly, uninterruptedly and of right for over seventy years and thereby acquired the right to hold the land in perpetuity free of rent. Chandrasekhara Aiyer, J., agreed with the conclusion reached by majority but rested his decision on the doctrine of promissory estoppels. Pointing out that the Government could not be allowed to go back on the representation made by it, he observed that even if “there was

AIR 1951 SC 469

merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfill it.

However, in *M/s. Jit Ram Shivkumar v. State of Haryana*,⁸⁰ some confusion seems to have been created by the general and very wide observations of Kailasam, J., that “...the principle of estoppels is not available against the Government in exercise of legislative, sovereign or executive power”.⁸¹ Similar observations in *Excise Commissioner, U.P. v. Ram Kumar*⁸² and *Ramanatha Pillai v. State of Kerala*,⁸³ on which reliance was placed by Kailasam, J. were also in the nature of obiter.

The decision of the Supreme Court in *Gujarat State Financial Corporation v. M/s. Lotus Hotels Pvt. Ltd.*⁸⁴ emphasizes the point that the doctrine of promissory estoppels constitutes an important check against arbitrary exercise of discretion by the administration even after *Jit Ram Shivkumar*. In this case the Gujarat State Financial Corporation, which was an instrumentality devised to provide medium and long term credit to industrial concerns, sanctioned a loan of Rs. 29.93 lakhs to M/s. Lotus Hotels Pvt. Ltd. For construction of a four-star hotel. Consequently M/s. Lotus Hotels Pvt. Ltd. created an equitable mortgage of the land purchased for the purpose of construction of the Hotel in favor of the Corporation as a security for loan and proceeded to undertake and execute the project of setting up the four-star hotel in Baroda. However, the Corporation refused to disburse the loan subsequently. Relying upon the doctrine of promissory estoppels as expounded in *M.P. Sugar Mills* the court held that agreement to advance the loan was entered into in performance of the statutory duty cast on the Corporation by the statute under which it was created and set up. On its solemn promise M/s. Lotus Hotels incurred expenses, suffered liabilities. Presumably, if the loan was not forthcoming, the respondent may not have undertaken such a huge project. Therefore the Corporation is bound by its promise. The Corporation was directed to release Rs. 10 lakhs within one month’s time in favor of M/s. Lotus Hotels and

AIR 1980 SC1285
Ibid, at p. 1291.
AIR 1976 SC 2237
AIR 1973 SC 2641 at p. 2649
AIR 1983 SC 848

to pay the balance within a reasonable period. The court pointed out that Jit Ram Shivkumar cannot save the corporation from its liability because it only lays down that the principle of promissory estoppel cannot be invoked for preventing the Government from discharging its functions under law.

The doctrine of executive necessity constitutes an important limitation to the doctrine of promissory estoppels as it ensures a flexible approach by courts towards the problem of control of administrative discretion. However, the question arises, can the administration claim the exemption from its obligation under this equitable doctrine just by mentioning that ‘executive-necessity’ exists. The *Supreme Court in Union of India v. Anglo-Afghan Agencies*⁸⁵ held that the administration cannot claim exemption from its obligation under the doctrine of promissory estoppels on some ‘undefined and undisclosed grounds of necessity or expediency’. It must disclose to the court the reasons or grounds on which existence of executive necessity is claimed. It is only if the court is satisfied, on proper and adequate material placed by the government should not be held bound by the promise but should be free to act unfettered by it, that the court would refuse to enforce the promise against to Government.⁸⁶

4.10.2 Ultra-Vires Representation and the Doctrine of Promissory Estoppel

Relief on the basis of promissory estoppels is refused by the courts when the representation by which the administration is sought to be bound is beyond the powers of the officer or the public authority.⁸⁷ Thus in *M/s. Jit Ram Shivkumar v. State of Haryana*,⁸⁸ it was held that since neither the Municipal Committee nor the Government have power to grant exemption from octroi to anyone, forever under the concerned statute, the declaration in the advertisement did not bind either the Municipal Committee or the Government.

Refusal by the courts to apply this doctrine of equity in cases of ultra-vires representation has caused injustice in many cases. For example, where a person, who was required to carry out certain construction work under a contract with

⁸⁵AIR1968 SC 718

AIR 1979 SC 621 at p. 644.

State of Rajasthan v. Motiram, AIR 1973 Raj. 223; *M.S. Industry v. Jt. Chief Controller*, AIR 1977 Mad. 377; *State v. Amrit Banaspati*, AIR 1977 P & H. 268; *S.K. Juwarkar v. Dr. Kumaria*, AIR 1982 Goa 1; *Sah Mahadeolal Mohanlal v. State*, AIR 1982 Pat. 158

. AIR 1980 SC 1285

Government, carried out some additional constructions on the assurance of assistant executive Engineer was refused payment for additional work by the Government on the ground that the Assistant Executive Engineer had no authority to sanction additional work, the court refused to apply the doctrine of equitable estoppels on the ground that the representation was ultra-vires.⁸⁹

In England, however, the doctrine of equitable estoppels was applied in a similar situation in *Lever Finance Ltd. v. Westminster (City) L.B.C.*,⁹⁰ where the developers who had obtained planning permission changed their plan slightly. The local authority planning officer said no further consent was required. The developers went ahead with their altered plan. Subsequently the construction was questioned on the ground that no planning permission was obtained. It was contended by the local authority that since the planning officer's assurance was ultra-vires it was not bound by it. It was held by the court that since the local authority allowed its planning officer to deal with such cases, it was bound by his representation. Speaking for the majority, Lord Denning M.R. propounded the following principle :

*“There are many matters which public authorities can now delegate to officers. If an officer acting within the scope of his ostensible authority makes a representation on which another acts, then the public authority may be bound by it, just as much as a private concern would be.”*⁹¹

However, the vigor of this principle is diluted in *Indian Aluminium Co. v. K.S.E. Board*⁹² where the Supreme Court held that though generally the statutory discretion cannot be fettered but when the statute itself empowers the authority to bind itself in the exercise of its discretion, the authority is bound by agreement or contract entered into while exercising such discretion. The court held the K.S.E. Board bound by its agreement, not to enhance the rates of electricity, which it entered in the exercise of discretion under statute.

State of Rajasthan v. Motiram, AIR 1973 Raj 223
(1971) 1 Q.B. 222
Ibid at p. 230.
AIR 1975 SC 1967

This principle is followed in many subsequent cases of assurances,⁹³ Promises,⁹⁴ agreement⁹⁵ or contract, given or entered into by the administration in the exercise of its discretion under statute. However, the doctrine of promissory estoppels has not been applied in the face of statutory prohibition.⁹⁶

The courts have refused to estop the State from exercising its legislative function.⁹⁷ In *State of Kerala v. Gwalior rayon Silk Mfg. Co. Ltd.*⁹⁸ the State of Kerala was not estopped from expropriating vast forest lands belonging to the Company by passing a legislation even though the Company had invested a large amount of money in purchasing the land relying upon the undertaking of the State Government. It is evident from the facts of the case that justice required that the Government should have been bound. But in the face of State legislature's sovereign power' the individual interest had to give way. It is submitted that though it may seem hard but in view of their functional limitations the court could not direct the legislature either to pass or not to pass a particular legislation.

The courts in India have been too restrictive about the application of the doctrine of ultra-vires in this area. It is also submitted that the scope of the doctrine of promissory estoppels should be extended to cases of representation by an officer who had ostensible authority if justice towards individual so requires.

4.11 Power of Judicial Review and Discretionary Power of Administrative Tribunals in India

Legislatures usually establish various administrative tribunals or non-judicial bodies (hereafter also "administrative bodies" or "inferior tribunals") as well as the courts or judicial bodies. Examples of administrative bodies or inferior tribunals would include Government Ministers, minimum Wages Board or Tribunal, Workers Compensation Tribunal and Public Service Appeals Board. Often these bodies are established to deal with specific administrative or quasi-

Shri Krishan v. Kurukshetra University, AIR 1976 S.C. 376 *Krishna v. Rewa University*, AIR 1978 M.P. 86

M.P. Sugar Mills v. State of U.P. AIR 1979 SC 621

Chowgule & Co. P. Ltd. v. Union, AIR 1972 Goa 33; *S.K.G. Sugar Ltd., v. State of Bihar*, AIR 1978 Pat. 157

⁹⁶*Ranganath v. Institute of Chartered Accountants*, AIR 1975 Kant 188; *Haripada Das v. Utkal University*, AIR 1978 Orissa 68; *Kedarlal v. Secretary Board H.S. & T. Education*, AIR 1980 All

⁹⁷*Sankaranarayanan v. State of Kerala*, AIR 1971 S.C. 1997; *State of Kerala v. Gwalior rayon Silk Mfg. Co. Ltd.*, AIR 1973 SC 2374; *Gajanan Saw Mills v. State of M.P.*, AIR 1973 MP 235
Ibid.

judicial matters. For instance, the Minister for Foreign Affairs has the powers under the Immigration Act to decide whether to grant or refuse to grant a visa to a foreigner to enter the country or to cancel it if such person breaches conditions of his visa. The Minimum Wages Tribunal deals with minimum wages claims by workers. The Worker's Compensation Tribunal deals with compensation claims by workers who are injured during the course of their duties while the Public Service Appeals Board deals with appeals from public servants against disciplinary actions taken against them by their employers.

The legislature may confer absolute discretionary powers on tribunals and purport to exclude courts from performing their usual function of supervising and reviewing the validity or otherwise of the exercise of such powers by tribunals. For instance, the legislature may, by inserting a provision in the enabling legislation, prevent or purport to prevent aggrieved parties from appealing or making an application to the court for review of a decision of the tribunals. Another way is by imposing a time-limit by which time a certain action is to be taken so that if the action is not taken within the prescribed time-limit, the aggrieved person will be barred from seeking any relief from the courts.

The legislature seeks to oust the jurisdiction of the courts to supervise the exercise of powers by tribunals; the courts would normally not look kindly upon such legislation. Consequently, the courts have developed various counter measures to safeguard themselves against legislative encroachment on judicial powers to review the exercise of the powers by the tribunals. This paper examines attempts made by the legislature in Papua New Guinea (hereafter "PNG") in the various legislations dealing with land matters (hereafter "acquisition statutes") to oust jurisdiction of courts and how the judiciary has responded to these incursions into its jurisdiction to counter these legislative attempts.

The legislature may attempt to oust the review jurisdiction of courts through the enactment of acquisition statutes. Among these are the imposition authorities or tribunals over matters which are of an administrative, as opposed to judicial, nature.

Acquisition statutes usually impose time-limits within which landowners or authorities acquiring land must act. For instance, under section 13 of the Land Act 1996 and section 8 of the lands Acquisition (Development Purposes)⁹⁹ Act (hereafter “Lands Acquisition Act”) the landowner, who is served with a notice to treat, is required to respond to the notice within two months whereas under section 3 of the Land (underdeveloped Freeholds) Act the landowner upon being served with a development notice is to act within three months. A notice may be served on the landowner in a number of ways, including, (i) publication in the national Gazette or newspapers; (ii) broadcasting on radios and television; (iii) delivery by hand to affected persons; and (iv) displaying it in conspicuous places at the place where the land is situated.

In *Dent v. Minister for Lands*¹⁰⁰ the plaintiff was granted a government lease on the condition that he would affect certain improvements thereon. The land was subsequently forfeited on the basis that the plaintiff had failed the condition to effect the improvements on the land within the time-limit stipulated in the lease. The plaintiff applied to the National Court outside the statutory time-limit for an appeal against the forfeiture under the Land Act or a judicial review under the Rules of the Supreme Court, arguing that he had a genuine reason for not effecting improvements within the time-limit as he was carrying out preliminary work which was necessary before effecting actual improvements in pursuance of the terms of the lease. The court, in exercising its constitutional powers under section 155(4) of the Constitution, granted the application, holding that the plaintiff had good reason for not complying with the statutory time-limit and that to do otherwise would cause injustice to him. The Court, therefore, granted extension of time even though the application was made outside the statutory time-limit for an appeal or a review.

⁹⁹This Act was repealed by the Land Act No. 45 of 1996 which came into force in the beginning of 1997. It must be noted that, although the Act was amended, references have been made to relevant provisions of the Act elsewhere in this paper merely to illustrate how the legislature attempts to oust jurisdiction of the courts in PNG. In the opinion of the author, the reference so made will not, therefore, affect the substance of this work.
[1981] PNGLR 488

The government's power to take land from the private landowner is usually exercised by some individual or authority on its behalf.¹⁰¹ In some instances, acquisition statutes would confer absolute discretion on such individual or authority in respect of the exercise of the power. For instance, section 7 of the Lands Acquisition Act confers absolute discretionary power on the minister to acquire land by compulsory process. It provides:

*Notwithstanding anything in any other law, where in the opinion of the Minister it is necessary to do so for the purpose of this Act, the Minister may acquire the land by compulsory process.*¹⁰²

The words "in the opinion" indicate that the minister has discretion to decide on his own accord whether land is to be acquired and takes no advice from any person or authority. A discretionary power implies freedom of choice; the competent authority exercising discretion may decide whether or not to act¹⁰³. For instance, the Minister for Lands may decide whether to purchase lands for public purposes in the National Capital District and, if so, how to act. For instance, (i) from whom should the land be acquired; and (ii) how much land should be bought.

While relying on the authority of a licensing case (not migration) of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*,¹⁰⁴ where an abuse of a discretionary power was alleged, the Supreme Court held that in the event of an administrative authority being granted an absolute discretion by law, it cannot be questioned in any court of law. The decision of the authority, however, can be upset only if proved to be unreasonable. The term "unreasonable" means "that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether."¹⁰⁵

S. 12, Land Act; s. 7, Lands Acquisition Acts; 9, Land (Underdeveloped Freeholds) Act provide for the Minister for Lands to exercise compulsory acquisition power on behalf of the government.

¹⁰²*Ibid.*

S. A. de Smith, *Constitutional and Administrative Law*, Harmondsworth, Eng. ; Baltimore, Md., Penguin Education, 2nd ed. ,1973,p.531.
[1948] 1 KB 223 at 228

¹⁰⁵*Supra* n.99.

The basis for the court's decision was that courts have a general jurisdiction over the administration of justice. However, from time to time the legislature establishes special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts. In such cases, they cannot hear appeals from such tribunals or substitute their own views on any matter which has been specifically committed to them by the legislature. However, such tribunals must confine themselves within the powers specifically vested in them and make their inquiry and decision according to the law of the land. The courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such cases, courts must intervene to correct the error. The courts, however, have always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from the appellate function. Their jurisdiction over inferior tribunals is supervision, not review.¹⁰⁶

Another attempt by the legislature to oust jurisdiction of the courts is by conferring power on inferior administrative bodies or tribunals to be exercised to the exclusion of courts. In doing so, it purports to prevent aggrieved parties from seeking judicial remedies by way of an appeal or an application for review to have a decision of an inferior tribunal reviewed. It is apparent from cases where statutes purport to oust the jurisdiction of the Court by attempting to prevent any appeal or review that the court would invariably hold that although it may be prevented from entertaining an appeal, it cannot be prevented under any circumstances from entertaining an application for a review by means of prerogative writs.

As pointed out by Lord Esher, M.R., in *Queen v. Commissioners for Special Purposes of the Income Tax*¹⁰⁷, the preliminary facts on which the initial jurisdiction of a tribunal depends may either be determinable by ordinary courts or by the tribunal itself. In the latter event, Lord Esher thought that the decision of the tribunal would be final. This finality of administrative decision has,

See, Rex v. Nat Bell Liquors Ltd., [1992] 2 AC 128 at 156, where it was held: "That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise".
(1888) 21 Q.B.D. 313 at 319

however, in course of time, yielded place to judicial review as I shall show later in the light of the recent decisions of the House of Lords.

Fortunately, the courts in India were not handicapped by the technicalities, which limited the operation of the prerogative writs in England. In *Harinagar Sugar Mills Ltd. V. Shyam Sunder*¹⁰⁸ the order of the deputy secretary reversing the decision of the Board of Directors of a company was held to be bad inasmuch as the deputy secretary did not give reasons for his decision. The court simply based its decision on the ground that it could not exercise its appellate jurisdiction under article 136 of the Constitution without knowing the reasons for the decision under appeal. In *Sardar Govindrao v. State of Madhya Pradesh*¹⁰⁹, the Supreme Court went one step further by holding that the applicant who had applied for the award of a grant of money or pension to the state government was himself entitled to know the reasons for the rejection of his application by the state government. These grounds compelling the quasi-judicial authorities to give reasons for their decisions did not rest specifically on the provisions of the Constitution. They must be fairly based on the requirements of justice itself. This is an instance of judicial legislation. Justice itself has been made here as a source of law.¹¹⁰

A further extension of the concept of jurisdiction was to include in its ambit a violation of the rules of natural justice governing the procedure of a trial or inquiry. According to the majority of the House of Lords in *Ridge v. Baldwin*¹¹¹ a violation of natural justice rendered the proceeding a nullity or void. Lord Reid in *Anisminic Ltd. v. Foreign Compensation Commission*¹¹² has summed up the jurisdictional defects which may occur even though the initial jurisdiction to entertain a proceeding was possessed by the tribunal. His observation, approved later by the Supreme Court in *Union of India v. Tarachand Gupta*¹¹³, is as follows:

AIR 1961 SC1669
AIR 1965 SC 1222
See for further discussion, V.S. Deshpande, 'Speaking' Orders, AIR (jour.) 147 (1969).
(1964) AC 40
(1968) AC 147
(1971) 1 SCC486 to 496

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice.

The judgment of Lord Reid in *Ridge v. Baldwin*¹¹⁴ was a landmark in the extension of the duty to act judicially. He pointed out that such duty need not be imposed by a statute. It flows from the nature of the decision which the authority has to give. This enormously extended the scope of the concept of a quasi-judicial act to include all acts of the administrative authorities which were to be done after considering the pros and cons of a case and the result of which would adversely affect an individual. Lord Reid's view was approved by the Supreme Court in *Associated Cement Companies Ltd. v. P. N. Sharma*¹¹⁵ and in *Shri Bhagwan v. Ram Chand*¹¹⁶.

A quasi-judicial act proper could be done ordinarily when there was a lis between two parties which the quasi-judicial authority was deciding. But it was found that even though there may be no such lis and the authority was directly dealing with an individual, the authority would have to consider the case objectively in a quasi-judicial manner before taking action against the individual which would affect him adversely. Even such action was, therefore, held to be liable to judicial review. In *A. K. Kraipak and others v. Union of India*¹¹⁷, the Supreme Court pointed out that the line of distinction between a quasi-judicial and an

¹¹⁴*Supra* n. 110.
(1965) 2 SCR 366
(1965) 3 SCR 218
(1970) 1 SCR 457

administrative act was very thin and disappearing. It is the nature of the act concerned which would decide whether judicial review would lie against it or not irrespective of the question whether the act was strictly quasi-judicial or not.

It was a matter of great difficulty, however, in each case to decide whether the impugned action of an administrative authority contravened a fundamental provision of statute or amounted merely to an error of law in acting under the statute. If the former, its act would be without jurisdiction. If the latter, it would be within jurisdiction. Parliament has often striven to express its intention in legislation that certain acts were within the exclusive jurisdiction of the administrative authorities and beyond the scope of the judicial review.

In India such limitation in a statute would be of little avail if the impugned action amounted to an infringement of a fundamental right. For, the remedies given by the Constitution such as articles 226 and 227 could not be whittled down by legislation.

The statement of law by Lord Esher, M.R., in *Queen v. Commissioners for Special Purposes of the Income Tax*¹¹⁸, referred to above, that the administrative decision is final when the legislature intends it to be final, held the field for a long time. But later decisions refused to concede finality to the decision of an administrative authority or tribunal by holding that no court of limited jurisdiction can give jurisdiction to itself on a point collateral to the merits of the case by wrongly deciding that point¹¹⁹. The recent decisions of the House of Lords have worked a silent revolution by finally negative the attempts of the legislature to secure finality for an administrative decision by excluding judicial review.

The grant of judicial review is, therefore, determined in each case by the courts. The attempt of the legislature to exclude judicial review has not succeeded.

Even though the tribunal has the primary jurisdiction to decide questions of fact, if its decision is totally unsupported by any evidence or if it is such that it could

¹¹⁸*Supra* n.106.

¹¹⁹*King v. The Assessment Committee of the Metropolitan Borough of Shoreditch*, (1910) 2 K.B. 859 at 880, referred to with approval in *State of Madhya Pradesh v. Jadav*, A.I.R. 1968 S.C. 1186 at 1190, and *Rex v. Fulham, Hammersmith and Kensington Rent Tribunal; Ex part Zerek*, (1951) 2 K.B. 1 at 6.

not be arrived at by any reasonable person, then it would shock the conscience of the court. It would be in the same category of an error of law apparent on the face of the record and would be a ground for judicial review.

The apparent width of the language of articles 226 and 227 and the ever-widening scope of judicial review by the judicial decisions would tempt lawyers and litigants to rush to the High Courts for judicial review of all kinds of mistakes made by the administrative authorities and tribunals. It must be remembered, however, that this would disturb the balance of work between the tribunals and the High Courts. It would amount to an abuse of the process of court if the High Courts were approached for correction of errors committed by the tribunals in all sorts of cases. The great safe-guard against this abuse is that mandamus and certiorari to quash (as distinguished from other kinds of certiorari) are both remedies which are within the discretion of the High Courts. Prohibition in English law may not be discretionary in that sense. But the issue of writs generally under article 226 has to be regarded as discretionary by the High Courts to prevent an abuse of the process of court.

By the rules of the Supreme Court in England comparatively short periods of limitation (six months) have been prescribed for making application for the issue of such writs.

In India, no periods of limitation were contemplated by the Constitution and, therefore, no legislation can perhaps be undertaken to prescribe them. But the discretion of the court is an integral part of the powers given by articles 226 and

It would not be correct to say, therefore, that a High Court is bound to entertain a writ petition in which contravention of fundamental right is alleged. The fundamental rights are no doubt guaranteed but their enforcement is not restricted to articles 226 and 227. On the contrary, the ordinary civil courts constitute the primary forum even for the enforcement of the fundamental rights.

Another authority generally relied on is *State of Uttar Pradesh v. Mohammad Nooh*¹²⁰. With great respect, observations in that case are somewhat widely worded but they have to be understood in the context of the peculiar facts of that case. The departmental authority holding the disciplinary inquiry against the

(1958) SCR 595

petitioner in that case was shown to have been personally biased against the petitioner. The inquiry was, therefore on the authority of *Manak Lal v. Dr. Prem Chand*¹²¹ that the petitioner could not be permitted to urge for the first time in a writ petition under article 226 of the Constitution before the High Court objections which should have been raised by him in the appeal and revisions before the appellate and the provisional authorities under the U.P. Police Regulations. It was further argued that the appellate and the provisional authorities were competent to decide the questions raised by the petitioner on merits. If they were to reject those contentions on merits, then it could not be said that there was any error apparent on the face of the record and consequently the matter could not come before the High Court under article 226. These contentions were rejected by the Supreme Court firstly by drawing a distinction between executive authorities holding disciplinary inquiries and a tribunal having the trappings of a court and presided over by a judge with legal training and background. It was, therefore, felt that no useful purpose would be served by asking the petitioner to go from one executive authority to another. Secondly, the bar of an alternative remedy was not as rigid in granting a certiorari as it was in granting mandamus. Here it may be submitted with respect that there is a distinction between certiorari to quash and other kinds of certiorari. Their lordships of the Supreme Court referred to page 130 of 11 Halsbury's Laws of England for the distinction between mandamus and certiorari. But the discussion of the specific question as to the discretion of the court to grant the order of certiorari is at pages 139 onwards. Certiorari as of course is issued for certain purposes. This does not include certiorari to quash. At page 140 it is stated as follows:

So far as relates to applications for certiorari to quash the determinations of inferior courts, when the jurisdiction to quash exists at common law the discretion of the Court is not limited by statute, but is exercised upon grounds established at common law.

The outstanding example so such illegality is that the provision of the statute under which the administrative authority is acting or which is sought to be applied against the petitioner is itself challenged as ultra vires by the petitioner.

(1957) SCR 575

At one time, it was thought that even the plea of ultra vires had to be heard by the departmental authorities. An order “under the Act” was construed by the Privy Council in *Raleigh Investment Co. Ltd. v. The Governor General in Council*¹²² to include even the decision of the question whether a provision of the Act was ultra vires. These decision was contrary to the well established principle that an authority acting under statute cannot itself decide whether the statute is unconstitutional or ultra vires. This part of the decision of the Privy Council is, therefore, no longer good law in India as held by the Supreme Court in *K. S. Venkataraman and Co. v. State of Madras*.¹²³

The rules of natural justice require that there should be a fair hearing granted to the petitioner and the inquiry or trial should be held by an impartial tribunal. These are essentially principles of fairness and justice. They are not magic incantations. Therefore, the particular infraction of a rule of natural justice will have to be examined before it could be said whether the discretion of the court to entertain the writ petition should be exercised in favour of the petitioner or not. Except when the grievance of the petitioner cannot be redressed by recourse to alternative remedies, the discretion would be exercised against the petitioner. For instance, a disciplinary authority may not allow the petitioner to file certain documents or to inspect certain documents from the official record. If such an erroneous order affects the fair hearing of the case, the departmental appellate and revisional authorities would themselves give redress to the petitioner. A priori, there is nothing to show that alternative remedies of appeal and revision would not be adequate in such a case. For, all that the High Court would do is to direct the tribunal to allow the petitioner to file the documents or to inspect the documents.

It is an equally salutary safeguard for the High Court to insist that a petitioner should not be guilty of delay and laches in coming to it under article 226. It was once believed that the question of delay would be immaterial if the fundamental right of a person is infringed.¹²⁴ The question was, however, fully discussed in *Tilokchand Motichand v. H. B. Munshi*.¹²⁵ The majority held that even under

(1947) 74 I.A. 50

(1966) 2 SCR 2293

¹²⁴ *Kamalabai Harjivandas v. T. B. Desai*, AIR 1966 Bom 36
(1969) 2 S C R 824

article 32 of the Constitution which itself is a guaranteed fundamental right, the Supreme Court also has a discretion to refuse to entertain a writ petition even though it is based on the contravention of a fundamental right. A fortiori, the High Court would be well entitled to exercise its discretion in insisting that a petitioner should come to it with the utmost expedition. The reason for this rule is stated by the Supreme Court in *State of Madhya Pradesh v. Bhailal Bhai*¹²⁶ in the following words:

*At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defenses legitimately open in such action. It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power.*¹²⁷

It is well known that the fundamental rights are not waived merely because they are not exercised or because they are compromised.¹²⁸ The reason is that they are based on a public policy and do not exist merely for the private gain of an individual. This principle is not in any way opposed to the exercise of the discretion the High Court against the petitioner who is guilty of delay and laches. The lack of diligence on his part may not destroy his fundamental right.

Another principle of justice is that one who seeks justice must himself do justice. A petitioner must, therefore, come to the court with clean hands. A petitioner who has been refusing to pay rent for a long time to the landlord was not allowed to seek relief under article 226 even though he could point out that the impugned orders against him were illegal.¹²⁹

The violation of the principles of natural justice is often made a fetish by certain petitioners. But the courts have to see beyond such violations. If the courts are convinced that in spite of a technical violation, no injustice has been done to the petitioner, they would be loath to entertain a writ petition on such a ground. This

(1964) 6 SCR 261

Id. At 271.

¹²⁸*Basheshar Nath v. C.I.T.*, (1959) 1 SCR (Suppl.)528

¹²⁹*Bardu Ram v. Ram Chander*, (1970) RCJ 1078

is more particularly so even if the entertainment of such a writ petition does not help to alter the situation.¹³⁰

Judicial review under the Constitution is, therefore, to be so administered as to serve that supreme purpose. Judges would be failing in their duty if in enforcing the law they are not vigilant to see that it is the interest of justice which is served and to see that justice is not delayed or defeated by technicalities.

4.12 Judicial Review of Policy Decisions in India

In our country, restraint consistently exercised by the Judiciary when it came to the review of policy decisions. In *Rustom Cavasjee Cooper v. Union of India*¹³¹ (commonly known as “Bank Nationalization Case”) the Supreme Court held that it is not the forum where conflicting policy claims may be debated; it is only required to adjudicate the legality of a measure which has little to do with relative merits of different political and economic theories.

In *Delhi Science Forum v. Union of India*¹³², a Bench of three learned Judges of the Supreme Court held while rejecting a claim against the opening up of the telecom sector, reiterated that the forum of debate and disclosure over the merits and demerits of a policy is the Parliament. It re-stated that the services of the Supreme Court are not sought till the legality of policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions.

In 2012, with regard to the legality on allocation of 2G spectrum on first time serve basis, the Apex Court held as follows:¹³³

“To summarize in the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and

¹³⁰*Smt. Harkartar Kaur v. The Lieutenant Governor*, AIR 1971 Delhi 195; *A. M. Allison v. B. L. Sen*, (1957) SCR 359

¹³¹*Supra n.11.*

¹³²AIR 1996 SC 1356
Centre for Public Interest Litigation v. UOI, (2012) 3 SCC 1

*suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the Executive for such matters”.*¹³⁴

In the recent past, the Supreme Court has adjudicated upon various decisions which have had a detrimental effect on the political motives of the Executive. In case of *U. P. power Corpn. v. Rajesh Kumar*¹³⁵, the controversy was pertaining to reservation in promotion for the Scheduled Castes and Scheduled Tribes with consequential seniority as engrafted of relaxation grafted by way of a proviso to Article 335 of the Constitution of India. Such reservation had always withstood judicial scrutiny by the dictum in *M. Nagaraj v. Union of India*. The more specific question involved in the present case was the validity of the provisions contained in Rule 8-A of the U. P. Government Servants Seniority Rules, 1991 (for brevity ‘the 1991 Rules’) that were inserted by the U.P. Government Servants Seniority (3rd Amendment) Rules, 2007. The Court observed that:

“In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8A of the 2007 Rules are ultra vires as they run counter to the dictum in M. Nagaraj case. The appeals arising out of the final judgment of Division Bench at Allahabad are allowed and the impugned order is set aside.”

In 1995, T.N. Godavarman Thirumulpad filed a writ petition with the Supreme Court of India to protect the Nilgiris forest land from deforestation by illegal timber operations.¹ The Supreme Court expanded the *Godavarman case*¹³⁶ from a matter of ceasing illegal operations in one forest into a reformation of the entire country’s forest policy. In its first order on the Godavarman case, the Court suspended tree felling across the entire country, paralyzing wood-based industries.

Despite a series of subsequent orders with far-reaching implications, the case is still pending in the Supreme Court. In the process of hearing over 800 interlocutory applications since 1996, the Court has assumed the roles of policymaker, administrator of policy, and interpreter of law. The Supreme

¹³⁴*Id.*

(2012) 7 SCC 1

¹³⁶*T.N. Godavarman Thirumulpad v. Union of India*, Writ Petition No. 202 of 1995

Court's vast assumption of powers concerning environmental issues has no precedence from past cases, neither in India nor in other developing countries. The Godavarman case opened a Pandora's Box that continues to affect industries and forest dwellers across the country.

The Hon'ble Supreme Court, In *B.A.L.C.O. Employees Union (regd.) v. Union of India* quoted¹³⁷

“In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise Court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, the Court will not interfere with such matters”.

Much of judicial review's utility exist because it is highly flexible, and when a statute does not provide for a review or appeal, judicial review's inherent flexibility provides the citizen with a remedy where one might otherwise not exist. However, judicial review will not normally be permitted if there is alternative appellate provision.¹³⁸

Then in the *Vodafone International Holding BV v. Union of India*¹³⁹, the Supreme Court ruled against tax demand to the tune of 11000 crores rupees and held that the transaction involved was a commercially planned transaction and was not a case of tax evasion or tax mitigation.

Moving in this direction, the apex Court in *Sidheswar Sahakari Sakhar Karkhana Ltd. v. Union of India*¹⁴⁰, was of the opinion that normally the Court should not interfere in policy matter which is within the purview of the government unless it is shown to be contrary to law or inconsistent with the provisions of the Constitution.

(2002) 35 SCL 182

¹³⁸*R. v. Brighton Justices*, ex parte Robinson [1973] 1 WLR 69

¹³⁹(2012) 6 SCC 613

(2005) 3 SCC 369

Therefore, it was held that grant of concession, exemption, incentive and rebate is a matter of policy with the government under the Central Excise Act, 1944, and hence, Court should not interfere unless found violative of law and Constitution. The Court was quick to add that this principle of judicial review is not a matter of exclusion of the power of judicial review but of judicial “self-restraint”. Before us there are various instances where serious administrative actions lapses in government department.

4.12 A Sum Up

Undoubtedly, the people look up to the Courts, which are temples of justice, with great expectation, hope and confidence. Similarly, people look up to the Parliament and State Legislatures, of which the Executive is a part, also with expectation and hope, because under the Constitution, the Parliament is the supreme legislative institution of the country, the people’s institution par excellence, through which laws for the people are made and executive accountability is enforced. We must recognize that Constitution is the supreme law and no organ of the State should go beyond the role assigned to it by the Constitution. It is the duty of all concerned, including the legislature, the Executive and the judiciary, to ensure that this balance is scrupulously adhered to. No organ can be the substitute of another. Visionary leaders of our country strove all through their life to preserve and protect this lofty ideal of our constitutional system, and ideal which needs repeated reiteration, as it has an eternal bearing on our parliamentary policy and constitutional and democratic framework.

Our Constitution makers ensured that the rights of the people were preserved and protected effectively against any Legislative or Executive excesses. Our constitutional set up has enabled the judiciary to set aside not only laws passed by the Parliament but also executive actions which are held to be not in conformance with the rights of the citizens under our constitution and its several provisions. Our constitution contemplates that the courts will interpret and scrutinize the constitutionality or validity of laws and executive actions but not will decide what the law should be nor matters of policy nor will usurp the function of the executive.

It is fundamental principle of law that every power must be exercised within the four corners of law and within the legal limits. Exercise of administrative power is not an exception to that basic rule. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. Unfettered discretion cannot exist where the rule of law reigns. Again, all power is capable of abuse, and that the power to prevent the abuse is the acid test of effective judicial review. Under the traditional theory, courts of law used to control existence and extend of prerogative power but not the manner of exercise thereof.

Judicial review means review by courts of administrative action with a view to ensuring their legality. Administrative authorities are given powers by statutes and such powers must be exercised within the limits of the powers drawn by such statutes. In judicial review of administrative action our courts merely enquire in judicial review, the courts undertake scrutiny of administrative action on the touchstone of doctrine of 'ultra vires'.

Judicial review is central in dealing with the malignancy in the exercise of power. However, in the changed circumstances of socio-economic development in the country the Court is emphasizing 'self restraint'. Unless the administrative action is violative of law or the Constitution or is arbitrary or mala fide, Courts should not interfere in administrative decisions. So, the abusive discretionary power of Administrative action must be review by judiciary. If judiciary finds any ground of illegality of any administrative action, it is the duty of the judiciary to maintain check and balance.

Several tribunals are functioning in the country. Not all of them, however, have inspired confidence in the public mind. The reasons are not far to seek. The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of caliber are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning. For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals.

Even the experiment of setting up of the Administrative Tribunals under the Administrative Tribunals Act, 1985, has not been widely welcomed. Its members have been selected from all kinds of services including the Indian Police Service. The decisions of the State Administrative Tribunals are not appealable except under Article 136 of the Constitution. On account of the heavy cost and remoteness of the forum, there is virtual negation of the right of appeal. This has led to denial of justice in many cases and consequential dissatisfaction. There appears to be a move in some of the States where they have been established for their abolition.

A tribunal which substitutes the High Court as an alternative institutional mechanism for judicial review must be no less efficacious than the High Court. Such a tribunal must inspire confidence and public esteem that it is a highly competent and expert mechanism with judicial approach and objectivity. What is needed in a tribunal, which is intended to supplant the High Court, is legal training and experience, and judicial acumen, and approach.

The Malimath Committee specifically recommended that the theory of alternative institutional mechanisms be abandoned. Instead, it recommended that institutional changes be carried out within the high Courts, dividing them into separate divisions for different branches of law, as is being done in England. It stated that appointing more judges to man the separate divisions while using the existing infrastructure would be a better way of remedying the problem of pendency in the High Courts.

Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised.

To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Court's under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the frivolous claims are filtered out

through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

One reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction.

The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problems are compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State legislations. However, even in the uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under single nodal ministry which will be in a position to oversee the working of these Tribunals.

The judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the judges of the superior judiciary are not available to the judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Court's under Article 226 and in this court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore,

the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

The power of judicial review over legislative actions vested in High Courts under Art 226 and in Supreme Court under Art 32 of the Constitution is an integral and essential feature of the constitution, constituting part of its basic structure. Ordinarily, therefore, the power of high Courts and the Supreme Court to test the constitutional validity of legislations can never be excluded.” Before that the power of appeal was out of the purview of the High Courts and Supreme Court. The only remedy from the tribunals was to appeal through a Special Leave Petition as per Article 136 of the Constitution of India. The court excellently interpreted the High Courts’ powers as the basic structure of the constitution and finally drew a clear picture for the status under Article 226/227. Again further it analyzing the class (3) of Art 32, pronounced that there is no prohibition for the Supreme Court under Art 32 also.

An administrative agency is a government authority, other than a court and other than a legislative body, which affects the right of private parties through adjudication, rulemaking, investigating, prosecuting, negotiating, settling, or informally acting. An administrative agency may be called a commission, board, authority, bureau, office, officer, administrator, department, corporation, administration, division or agency. Nothing of substance hinges on the choice of name, and usually the choices has been entirely haphazard. When the President, or a governor, or a municipal governing body exercises powers of adjudication or rulemaking, he or it is to that extent an administrative agency.

Now a days in society the administration is playing the vital and decisive role in designing and influencing the socio economic order. It enjoys a vast power. But on the same hand due to the vast powers vested in administrative functionaries and the administration, the agencies are resulting in mal-administration and the corruption. By the abuse of power or misuse of power, the administration forgets and disregards the individual’s rights. Growing administrative illegality has increased court dockets with cases demanding judicial review of administrative action.

In the democratic countries like India the courts are given the special places and wide roles to play for the control and review the administrative actions. To balance the personal rights and freedoms with the administrative needs according to the social welfare state the Governments and parliament in the country are in fewer efforts. Rather the Courts are only playing the creative role in order to maintain the relations of the growth and development of administrative law. But again the scope of Judicial Review and the domain of the courts are handful, where it looks for the specific issues and burden is casted to give shape to the principles by which the administrative functioning can be regulated.

CHAPTER 5

JUDICIAL REVIEW AS THE BASIC STRUCTURE OF THE CONSTITUTION: A NEW CONSTITUTIONALISM IN INDIA

5.1 An Overview

Though fundamental to the legal system, constitution also is subject to changes. In the case of an unwritten constitution such changes occur involuntarily while written constitutions are subject to changes through deliberation, known as amendments.' Amendability of the constitution is a sine qua non, as absence of possibility to make changes through amendments may lead to its changes through extra constitutional methods including revolution.' Moreover, non-amendability of the fundamental law implies monopoly of a generation over the future, which is an unacceptable proposition." In short, to live up to the needs of the changing times as well as to assume self-existence a constitution should be capable of adjusting to changes, how-ever protecting itself against self eradication.'

In the absence of appropriate provisions for schematic amendment the changes in the Constitution may run riot, damage its identity and leave the very existence of the constitution doubtful. Therefore, provision for amendment to bring about an orderly change is usually incorporated in constitutions.

The Constitution makers gave the power to amend the Constitution in the hands of the Parliament by making it neither too rigid nor too flexible with a purpose that the Parliament will amend it as to cope up with the changing needs and demands of "we the people". The Parliament in exercise of its constituent power under Article 368 of the Indian Constitution can amend any of the provisions of the Constitution and this power empowers the Parliament to amend even Article 368 itself. On its plain terms Art.368 is plenary and is not subject to any limitations or exceptions. The Constituent Assembly debates indicate that the founding fathers did not envisage any limitation on the amending power.

Bringing alteration to the Constitution provisions by the Parliament was very easy process before *Keshavananda Bharathi's Case*¹, because there was no implied or express limitation on its amending power exercised under the

AIR 1973 SC 1461

Constitution. But in the *keshavanandha's case*², uncontrolled power of the Parliament has been controlled and curtailed by the Doctrine of basic structure. We did not have this doctrine at the commencement of the Constitution of India.

The 'Doctrine of Basic Structure' is a judge- made doctrine to put a limitation on the amending powers of the Parliament so that the basic structure of the basic law of "the land" cannot be amended in exercise of its constituent power under the Constitution.

5.2 Constituent Power and Ordinary Legislative Power

Unlike the British Parliament which is a sovereign body, in the absence of a written constitution, the powers and functions of the Indian Parliament and State legislatures are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdictions. The general framework for making these laws is provided by the Constitution. Parliament alone is given the power to make changes to this framework under Article 368. Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament.

Another illustration is useful to demonstrate the difference between Parliament's constituent power and law making powers. According to Article 21 of the Constitution, no person in the country may be deprived of his life or personal liberty except according to procedure established by law.

The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the fundamental right to life by abolishing

²*Ibid.*

death penalty, the Constitution may have to be suitably amended by Parliament using its constituent power.

Most importantly seven of the thirteen judges in the *Kesavananda Bharati case*³, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Constitution that would profoundly change its character, whether by changing institutional structures or altering its basic principles. under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. Thus, the decision has strengthened our democracy, and that Parliament's authority and legitimacy are not diminished if it lacks the power to make radical changes in the Constitution.

5.3 Evolution of the Concept of Basic Structure: The Kesavanada Case a Milestone

After independence, the Government of India started to implement agrarian reforms scheme, but unfortunately, this action of the government was attacked and challenged in many High Courts, because the initiation of agrarian reforms were directly violating the Fundamental Right such as Arts.14, 19 and 31, especially right to property which was a fundamental right in the original constitution. Bihar Land Reforms Act, 1950 was the first enactment on agrarian reform which was challenged in the Patna High Court.⁴ To nullify the judgment of High Court and to immunise this law from Fundamental Rights, Article 31-B and the Ninth Schedule were introduced in the Constitution by the Constitution First Amendment Act 1951.

The question whether Fundamental Rights can be amended under Article 368 came for consideration in the Supreme Court in *Shankari Prasad case*⁵. In this case validity of Constitution (First Amendment) Act, 1951 which inserted inter alia, Articles.31-A and 31-B of the Constitution were also challenged. The amendment was challenged on the ground that it abridges the rights conferred under Article 13 of Part III and hence was void. The Supreme Court however

Ibid.

AIR 1951 SC 455

rejected the above argument and brought out the distinction between legislative power and constituent power and held that “law” in Article 13 did not include an amendment of the Constitution made in the exercise of constituent power and Fundamental Rights were not outside the scope of amending power.⁶

The Constitution (Seventeenth Amendment) Act, 1964 introduced a major change and put a number of laws in the Ninth Schedule, so as to keep them away from the judicial review and was challenged before the Court. The majority of the judges in *Sajjan Singh case*⁷ on the same logic as held in the *Shankari Prasad case*⁸ held that the law of amendment is superior law and is not subject to Article 13(2). It also held that the *Shankari Prasad case*⁹ was rightly decided and affirmed that the Parliament under Article 368 can amend any of the provision of the Constitution including the Fundamental Rights and make a suggestion to the Parliament that Fundamental rights should be included in the Proviso of the Article 368.

One of the arguments in this case was the scope of judicial review which was reduced to a great extent, so the amendment should be struck down. The Court rejected this argument and held by majority that the pith and substance of the amendment was to amend the Fundamental Rights and not to restrict the scope of Article 226. Their minority view on this point was very different, they are of the view that every Constitution has certain basic principles which could not be changed.¹⁰

In *Golak Nath case*¹¹, the validity of 17th Amendment which inserted certain Acts in Ninth Schedule was once again challenged. The Supreme Court ruled that the Parliament had no power to amend Part III of the Constitution and overruled its earlier decision in *Shankari Prasad*¹² and *Sajjan Singh case*¹³. In order to remove difficulties created by the decision of Supreme Court in *Golak Nath's case*¹⁴ the Parliament enacted the 24th Amendment Act.

The Court unanimously declared that the Constitution (1st Amendment) Act, 1951 was constitutional.

AIR 1965 SC 845

⁸*Id.n.5.*

Id.

¹⁰*Supra n.7.*

AIR 1967 SC 1643

¹²*Supra n.5.*

¹³*Supra n.7.*

¹⁴*Supra n.11.*

In 1973, in *Keshavananda Bharati vs State of Kerala*¹⁵, the Supreme Court reviewed the decision in the *Golak Nath case*¹⁶. Ten of the 13 judges held that Article 368 itself contained the power to amend the Constitution and that law' in Article 13(2) did not take in a constitutional amendment under Article 368. The law declared in the *Golak Nath case*¹⁷ was accordingly overruled. On the question whether the amending power under Article 368 is absolute and unlimited, seven judges, constituting a majority, held that the power was subject to an implied limitation; a limitation that arose by necessary implication from its being a power to 'amend the Constitution'. By a majority of 7:6 the Court ruled that Article 368 does not enable Parliament to alter the "basic structure" or framework of the Constitution'. Three different terms, 'basic elements', 'basic features' and 'basic structure', were used. What constituted the basic elements, features or structure was, however, not clearly made out by the majority and remained an open question.

In *Keshavanandha Bharati Case*¹⁸ an attempt was made to question the plenary power of the Parliament to abridge or take away the Fundamental Rights, if it was necessary by the way of amendment under Art.368 of the Constitution. Seven out of the thirteen judges Bench held that the Parliament's constituent power under Art.368 was constrained by the inviolability of the Basic Structure of the Constitution, which was one of the Basic features of the Constitution. The Basic Structure of the Constitution could not be destroyed or altered beyond recognition by a constitutional amendment.

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Justice Sikri, C.J., had tabulated the 'basic features' of the Constitution as follows¹⁹:

Supremacy of the Constitution.

Republican and democratic form of government.

¹⁵*Supra n.1*

¹⁶*Id. n.14.*

Id.

¹⁸*Id. n.15.*

¹⁹*Id.*

Secular character of the Constitution.

Separation of powers.

Federal character of the Constitution.

In the same case²⁰, Justice Hegde and Justice Mukherjee included the sovereignty and unity of India, the democratic character of our polity and individual freedom in the elements of the basic structure of the Constitution. They believed that Parliament had no power to revoke the mandate to build a welfare state and an egalitarian society. Justice Khanna also said that Parliament could not change our democratic government into a dictatorship or a hereditary monarchy, nor would it be permissible to abolish the Lok Sabha and Rajya Sabha. The secular character of the state could not, likewise, be done away with.

In summary the majority verdict in *Kesavananda Bharati*²¹ recognised the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of *Sankari Prasad*²² by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.

5.4 The Relevance of Kesavananda in the Aftermath of the Case

The *Kesavananda Bharati case*²³ upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution. Further the Court also held that certain key words in the Preamble formed part of the basic structure of the Constitution and declared that this basic structure was inviolable thereby casting a limitation to Parliament's power to amend the Constitution. Earlier the Court while deciding *Berubari*²⁴ had taken the view that the Preamble as not a part of the Constitution. Applying the

²⁰*Id.*

Id.

²²*Supra n.5.*

Supra n.1.

AIR 1960 SC 845

ratio decidendi in this case an amendment of the Preamble may well neigh have been impossible since the Court had ruled that the amending power under Art.368 relates only to the amendment of the Constitution and the Preamble was declared not a part of it.

With *Kesavananda*²⁵ having changed status quo, in an act of asserting Parliamentary supremacy the Parliament amended the preamble in 1976. The original drafting in the Preamble used the words "sovereign democratic republic". The two additional words "socialist" and secular were introduced by the controversial 42nd amendment. The amendment was pushed through by Indira Gandhi in 1976, when she had dictatorial powers. A committee under the chairmanship of Sardar Swaran Singh recommended that this amendment be enacted after being constituted to study the question of amending the constitution in the light of past experience. Further the words "integrity of the Nation" was also inserted in the last of the objectives mentioned in the Preamble.

The question of the validity of the amendment of the Preamble has not been challenged. The Supreme Court in *D.S. Nakara v. Union of India*²⁶ however relied on the word "Socialism" inserted by virtue of the 42nd Amendment Act, 1976. In that case it was held that the 1973 Pension Rules introduced by the Central Government revising the earlier pension rules 1972 should be applied to all pensioners and not merely to those who retired after 31-3-79 with the Court taking the view that the principle of Socialism requires that the State should take care of the old and the infirm.

The mistrust the Apex Court seemed to place with Parliament's sweeping powers to amend the constitution and the apprehension that the elected representatives of the people could not be trusted to act responsibly, which appeared farfetched at the time when *Kesavananda*²⁷ was decided, came true very soon and all too dramatically.

Mrs. Gandhi's election to the Lok Sabha was set aside by the Allahabad High Court on June 1975 on the ground of committing a 'corrupt practice'.²⁸ To quell

*Id.n.*23.

AIR 1983 SC 130

²⁷*Supra n.1.*

State of U.P. v. Raj Narain, AIR 1975 SC 865

the turmoil that followed, an internal Emergency was imposed on 25 June 1975 and Mrs. Gandhi filed an appeal in the Supreme Court.²⁹ Before the appeal was taken up for hearing, the electoral law was amended retrospectively to take away the basis on which the finding of 'corrupt practice' was arrived at by the High Court. In addition, an amendment to the Constitution, namely, the Constitution (Thirty-ninth) Amendment Act, 1975 was rushed through.³⁰

The amendment had three principal features. First, it substituted the existing Article 71 with a new article which stated that Parliament may by law regulate any matter relating to or connected with the election of the President or Vice-President including the grounds on which such election may be questioned. Secondly, it inserted Article 329A, which purported to apply to the Prime Minister and Speaker, but was clearly intended to apply to Mrs. Gandhi, and had the effect of wiping out all judicial proceedings concerning her election.³¹

Representation of People Act, 1951, the Representation of People (Amendment) Act, 1974 which had been enacted in order to get over the judgment of the Court in *Kanwar Lal Gupta v Amarnath Chawla*³², where it was held that the expenditure incurred by a political party on his behalf would be included in the expenditure incurred by a candidate and the Election Laws (Amendment) Act, 1975 were inserted in the Ninth Schedule. The most offensive feature of Article 329A was clause 4, which provided that no law made by Parliament before the commencement of the Thirty-ninth Amendment Act, in so far as it related to election petitions and matters connected therewith, shall apply or shall be deemed to have ever applied to or in relation to the election of the Prime Minister or the Speaker to either House of Parliament. The said amendment further provided that such election shall not be deemed to be void or ever to have become void of any ground on which such election could be declared to be void under any such law and notwithstanding any order made by any court before such commencement declaring such election to be void, such election shall continue to be valid in all

²⁹*Indira Nehru Gandhi v Raj Narain*, AIR 1975 SC 1590

³⁰*Id.*

³¹*Id.*
(1975) 3SCC 646

respects and any such order and any finding on which such order is based shall be deemed always to have been void and of no effect'.³³

In *Indira Nehru Gandhi v Raj Narain*³⁴, a five-judge bench applied the basic structure doctrine to invalidate Article 329(A), though the Prime Minister's election was upheld on the basis of the retrospective amendment to the electoral law. The judges invalidated the amendment on various grounds such as free and fair elections, democracy, equality, and the rule of law being parts of the basic structure of the Constitution.

5.5 Basic Structure Concept Reaffirmed: The Indira Gandhi Election Case

In 1975, The Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.³⁵

Amendments were also made to the Representation of Peoples Act of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, 1975 in order to save the Prime Minister from embarrassment if the apex court delivered an unfavourable verdict. The mala fide intention of the government was proved by the haste in which the Thirty-ninth amendment was

³³*Supra n. 29.*

³⁴*Id.*

³⁵*Id.*

passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day. The Rajya Sabha passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.³⁶

Counsel for Raj Narain who was the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review. Counsel also argued that Parliament was not competent to use its constituent power for validating an election that was declared void by the High Court.³⁷

Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute. One judge, Beg, J. upheld the amendment in its entirety. Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect.³⁸

Again, each judge expressed views about what amounts to the basic structure of the Constitution. According to Justice H.R. Khanna, democracy is a basic feature of the Constitution and includes free and fair elections. Justice K.K. Thomasheld that the power of judicial review is an essential feature.³⁹

Justice Y.V. Chandrachud listed four basic features which he considered unamendable:⁴⁰

Sovereign democratic republic status

Equality of status and opportunity of an individual

Secularism and freedom of conscience and religion

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

4. Government of laws and not of men *i.e.* the rule of law

According to Chief Justice A.N. Ray, the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections. Ray, C.J. held that ordinary legislation was not within the scope of basic features.⁴¹

Justice K.K. Mathew agreed with Ray, C.J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary.

Justice M.H. Begdis agreed with Ray, C. J. on the grounds that it would be unnecessary to have a Constitution if Parliament's constituent power were said to be above it. Judicial powers were vested in the Supreme Court and the High Courts and Parliament could not perform them. He contended that supremacy of the Constitution and separation of powers were basic features as understood by the majority in the *Kesavananda Bharati*⁴² case. Beg, J. emphasised that the doctrine of basic structure included within its scope ordinary legislation also.⁴³

Despite the disagreement between the judges on what constituted the basic structure of the Constitution, the idea that the Constitution had a core content which was sacrosanct was upheld by the majority view.

5.6 Forty Second Amendment: Efforts to Nullify the Effect of Kesavananda during the Period of Emergency

Soon after the declaration of National Emergency, the Congress party constituted a committee under the Chairmanship of Sardar Swaran Singh to study the question of amending the Constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the Constitution including the Preamble, through the Forty-second amendment

⁴¹*Id*

⁴²*Supra n.1.*

⁴³*Id. n. 41.*

(passed in 1976 and came into effect on January 3, 1977). Among other things the amendment:

Gave the Directive Principles of State Policy precedence over the Fundamental Rights contained in Article 14 (right to equality before the law and equal protection of the laws), Article 19 (various freedoms like freedom of speech and expression, right to assemble peacefully, right to form associations and unions, right to move about and reside freely in any part of the country and the right to pursue any trade or profession) and Article 21 (right to life and personal liberty). Article 31C was amended to prohibit any challenge to laws made under any of the Directive Principles of State Policy;⁴⁴

Laid down that amendments to the Constitution made in the past or those likely to be made in future could not be questioned in any court on any ground;

Removed all amendments to fundamental rights from the scope of judicial review and

Removed all limits on Parliament's power to amend the Constitution under Article 368.

5.7 The Basic Structure Doctrine in the Post-Emergency Phase

Within less than two years of the restoration of Parliament's amending powers to near absolute terms, the Forty-second amendment was challenged before the Supreme Court by the owners of Minerva Mills a sick industrial firm which was nationalised by the government in 1974.⁴⁵ Mr. N.A. Palkhivala, renowned constitutional lawyer and counsel for the petitioners, chose not to challenge the government's action merely in terms of an infringement of the fundamental right to property. Instead, he framed the challenge in terms of Parliament's power to amend the Constitution. Mr. Palkhivala argued that Section 55 of the amendment⁴⁶ had placed unlimited amending power in the hands of Parliament. The attempt to immunise constitutional amendments against judicial review violated the doctrine of basic structure which had been recognised by the

Article 31C stated that laws passed to implement the Directive Principles of State Policy could not be challenged in courts on the ground that they violated any fundamental right. Prior to the Forty-second amendment this clause was applicable only to Article 39 (b) & (c) of the Directive Principles which dealt with equitable distribution of wealth and resources of production.

⁴⁵*Minerva Mills v. U.O.I.*, AIR 1980 SC1789
Constitution (Forty-Second Amendment) Act, 1976.

Supreme Court in the *Kesavananda Bharati*⁴⁷ and *Indira Gandhi Election Cases*⁴⁸. He further contended that the amended Article 31C was constitutionally bad as it violated the Preamble of the Constitution and the fundamental rights of citizens. It also took away the power of judicial review.⁴⁹

Chief Justice Y.V. Chandrachud, delivering the majority judgement (4:1), upheld both contentions. The majority view upheld the power of judicial review of constitutional amendments. They maintained that clauses (4) and (5) of Article 368 conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure.⁵⁰

The judges, who concurred with Chandrachud, C.J. ruled that a limited amending power itself is a basic feature of the Constitution. Bhagwati, J. the dissenting judge also agreed with this view stating that no authority howsoever lofty, could claim to be the sole judge of its power and actions under the Constitution.⁵¹

The majority held the amendment to Article 31C unconstitutional as it destroyed the harmony and balance between fundamental rights and directive principles which is an essential or basic feature of the Constitution. The amendment to Article 31C remains a dead letter as it has not been repealed or deleted by Parliament. Nevertheless cases under it are decided as it existed prior to the Forty-second amendment.⁵²

5.7.1 The Consolidation of the Basic Structure Doctrine in the Post-Emergency Phase

The surviving provisions of the Forty-second amendment, which amended Article 31C and Article 368 were challenged before the Supreme Court in *Minerva Mills v Union of India*⁵³. The basic structure doctrine was expanded in this case. The Court, relying on the doctrine of stare decisis and the earlier ruling in *Kesavananda*⁵⁴ held that, the power of Parliament to amend the Constitution

⁴⁷*Supra n. 1.*

⁴⁸*Supra n.29.*

⁴⁹*Id. n.45.*

⁵⁰*Id.*

Id.

⁵²*Id.*

⁵³*Id.*

Supra n.1.

was limited, it could not by amending the Constitution convert the power into an unlimited power (as it had purported to do by this amendment.) The court went on to invalidate the amendment of Article 31-C by the Forty-second Amendment on the ground that it subordinated fundamental rights conferred by Articles 14 and 19 to the Directive Principles, that the Constitution was founded on the bedrock of the balance between Fundamental Rights and Directive Principles; that to give absolute primacy of one over the other was to disturb the harmony of the Constitution and that this harmony between Fundamental Rights and Directive Principles was an ‘essential feature’ of the ‘basic structure of the Constitution’.⁵⁵

It has often been expressed that *Minerva Mills* represents the assertion of judicial supremacy without contest. All the same it is pertinent to point out that a subsequent Constitution Bench in *Sanjeev Coke Manufacturing Company v Bharat Coking Coal Limited*⁵⁶ expressed serious misgivings about the decision in *Minerva Mills* observing: ‘.... We confess that the case has left us perplexed’, and noted further,

*We have serious reservations on the question whether it is open to a Court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We [judges] are not authorized to make disembodied pronouncements on serious and cloudy issues of constitutional policy without the battle lines properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper list between parties properly ranged on either side or crossing of swords. We think it is inexpedient for the Supreme Court to delve into problems which do not arise and express opinion thereon.*⁵⁷

Though Article 31-C did come under scrutiny, in this case, the Basic Structure Doctrine was not overruled.

*Woman Rao v Union of India*⁵⁸, following close on the heels of *Minerva Mills*⁵⁹, is noteworthy for two reasons. First, as a logical extension of the basic structure

⁵⁵*Id. n.53.*

AIR 1983 SC 239

⁵⁷*Id.*
(1981) 2 SCC 362

⁵⁹*Supra n.45.*

doctrine, it held that any amendment of the Constitution after 24th April 1973, which included laws in the Ninth Schedule would have to be tested by reference to the basic structure doctrine. The Court did not disturb the pre-Kesavananda insertions in the Ninth Schedule. This was also necessary to prevent a fraud on the Constitution, because laws which had nothing to do with agrarian reform or Directive Principles were included in the Ninth Schedule merely to protect them from constitutional challenge.

Secondly, *Woman Rao*⁶⁰ applied the basic structure doctrine to uphold the validity of Article 31A and 31C instead of holding them valid on the basis of stare decisis. The majority took the view that in none of the earlier decisions, namely *Sankari Prasad*⁶¹, *Sajjan Singh*⁶², *Golak Nath*,⁶³ and *Kesavananda*⁶⁴ was the validity of the First Amendment put in issue and that it could only be said that the validity of Article 31A was recognized in those decisions. It then proceeded to hold that the Directive Principles contained in Article 39(b) and (c) were part of the Constitution as originally enacted, and that it was in order to effectuate the purpose of these Directive Principles that the First and Fourth Amendments were passed.⁶⁵

It held that the First and Fourth Amendments strengthened, rather than weakened the basic structure of the Constitution. A portion of Article 31C, though already upheld in *Kesavananda*, was again upheld by applying the basic structure test, holding that laws passed truly and bona fide for giving effect to Directive Principles contained in Article 39(b) and (c) would, far from damaging the basic structure, only fortify it.⁶⁶

Though several other features of the Forty-second amendment were removed by the Forty-third and Forty-fourth amendments passed by the Janata government, which came to power after Mrs. Gandhi's defeat, the Forty fifth amendment which had proposed to amend Article 368 with provision for a referendum and

⁶⁰*Id n.58.*

⁶¹*Supra n.5.*

⁶²*Supra n.7.*

⁶³*Supra n.11.*

⁶⁴*Supra n.1*

⁶⁵*Id. n.60.*

Id.

with an enumeration of basic features in the article itself fell through as the Janata Party did not have the requisite majority in the Upper House.

*Minerva Mills*⁶⁷ and *Woman Rao*⁶⁸ gave the Court the opportunity to regain the role of ‘sentinel’ which had suffered significant erosion during the Emergency particularly in the light of the ruling in *ADM Jabalpur v Shivkant Shukla*⁶⁹. Though it had in the *Indira Nehru Gandhi*⁷⁰ case struck down a constitutional perversion, it had failed to protect the citizen’s liberty. The innovative and nascent basic structure doctrine gave the Court an opportunity to show in *Minerva Mills and Woman Rao* that it was willing to stand up against Parliamentary might, and public opinion, happy and relieved that the Court was standing up again, preferred not to worry about the sovereignty of Parliament.

In *Kihoto Hollohan vs Zachillhu*⁷¹ the Supreme Court held that para 7 of the 10th Schedule to the Constitution, which excluded judicial review of the decision of the Speaker/Chairman of the House on the question of disqualification of MLAs/MPs offended the basic structure of the Constitution. As a result, the decisions given by the presiding officers of the legislature are subject to judicial review. This again is a salutary decision considering the inability of many presiding officers to decide the questions of disqualification dispassionately, uninfluenced by the party in power.

These decisions illustrate that the theory of basic structure has served us well. It helps protect the core of the Constitution from the onslaughts of Parliament. However, there is no way out of judicial errors. In *L. Chandra Kumar v Union of India*⁷² the Supreme Court declared that the power of judicial review over legislative action vested in High Courts by Articles 226 and 227 and in the Supreme Court by Article 32 is an integral and essential feature of the Constitution and part of its basic structure. Consequently, clause (2)(d) of Article 323-A and clause (3)(d) of Article 323-B, to the extent they excluded jurisdiction of the High Courts and the Supreme Court under Articles 226, 227 and 32 with respect to matters falling within the jurisdiction of tribunals constituted under Articles 323-A and 323-B, were found to be violative of the basic feature of judicial review, and struck down. However, the Supreme Court, instead of restoring status quo ante and thereby reviving the

⁶⁷ *Supra n.45.*

⁶⁸ *Supra n.58.*
AIR 1976 SC 1207

⁷⁰ *Supra n.29.*
(1992) 1 SCR 686
AIR 1995 SC 1151

jurisdiction of the High Courts under Articles 226 and 227 to entertain petitions directly in matters over which the tribunals had jurisdiction, placed a fetter on the resurrected jurisdiction of the High Courts by laying down that:⁷³

*The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.*⁷⁴

This postscript raises a serious question for consideration. While striking down a part of the Constitution (42nd Amendment) Act, passed by Parliament as violative of the basic structure of the Constitution, how could the Supreme Court itself restrict the revived jurisdiction of the High Courts under Articles 226 and 227 by creating a bar to their entertaining writ petitions directly in matters falling under the jurisdiction of the tribunals? What Parliament cannot do under Article 368 can the judiciary do with respect to the basic structure of the Constitution? In other words, can the Supreme Court restructure the basic structure? In fact, there was no need for the earlier mentioned postscript at all, because it is a settled principle of law that if there is an adequate and equally efficacious alternative remedy, High Courts will not ordinarily entertain a writ petition and instead relegate the petitioner to the alternative remedy.⁷⁵

Therefore, the question to be considered is, in the rare event of the judiciary committing a serious error in striking down an amendment of the Constitution applying the doctrine of basic structure in a given case, who can correct it, when and how? The basic structure is what the Supreme Court says it is. Parliament is bound by the law declared by the Supreme Court. Therefore, Parliament cannot overcome a decision of the Supreme Court declaring a constitutional amendment ultra vires the basic structure of the Constitution. The Court alone has the power to correct its errors. Correction of judicial errors requires constitution of larger Benches. Experience shows that it takes a long time for the Court to appreciate its

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

error and correct it. There is a feeling in some quarters that Parliament can get over the theory of basic structure by convoking another Constituent Assembly by law. In the *Golak Nath case*⁷⁶, Justice Hidayatullah had observed:

*Parliament must amend Art. 368 to convoke another Constituent Assembly, pass a law under item 97 of the First List of Schedule VII to call a Constituent Assembly and then that assembly may be able to abridge or take away the Fundamental Rights if desired. It cannot be done otherwise.*⁷⁷

There is no provision in the Constitution that permits creation of a Constituent Assembly to revise it or to redraft its provisions constituting the basic structure. Entry 97 of the Union List confers residuary power of legislation with respect to matters not enumerated in any of the three lists in Schedule VII. The power of legislation for facilitating amendment of the Constitution so as to abridge its basic structure cannot be located in Entry 97 at all. What an amendment of the Constitution made under Article 368 cannot do, obviously a law made under Entry 97 cannot accomplish. Parliament's assertion of its unlimited right to amend any provision of the Constitution in exercise of its constitutional power through the Constitution (24th Amendment) Act, 1971, as the present wording of Article 368 reads, stands frustrated by the theory of basic structure in *Keshavananda Bharati*⁷⁸ and the categorical declaration in *Minerva Mills*. What cannot be done directly cannot be achieved indirectly is a well-known proposition of law.

It follows that error, if any, committed by the Supreme Court while applying the theory of basic structure can be corrected only by the Supreme Court. But self-correction takes a long time. No one can be sure that it will be corrected at all. By propounding the theory of basic structure, the Court has assumed a larger role as sole guardian of the Constitution and taken upon its shoulders enormous responsibility for discharging which statesmen like judges with vision, exceptional ability and integrity are needed.

The judiciary has secured for itself a decisive voice in the appointment of judges by its

⁷⁶*Supra n.11.*

⁷⁷*Id.*

⁷⁸*Supra n.1.*

controversial decision in *Supreme Court Advocates-on-Record v Union of India*⁷⁹. It is now fairly clear what a difficult task it is for the Chief Justice of India and the few seniormost judges of the Supreme Court constituting the collegium to select the most suitable candidates for elevation to the highest court. In the absence of transparency about the selection process, doubts are expressed about some of the selections made. Past experience does not show that the hope expressed by the president of the Constituent Assembly has borne fruit. The apprehensions voiced by Dr B.R. Ambedkar on the floor of the Constituent Assembly in 1949 are today entertained by many more citizens who are somewhat disillusioned and are seriously concerned about the future of parliamentary democracy in the country.

Present-day political groupings do not permit Parliament to function regularly, much less effectively. For example, allowing the budget to be passed without any debate is a serious matter. If Members of Parliament are mainly interested in settling political scores with their rivals in the two Houses of Parliament and outside, and are not much concerned about the problems of the people that warrant concerted action on the part of all constitutional authorities, if the electoral process continues to be dominated by money power, muscle power, caste and communal factors, if criminalization of politics has already crossed limits of tolerance, and if the checks and balances provided in the Constitution have by and large collapsed or ceased to be effective, it would be difficult to work the Constitution in the manner visualized by the founding fathers. The situation calls for serious introspection and decisive action to save the institutions that are out of shape and to make the Constitution work better.

Radical electoral reforms to revitalize Parliament and state legislatures so as to make parliamentary democracy a success, and judicial and administrative reforms to ensure that the institutions function strictly within the constitutional bounds, with greater transparency, accountability and efficacy, are the need of the hour.

In another case⁸⁰ relating to a similar dispute involving agricultural property the apex court, held that all constitutional amendments made after the date of the *Kesavananda Bharati* judgement were open to judicial review. All laws placed in the Ninth Schedule after the date of the *Kesavananda Bharati* judgement were

(1993) 4 SCC 441

⁸⁰*I. R. Coelho v. State of T.N.*, AIR 2007 SC861

also open to review in the courts. They can be challenged on the ground that they are beyond Parliament's constituent power or that they have damaged the basic structure of the Constitution.

5.8 Basic Structure and Power of Judicial Review

A good Constitution always provides for the power of judicial review over the Constitutional amendments and legislative Acts.⁸¹ The core concern of the Basic Structure is the 'Judicial Review', which is its integral or inseparable part. In this sense, without judicial review, the basic structure doctrine is simply inoperable or non-functional. That is by taking away the component of judicial review, we would be denying the very existence of the doctrine of the basic structure which is simply impermissible.⁸² Art.31-B confers uncontrolled power on the Parliament by excluding judicial review in the exercise of its amending power.

Such a scope has been given to the Art.31-B for the purpose of promoting agrarian reforms in order to establish an egalitarian society. But unlike Arts.31-A and 31-C, Art.31-B has no definite criterion and Parliament under this Article has the power to confer 'fictional immunity' on the laws passed by it. Whereas Art.31-A and C have specific standards which are not affecting or violating the basic structure.

Art.31-A excludes judicial review of certain laws from the application of Arts.14 and 19. It does not exclude un-catalogued number of laws from the challenge on the basis of Part III. It is for the reason, the provisions of Art.31-A has been held to be not violative of the Basic Structure.⁸³

Likewise, Art.31-C carries its own criteria. It applies as a yardstick the criteria of sub clause (b) and (c) of Art.39, which refers to equitable distribution of resource.⁸⁴ However, when the ambit of Art.31-C was enlarged by the Forty Second Amendment of the Constitution, vesting the power of the exclusion of

⁸¹Arijit pasayat & C.K. Thakker, *C.D.Jha's 'Judicial Review of Legislative Acts'*, Second Edition, 2009, p xxxiv.

⁸²Virendra Kumar, *Basic Structure of the Indian Constitution : Doctrine of Constitutionally Controlled Governance (From Keshavanand Bharti to I.R.Coelho)*, JI LI, 2007, Vol-49, Jan – March, p.365.

⁸³*I. R. Coelho v. State of T.N.*, Supra n. 80 at 884.

⁸⁴*Id.*

judicial review in the legislature, such an addition was held to strike at the basic structure of the Constitution. It is on this ground that second part of Art.31-C was held to be beyond the permissible limits of power of amendment of the Constitution under Art.368.⁸⁵

This is how, initially Art.31-B also considered constitutionally valid in *Shankari Prasad case*⁸⁶, because, in the initial stage, the Parliament placed only land reforms laws into the Schedule. But afterwards they enlarged this Article and Schedule by inserting divisive laws to this Schedule which were abhorrently violating Constitution principles. As a result, Supreme Court said and permitted the judiciary to review the Ninth Schedule laws by evolving the basic structure otherwise, we would have not seen this doctrine and if the invocation of amending power in pursuance of Art.31-B would have remained confined to land reforms, there seemed no difficulty either to seek basis of the basic structure of the Constitution which was propounded in *Keshavanada's case*⁸⁷ or to its application on the principle of exception.

For re-reading or re-defining the scope of this Art.31-B, the Constitutional bench in *I.R.Coelho*⁸⁸ has approached the whole issue de novo in the light of first principles of constitutionalism as evolved by the Court in *Keshavananda Bharathi's case*⁸⁹. Legitimacy of Art.31-B read with the Ninth Schedule of the Constitution is preserved by redrafting the scope of judicial review under basic structure doctrine. Finally, Supreme Court in *I.R.Coelho*⁹⁰ observed that, “if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infracton shall be open to challenge on the ground that it destroys or damages the basic structure...”⁹¹ this means that, mere violation of Fundamental Rights by the laws incorporated in the Ninth Schedule by virtue of exercise of amending power in pursuance of Art.31-B is not a ground for invalidating the Constitutional amendments ipso facto.

⁸⁵*Id.*

⁸⁶*Supra n.5.*

⁸⁷*Supra n.1.*

⁸⁸*Supra n.80.*

Supra n.1.

⁹⁰*Id. n.88.*

⁹¹*Id.*

Further Court clarified that, “We are not holding such laws per se invalid but, examining the extent of power which the legislature will come to possess”.⁹² These would be void only if it is also held that they are violative of the basic structure of the Constitution. But in *Golak Nath*⁹³, Supreme Court was observed by saying that you cannot adversely amend Fundamental Rights at all; whereas *Keshavananda Bahrathi*⁹⁴ case lays down that abrogation of fundamental rights may or may not violate the basic structure doctrine.¹⁰⁰ If they violate basic structure doctrine, then violation of Fundamental Rights is not permissible, if their violation does not violate basic structure doctrine, then their violation is permissible. But in *I.R. Coelho*, Nine judge bench clearly crystalized the steps that are required to be taken for determining whether the Ninth Schedule laws violative of part III, then its impact examined and if it shows that in effect and substance, it destroys the basic structure, the consequence of invalidation has to follow.⁹⁵

5.9 Ninth Schedule: Challenge to the Power of Judicial Review

Before determining whether the doctrine of Basic Structure applies to the legislations included in the Ninth Schedule, it is important to deal with the genesis and evolution of the Ninth Schedule and the constitutional challenge faced by it.

5.9.1 Background to Ninth Schedule Leading up to Coelho

India achieved independence from Great Britain in 1947. Shortly afterwards, India’s leaders crafted the Constitution of India (constitution), which came into effect on January 26, 1950. Authored by Dr.B.R. Ambedkar, it is the longest written constitution in the world. As with most constitutions, all laws passed by the legislative branch must conform to its provisions.⁹⁶ Not long after the enactment of the constitution, Parliament found reason to amend it.⁹⁷ India’s first

⁹²*Id.*

⁹³*Supra n. 11.*

⁹⁴*Supra n.1.*

⁹⁵*Id.n.90.*

Milan Dalal, *India's New Constitutionalism: Two Cases That Have Reshaped Indian Law*, 31 B.C. Int'l & Comp. L. Rev. 257 (2008), <http://lawdigitalcommons.bc.edu/iclr/vol31/iss2/4>

⁹⁷See A.G. Noorani, *Ninth Schedule and the Supreme Court*, Econ. & Pol. Wkly., March ,2007, at

prime minister, Jawaharlal Nehru was a staunch supporter of nationalisation and expropriation of land from the elite for redistribution to the poor. Yet, India's new constitution had guaranteed a right of property to its citizens, and therefore Nehru's grand plans for equitable redistribution of zamin (land) were soon confronted by the zamindars (landowners) in the courts.⁹⁸ Early court rulings held the land reform laws "transgressed the fundamental right to property guaranteed by the Constitution".⁹⁹

As a result, Prime Minister Nehru introduced the First Amendment to the constitution of India on May 29, 1951, creating a famous scheme known as the "Ninth Schedule".¹⁰⁰ The First Amendment created article 31B, which described the Ninth Schedule and was inserted into part III of the constitution.¹⁰¹ Originally consisting of thirteen laws, the Ninth Schedule was narrowly crafted to immunise land reform laws from judicial review.¹⁰²

Article 31B and the Ninth Schedule were introduced in the Constitution by the First Amendment to assist the process of legislation to bring about agrarian reforms and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights. Article 31B provides that the Acts and Regulations specified in the Ninth Schedule shall not be deemed to be void or ever to have become void on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. The provisions of the Article are expressed to be without prejudice to the generality of the provision in Article 31A and the concluding portion of the Article supersedes any judgment, decree or order of any court or tribunal to the contrary. It is extremely unfortunate to note that the number of items in the Ninth Schedule have increased from 13, when initially enacted, to more than 284.¹⁰³

⁹⁸*Id.*

Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, 2006, available at http://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_indian_constitution.pdf

¹⁰⁰*Id.*

Constitution (First Amendment) Act, 1951.

¹⁰²*Supra n.97.*

¹⁰³*Id.*

Furthermore it is also regrettable to observe that the laws included in the Ninth Schedule are no longer restricted to those enacted to further agrarian and land reforms. The constitutionality of Article 31B and the Ninth Schedule first came up for challenge in *Sankari Prasad v. Union of India*¹⁰⁴ wherein the Court upheld the Constitutionality of the First Amendment. The decision in *Sankari Prasad* was reaffirmed by the Supreme Court in *Sajjan Singh v. State of Rajasthan*¹⁰⁵. In that case, Gajendragadkar C.J., observed that the genesis of the amendment made by adding Articles 31A and 31B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms.⁶⁷ This Amendment came up for challenge again in the famous *Golak Nath Case*¹⁰⁶ in 1967, wherein it was upheld.

After this case the Parliament passed the Constitution (29th Amendment) Act, 1972 and amended the Ninth Schedule to the Constitution by inserting therein two Kerala Amendment Acts in furtherance of land reforms namely, the Kerala Land Reforms Amendment Act, 1969;70 and the Kerala Land Reforms Amendment Act, 1971.⁷¹ These amendments were challenged in *Kesavananda Bharati's case*¹⁰⁷. The decision in *Kesavananda Bharati's case* was rendered on 24th April, 1973 by a 13 Judge Bench and, by majority of seven to six, *Golak Nath's case*¹⁰⁸ was overruled. The Constitution 29th Amendment was declared to be valid. In *Kesavananda Bharati's case*¹⁰⁹ the validity of Article 31B was not in question. The constitutional amendments under challenge in *Kesavananda Bharati's case*¹¹⁰ were examined assuming the constitutional validity of Article 31B. Khanna J. opined that the fundamental rights could be amended, abrogated or abridged so long as the Basic Structure of the Constitution is not destroyed but at the same time, upheld the 29th Amendment as unconditionally valid. Khanna J. upheld the 29th Amendment in the following terms:¹¹¹

“We may now deal with the Constitution (Twenty ninth Amendment) Act. This Act, as mentioned earlier, inserted the

¹⁰⁴*Supra n.5.*

¹⁰⁵*Supra n.7.*

¹⁰⁶*Supra n.11.*

¹⁰⁷*Supra n.1.*

¹⁰⁸*Id. n.106..*

¹⁰⁹*Id. n.107.*

¹¹⁰*Id.*

¹¹¹*Id.*

Kerala Act 35 of 1969 and the Kerala Act 25 of 1971 as entries No. 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty ninth Amendment) Act.”¹¹²

The constitutional validity of all the legislations incorporated in the Ninth Schedule again came up for question in 1981, when the Supreme Court was asked to determine the constitutional validity of all Amendments to the Ninth Schedule in the case of, *Waman Rao v. Union of India*¹¹³. This is because in this case, the Constitution (First Amendment) Act, 1951 which introduced Article 31-A into the Constitution with retrospective effect, and Section 3 of the Constitution (Fourth Amendment) Act, 1955 which added the new clause (1), sub-clauses (a) to (e), for the original clause (1) with retrospective effect was questioned. In addition to this, Section 5 of the Constitution (First Amendment) Act, 1951, which introduced Article 31B was questioned in addition to the constitutionality of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961.⁷⁶ The Court unanimously upheld the First and Fourth Amendments. This decision is a classical manifestation of “Judicial Convenience or Judicial Arbitrariness”.

The Acts were put in the Ninth Schedule prior to that decision, that is, 24th April 1973, were immune from challenge. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution. However the laws included thereafter are subject to challenge and can be examined on the touchstone of Articles 14, 19 and 31.¹¹⁴

The various constitutional amendments, by which additions were made to the Ninth Schedule on or after April 24, 1973 will be valid only if they do not damage or destroy the Basic Structure of the Constitution.¹¹⁵ The Court upheld Article 31B and the First Amendment and Chandrachud C.J., stated:¹¹⁶

Id.
¹¹³*Supra n. 58.*

¹¹⁴*Id.*
Id.
Id.

*“The Amendments, especially the 1st, were made so closely on the heels of the Constitution that they ought in deed to be considered as a part and parcel of the Constitution itself. These Amendments are not born of second thoughts and they do not reflect a fresh look at the Constitution in order to deprive the people of the gains of the constitution. They are, in the truest sense of the phrase, a contemporary practical exposition of the Constitution.”*¹¹⁷

The primary ground on which this case faces criticism is the utter disregard of the judiciary to the explicit text of Article 31B.

5.9.2 Application of the Basic Structure to Laws in the Ninth Schedule

The issue whether the Basic Structure applies to laws in the Ninth Schedule has to be analysed in light of Mathew J.’s decision in *the Election Case*¹¹⁸. He is against the proposition that a constitutional amendment putting an Act in the Ninth Schedule would make the provisions of the Act vulnerable for the reason that they damage or destroy a basic structure constituted not by the fundamental rights taken away or abridged but some other basic structure. He justifies his stand in rejecting the proposition on the grounds that the ratio in *Kesavananda Bharati v. State of Kerala*¹¹⁹ cannot be construed to lead to such a conclusion.¹²⁰

This brings us to the question as to whether the validity of a statute incorporated in the Ninth Schedule can be determined on the grounds that it violates any other part of the Basic Structure besides those fundamental rights which pertain to the Basic Structure? Mathew J., relying on Sikri C.J.’s opinion in *the Fundamental Rights Case* came to the conclusion that even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertain or pertain to basic structure.¹²¹

However, the Act cannot be attacked for a collateral reason, namely, that the provisions of the Act have destroyed or damaged some other basic structure, say, for instance, democracy or separation of powers. Also pertinent to note is Khanna

¹¹⁷*Id.*

¹¹⁸*Indira Gandhi v. Raj Narain*, Supra n.29.

¹¹⁹*Supra n.1.*

¹²⁰*Id. n.117.*

¹²¹*Id.*

J.'s clarification of his stand in *Kesavananda Bharati case*¹²² that fundamental rights can be a part of the Basic Structure. This clarification, as observed by Seervai raises a few serious problems of its own:

*“The problem was: in view of the clarification, was Khanna J. right in holding that Article 31B and Schedule IX were unconditionally valid? Could he do so after he had held that the basic structure of the Constitution could not be amended?”*¹²³

Seervai also notes another problem which will arise if the power of amendment is limited by the doctrine of basic structure, which is that though the Acts included in the Ninth Schedule do not become a part of the Constitution, by being included in the Ninth Schedule they owe their validity to the exercise of the amending power.¹²⁴ It is Seervai's submission in light of Khanna J.'s clarification that if Parliament, exercising constituent power, cannot enact an amendment destroying the basic feature of the State, neither can Parliament, exercising its constituent power, permit the Parliament or the State Legislatures to produce the same result by protecting laws, enacted in the exercise of legislative power, which produce the same result.¹²⁵

Although the government questioned the basic structure doctrine articulated in *Kesavananda Bharati*, the ruling was re-affirmed in subsequent decisions. Thus, for over forty years, Parliament was able to operate by amending the constitution so long as it did not erode the basic structure of the constitution.

5.9.3 Justiciability of the Ninth Schedule

The power to put laws out of the reach of the judiciary under article 31B led Parliament to enact several laws and place them within the Ninth Schedule, which had originally been created by Prime Minister Nehru to help protect progressive land reform laws from judicial scrutiny.¹²⁶ The proliferation of laws included within the Ninth Schedule led to much public consternation, and the constitutional bench of the Indian Supreme Court finally agreed to take up a case

¹²²*Supra n.119.*

Seervai, *“Constitution of India”*, Universal Law Publishing, 4th ed., Vol.3.

¹²⁵*Id.*

¹²⁶*Supra n. 117.*

challenging laws under the grounds that they “could not have been validly inserted in the Ninth Schedule.”¹²⁷

On January 11, 2007, Chief Justice Y.K. Sabharwal handed down the case of *I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu*¹²⁸. The Chief Justice began by stating the broad question to be considered by the court:

*“[W]hether on and after [April 24, 1973] when [the] basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunise legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court?”*¹²⁹

The Chief Justice first traced the development of the law, citing the major cases that had been decided by the court with respect to interpretation of some articles of the constitution and challenges to the Ninth Schedule.⁹⁰ Thus the court found occasion to focus on the *Golak Nath case*¹³⁰, which had “held that [a] constitutional amendment is next, the court dove into a discussion on the importance of fundamental rights.¹³¹ Quoting the Nobel laureate and economist, Dr. Amartya Sen, the court noted “the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.”¹³²

Furthermore, the court noted that “fundamental rights occupy a unique place in the lives of civilized societies and have been described . . . as ‘transcendental,’ ‘inalienable’ and ‘primordial.’¹³³ Moreover, noting the importance of fundamental rights in providing checks and balances, the court stated:

[T]he jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the

¹²⁷ *Supra n. 80.*

Id.

¹³⁰ *Supra n. 11.*

¹³¹ *Supra n. 129.*

¹³² *Id.*

¹³³ *Id.*

*State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.*¹³⁴

Noting the nature of fundamental rights in providing a check against actions of Parliament, the court then stated that “separation of powers is part of the basic structure of the Constitution.”¹³⁵ This led the court to examine the central question of “whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights.”¹³⁶

The court disposed of the question of its ability to conduct judicial review of legislation under the Ninth Schedule by stating that it would be contrary to the check that article 32¹³⁷ confers: “It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution.”¹³⁸

Additionally, the court again looked to its previous jurisprudence in the *Kesavananda Bharati* case and pointed out that although “Parliament has [the] power to amend the provisions of Part III so as to abridge or take away fundamental rights . . . that power is subject to the limitation of basic structure doctrine,” and “at least some fundamental rights do form part of basic structure of the Constitution.”¹³⁹ The Supreme Court thus held it could strike down any law inserted into the Ninth Schedule if it were contrary to the basic structure of the constitution.

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Id.*

Article 32 provides: Remedies for enforcement of rights conferred by this Part—

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

The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of fundamental rights.

¹³⁸*Supra n.80.*

¹³⁹*Id.*

5.10 Expanded Scope of Judicial Review over Ninth Schedule: I.R. Coelho Case

At the very outset, the *IR Coelho v. State of Tamil Nadu*¹⁴⁰ Court clearly states that the decision in the case is based on the presumption that Article 31B is valid and shall not look into the same. The Court held that after the 24th April 1973, the laws that were included in the Ninth Schedule could not escape scrutiny by the Courts based on the rights contained in Part III of the Constitution and such laws are “consequently subject to the review of fundamental rights as they stand in Part III”.¹⁴¹ However, the test is not restricted to this stage, since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles.¹⁴²

If the law infringes on the essence of any of the fundamental rights or any aspect of the Basic Structure then it will be struck down. The extent of abrogation and limit of abridgement shall have to be examined in each case.

There have been several decisions relating to what constitutes the Basic Structure over the years.¹⁴³ The very fact that its contours are constantly unfolding and being revealed in successive judgments is an indication of its nebulous and ill-defined nature. The *IR Coelho case*¹⁴⁴ is the latest milestone in the judicial description of what constitutes the Basic Structure. Justice Sabharwal was mindful of the decision delivered a couple of months earlier in the *M. Nagaraj Case*¹⁴⁵. In that case, the Court, while considering the debate between the need to interpret the Constitution textually, based on original intent on the one hand, and the indeterminate nature of the Constitutional text that permits different values to be read into the Constitution, held that the Basic Structure of the Constitution need not be found in the Constitutional text alone.¹⁴⁶ This view of the Court

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²*Id.*

¹⁴³*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461; *Indira Gandhi v. Raj Narain*, AIR 1975 SC

2299; *Minerva Mills v. Union of India*, AIR 1980 SC 1789; *Waman Rao v. Union of India*, AIR 1981 SC 781

¹⁴⁴*Supra* n.80.

¹⁴⁵*M. Nagaraj v. UOI*, AIR 2007 SC 71

¹⁴⁶*Id* n.144.

found reiteration in *IR Coelho Case*¹⁴⁷ wherein the Court noted that textual provisions and such overarching values could both form part of the Basic structure. In light of this the Court was faced with the task of answering the questions: whether all fundamental rights are included in the Basic Structure doctrine? If the answer to the question is in the negative, then the Court is required to determine, which fundamental rights can be identified as part of the Basic Structure.¹⁴⁸

The Court, while discussing the hierarchy it has created amongst the fundamental rights, takes recourse under the distinction between the ‘rights test’ and the ‘essence of rights test’. At this juncture, the view of the Court warrants mention:¹⁴⁹

*“We are of the view that while laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into the Ninth Schedule does not restrict Part III review, it merely excludes Part III at will. For these reasons, every addition to the Ninth Schedule triggers Article 32 as part of the Basic Structure and is consequently subject to the review of the fundamental rights as they stand in Part III”.*¹⁵⁰

This would mean that if a law was to be included in the Ninth Schedule the scrutiny of all fundamental rights would be available as per the ‘rights test’. However, the Court does not stop at this but goes on to say that every amendment that places a law in the Ninth Schedule after 24th April 1973 would have to satisfy the Basic Structure test.¹⁵¹

A natural implication of this distinction is that the laws placed in the ninth schedule are not a formal part of the Constitution. An ambiguity which is created by drawing this distinction is that the distinction between the amendment and the law that it includes in the Ninth Schedule gets blurred. It becomes impossible to

¹⁴⁷*Id.*

Id.

¹⁴⁹*Id.*
¹⁵⁰*Id.*

¹⁵¹*Id.*

separate the laws, which constitute the body of the amendment from the amendment itself.¹⁵²

5.11 Significance of the Doctrine of Basic Structure

The basic structure limitation comes out of the realization that the only way to safeguard the Constitution from opportunistic destruction and defilement by temporary majorities in Parliament is to reject those amendments which go to tarnish its identity. It arises out of the need to strengthen the Constitution and to prevent its destruction by a temporary majority in Parliament. What is basic structure will depend upon what is vital to Indian democracy and that cannot be determined except with reference to history, politics, economy and social milieu in which the Constitution functions. The Court cannot impose on society anything it considers to be basic. What the judges consider to be basic structure must meet the requirement of national consciousness about the basic structure. Whatever may be the merits or demerits of judicial review, to an extent, the basic structure limitation upon the constituent power has helped arrest such forces to some extent and to stabilize the democracy.

5.12 Uncertainty of Basic Features

A five-judge Bench of the Supreme Court in the *Shankari Prasad case*¹⁵³, unanimously held within a year after the commencement of the Constitution that Parliament had unfettered power to amend the Constitution. This position was reiterated by majority in the *Sajjan Singh case*¹⁵⁴, 15 years later though a minority view doubted the amenability of Fundamental Rights.

The settled law on Parliament's power to amend any part of the Constitution was reversed in the 11-judge Bench decision in the *Golak Nath case*¹⁵⁵ by a narrow majority of six to five. Chief Justice Subba Rao in effect ruled that Fundamental Rights cannot be abrogated even by an amendment of the Constitution because amendments are also laws within the meaning of Article 13.¹⁵⁶

Id.
¹⁵³*Supra* n.5.
¹⁵⁴*Supra* n.7.
¹⁵⁵*Supra* n.11.
¹⁵⁶*Id.*

The shift in the Court's perception can be understood only in terms of the socio-political developments of the times. The repeated judicial interventions against zamindari abolition and land reform laws based on inadequacy of compensation under right to property guarantee did create distrust between Parliament and the judiciary, each claiming to interpret constitutional intent in opposing fashion. Parliament ultimately won, though in the process the people lost a valuable right originally guaranteed as a Fundamental Right under the Constitution (Right to Property) (Article 31), deleted from Part III by Constitution (44th Amendment Act, 1978).

The birth of the basic features doctrine happened in the *Keshavananda Bharati case*¹⁵⁷, wherein the thirteen judges, by a majority of seven to six, overruled *Golak Nath* to declare that the Constitution has certain 'basic features' that cannot be altered or destroyed at all through the amending process. To the extent Fundamental Rights are part of the 'basic features' they are un-amendable. It is difficult to explain how and where the majority of judges in *Keshavananda Bharati* discovered this unique doctrine to curtail the parliamentary power of amendment which the Court itself had repeatedly held before to be unfettered.

Does the Court have such a power as part of judicial review or in its inherent jurisdiction? Interpretation of which provision of the Constitution can lead to such a result? Can such a thin majority of just one judge rewrite the constitutional text to make a substantial dent in the distribution of powers and cause erosion of parliamentary authority in legislative business? While these and related questions were debated again and again, the 'basic structure doctrine' has been acted upon by the Court, thereby establishing judicial supremacy on matters of constitutional principles and policies.

In fact, it is pertinent to point out that the parliamentary political system was chosen for India because of a desire to have a strong executive government in the context of the political situation arising out of the partition of the country and the integration of states. Parliamentary sovereignty, an associated legal paradigm of strong executive government, became a powerful institutional fact in the working of the Constitution. However, lawyers and judges brought up in the legacy of the

¹⁵⁷*Supra* n. 1.

Common Law culture projected the argument that Parliament is only a creature of the Constitution and, therefore, primacy is with the Constitution. This logic paved the way for the acceptance of the law declared by judges having priority over all enacted laws, including constitutional amendments. In all this, there was a lurking fear of Parliament not respecting Fundamental Rights to the same degree as the judges thought the Constitution demanded. The 'basic structure' doctrine which the minority judges (Justices Mudholkar and Hidayatullah) hinted at in the *Sajjan Singh case*¹⁵⁸, came in as a solid shield against the claim of parliamentary supremacy in the matter of amendments even in the face of the explicit language of Article 368.

The question is not whether such an ingenious interpretation blocking unfettered discretion for Parliament's power of amenability has done some good against the uncertainties of majoritarian politics, or whether the Constitution is safer in the hands of the Court than of Parliament; the question is whether 'the people' operating through a representative parliament are helpless to determine the structure and quality of governance and whether a small, often divided, set of appointed judges can replace democratic judgment on 'basic features', whatever it means. One cannot forget that the infamous judgment in *ADM Jabalpur*¹⁵⁹ also came from the very same court that unhesitatingly approved the suspension of the Right to Life and Liberty under Emergency laws. The difficulty arises because of the uncertainty of so-called 'basic features' and the inclination of the court to change its interpretation by narrow majorities from time to time.

Secularism is declared a basic feature in the *S.R. Bommai case*¹⁶⁰. Presumably, socialism, as interpreted by the Supreme Court in the nationalization era, is also a basic feature. If so, it may raise several questions for policy planners now involved in disinvestments and privatization that the court alone can clarify. Judicial review and judicial independence are considered part of the 'basic features'. When the Court claims exclusive jurisdiction in deciding judicial appointments to superior courts, interpreting the written text that way, and limits power expressly given to the executive by the Constitution, it is legitimate to ask

¹⁵⁸*Supra* n.7.

¹⁵⁹*Supra* n. 69.

¹⁶⁰AIR 1994 SC 1918

whether we are heading for an arrangement that is contrary to the spirit of parliamentary democracy and concentrates unfettered power in one institution, which, incidentally, is not an elected body. Can one proceed on the assumption that judges cannot go wrong and what they decide would always be in the best interests of the people? Or is it that 'the people themselves' do not know their interests and they need to be told by an expert body? These are discomfoting questions that loom large in the public mind and present themselves whenever controversial decisions on popular issues are rendered by the Court.

5.13 Doctrine of Basic Structure: Advantages and Perils

Once the power to annul amendments to the Constitution, which is the highest form of activism, is conceded to the Court, the exercise of lesser powers is logical, and ultimately judicial restraint based on the Court's own view of its area of competence and effectiveness becomes the only check on the exercise of judicial power.

The criticism that may be attributed to the Basic Structure Doctrine is that the doctrine rests on the unsure foundations of judicial perceptions and judicial majorities. It imposes constraints and limitations on the Parliament to amend the Constitution, a matter which was not contemplated by the founding framers. It fails to appreciate that we live in changing times and laws cannot be static. A constitution has to reflect the changing needs of the nation and must be dynamic and flexible.

Another pertinent limitation to the basic structure doctrine is that if the power to amend the constitution cannot be exercised to amend its basic features, the power gets reduced to the status of a 'removal of difficulties' clause. Surely, high constituent power ought to mean something more. The Basic structure doctrine rests on the unsure foundations of judicial perceptions and judicial majorities. It emerged for the first time in 1973 by a majority of one, twenty-three years after the working of the Constitution. Yet in 1980, in the *Minerva Mills* case¹⁶¹, the Court found a 'limited amending power' to be a basic feature of the Constitution-

¹⁶¹*Supra* n. 45.

when right from *Sankari Prasad*¹⁶² to *Sajjan Singh*¹⁶³ the view was that there were no limitations on the amending power.

Critics point out that the basic structure doctrine proceeds upon a distrust of the 'democratic process', which in itself must surely be part of the basic structure. In limiting the amending power, the basic structure doctrine in fact stifles democracy, a basic feature. The limitations of the basic structure doctrine were brought out by the Court's decision in *ADM Jabalpur*¹⁶⁴. The Presidential proclamation suspending Article 21 did not, according to the Court, leave the citizen with the right to protect his liberty. Thus a right which could not be taken away even by amending the Constitution, pursuant to the basic structure doctrine was now stripped by an executive proclamation. However the Parliament strengthened the right to life and liberty by providing in the Forty-fourth amendment that the rights conferred by Articles 20 and 21 could not be suspended even during an emergency.

Since 1967, the Supreme Court has interpreted Article 13 of the Constitution to mean that the document's "basic structure" cannot be altered by any means. Using this doctrine, the Supreme Court has struck down the 39th Amendment and parts of the 42nd Amendment as being in violation of the Basic Structure of the Constitution.

In recognising the need of the Constitution not to be rigid but a dynamic document the doctrine nevertheless ensures that Parliament cannot use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution. By declaring that judicial review is part of the Basic Structure of the Constitution the Supreme Court reserves its right to review any amendment to the Constitution in the light of the Basic Structure. Indeed The basic structure doctrine stands in the way of untrammelled constitutional reform and provides the much needed check and balance required in a Parliamentary Democracy.

¹⁶²*Supra* n.5.

¹⁶³*Supra* n.7.

¹⁶⁴*Supra* n. 69.

5.14 A Sum Up

The constitution of a nation is a living thing and must be allowed to evolve naturally unless a revolution overtakes it. Any attempt to redraft the Indian Constitution in its essential elements is fraught with unforeseen consequences, which at the present stage of India's democracy very few would venture to invite. At the same time debating the strengths and weaknesses of the system and proposing alternative courses of action is the democratic way of building public opinion towards change and progress.

The basic philosophy underlying the doctrine of non-amenability of the basic features of the Constitution, evolved by the majority in *Kesavananda Bharati v. State of Kerala*, has been beautifully explained by Justice Hegde and Justice Mukherjee, and, I quote:

“Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed.”

If Parliament excludes the judicial review for the purpose of questioning the agrarian reform laws, really their action is justiciable and commendable, but if they exclude the same which form parts of basic structure to question the laws like election, reservation, insurance law etc. were placed in the Schedule is really it is great threat to the ideals and principles of the Constitution. Thereby Schedule made controlled Constitution into uncontrolled and made Principle of Constitutionalism disappear from the Constitution text. This kind of act by Parliament affects the supremacy of the Constitution and this gives scope to the Parliament to become supreme.

But in *I.R.Coelho's* case Supreme Court held that, the basic structure doctrine requires the State to justify the degree of invasion of Fundamental Rights. The

Parliament is presumed to legislate compatibly with the Fundamental Rights and this is where judicial review comes in.

The greater invasion into essential freedoms, greater is the need for justification and determination by the Court whether invasion was necessary and if so to what extent. The degree of invasion is for the court to decide. Compatibility is one of the species of judicial review which is premised on compatibility with rights regard as fundamental.

The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine. Thereby Supreme Court reaffirms the Constitution Supremacy through this basic structure and now we can say that the “Doctrine of Basic Structure made uncontrolled Constitution into Controlled one.

Finally it can be said that, if the Framers of our Constitution, had inserted express provision under Constitution of India regarding limitation of amending power of the Parliament under Article 368 itself, there would not have been a situation of introducing the basic structure doctrine and if the Parliament had exercised its amending power without disturbing the Constitution’s supremacy in the case of Ninth Schedule, judiciary would not have made any attempt to propound the doctrine of basic structure even without express provisions of Constitution relating to limitation of amendment.

CHAPTER 6

EXPANSION OF SCOPE OF HUMAN RIGHTS THROUGH THE MECHANISMS OF JUDICIAL REVIEW: IN CONTEXT OF SOCIO-ECONOMIC DEVELOPMENT IN INDIA

6.1 An Overview

The term 'Human Rights' refers to a bundle of rights, woven in perpetuity to the human life. In other words, they are moral claims, inalienable and inherent in all human individuals by virtue of their humanity alone. These claims are articulated and formulated to achieve certain standards, which are much higher than the animal living and have been translated into legal rights, having been established according to the law-creating processes of societies, both national and international. The basis of these legal rights is the consent of the governed, that is the consent of the subjects of the rights and are available to all individuals on a preconceived notion that all are born equal in dignity and rights.

The idea of elaboration and protection of rights of human beings developed and gradually transformed into written norms. Many important landmarks formed the channelising factors, such as, the Magna Carta (1215), the Petition of Right (1628) and the Bill of Rights (1689) in England. Particularly during the eighteenth century, the early ideas of natural law developed into an acceptance of natural rights as legal rights, and these rights for the first time were written into national constitutions, thus reflecting an almost contractual relationship between the State and the individual which emphasized that the power of the State derived from the assent of the free individual. The French Declaration of the Rights of Man and of the Citizen of 1789 and the American Bill of Rights of 1791 were based on this premises. During the nineteenth century this principle was adopted by a number of independent States and social and economic rights also began to be recognized.

Fundamental rights and directive principles of state policy as enshrined in the Indian constitution denote the inalienable rights and duties of an individual. The concept of Directive Principles embedded in the Constitution was inspired by and based on Article 45 of the Irish Constitution. The fundamental rights as enlisted in Part III of the constitution are a direction to the state regarding its obligations

towards the individuals, while the directive principles of state policy in Part IV reflect the ideals and socio-economic goals that the state should aim to achieve in its governance. The fundamental rights are justifiable and guaranteed by the constitution, while the directive principles of state policy are directives to the state and the government machinery which are unenforceable in courts of law.

Time and again the conflict between the enforceability of fundamental rights and directive principles of state policy has come to the fore. The reason behind the conflict seems to be the phraseology of the provisions with respect to the enforceability of both the parts and their interpretation by the courts of the land. Part III of the constitution is explicitly said to be enforceable in a court of law and Part IV is merely directive in nature, which suggests its unenforceability. But to ensure development at all level the judiciary in India, stressed on the harmonious relation between Part III and Part IV of the constitution and encompassed that they were in fact supplementary to each other.¹

India follows a system of separation of powers between the three wings- Executive, Legislature and Judiciary. The three wings are on an equal footing and none is superior or inferior to the other. They are independent and each wing is expected not to interfere in the working of the other wing. However, recent years have witnessed judicial activism in which judiciary has transgressed its boundaries and interfered with the working of legislature as well as the executive. There are several instances to support this view. For example, in the case of *Vishakha v. State of Rajasthan*², Supreme Court has given guidelines for the prevention of sexual harassment of women at workplace as there was no existing law in this regard. These guidelines were to be followed throughout the country until the Legislature came up with suitable legislation. Thus, judiciary went beyond its boundaries.

Judicial activism is criticized on the ground that it is nothing but interference in the spheres of the executive and the legislature. However, it may be seen as a tool to fill the vacuum created due to the inability of the legislature and the executive. Thus, judicial activism may also be termed as a “necessary evil” which is

Kesavanda Bharati v State of Kerala, AIR 1973 SC 1461; *Minerva Mills Ltd. v Union of India*, AIR 1980 SC 1789
AIR 1997 SC 3011

required when the legislature and the executive are unable to perform their functions properly.

Under the circumstances of our developing country, our judiciary has enlarged the scope of justice. For the enforcement of fundamental rights, the Supreme Court through judicial innovation and activism has expanded the common law principle of 'locus standi'. It has been made possible for courts to permit anyone with sufficient interest and acting bona fide to maintain an action for judicial redress, and to activate the judicial process. In the support of rights, courts have found a post card or newspaper article to be material enough to set-off judicial action. This has helped to bring justice closer to the common man.

6.2 Human Rights: International Instruments vs Constitution of India

The aspirations of the people have found expression in the Indian Constitution, which enacted a nearly complete catalogue of Human Rights around the time when the international scene was witnessing the framing of Universal Declaration of Human Rights. The Fundamental Rights, Directive Principles along with the promises made under the Preamble and other provisions of the constitution, lay the emphasis on making the Indian Constitution a viable instrument of the Indian people's salvation and to secure the basic minimum human rights, as contemplated as the founding stones of good governance.

The rights guaranteed and provided in the Constitution are required to be in conformity with the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights in the view of the fact that India has become a party to these covenants by ratifying them and as these Covenants are a direct consequence and follow-up of the Universal Declaration of Human Rights, it is this aspect of the Declaration which has been the guiding force and the mentor of Human Rights incorporation in the Constitution of India.

The Fundamental Rights in the Constitution constitute the Magna Carta of individual liberty and human rights. The declaration of Fundamental Rights in the Constitution serves as a reminder to the Government in power that certain liberties and freedoms essential for all the people and assured to them by the Fundamental Law of the land are to be respected.

The emphasis on the entire scheme of the Constitution under the heading of the Preamble, the Fundamental Rights and the Directive Principles is on the building of an Egalitarian Society and on the concept of Socio-Economic Justice. The fundamental Rights and the Directive Principles together constitute the heart and soul of the Indian Constitution. Along with the list of Fundamental rights, the Directive Principle of State Policy are the conscience of the Constitution.

The goals of the human rights can be read from the Preamble as a Political, social, economic and Cultural Revolution that the people of India have committed themselves to.³The Fundamental Rights that are guaranteed under the Constitution have a close similarity with

those in the U.N. Declaration of Human Rights in form and content in Articles 14,15,16,19,20,21,23,25,29,31 and 32.⁴ For example, the Universal Declaration addressed the question of affordability in Article 22 when it mentioned the resources of each state in the implementation of Economic, Social and Cultural Rights.

The Economic, Social and Cultural Rights enshrined in the Universal Declaration of Human Rights and also in the Covenant on Economic, Social and Cultural Rights are included in Part IV of the Indian Constitution and are known as the Directive Principle of State Policy. The Constitution therein directs the State to provide adequate means of livelihood, equitable distribution of material resources, equal pay for equal work, a living wage for all workers, just and human conditions of work, unemployment cover for all people in old age and sickness, and free and compulsory education for children .

Article 26 of the Universal Declaration of Human Rights, 1948 states, "Everyone has the right to education...directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms".

It is in reference to this provision that with the President giving his assent to the Constitution

(83rd Amendment) Bill, the right to education has been incorporated in the Constitution of India as a fundamental right. The Bill seeks to make the right to

Chiranjivi, Nirmal J., *Human Rights in India*, New Delhi: Oxford University Press, 2nd ed., 2000, p.43.
Constitution of India, 1950.

free and compulsory education for children from 6-14 years of age- a fundamental right. At the same time it also makes it a fundamental duty of the parents to provide opportunities for education to children belonging to this age group. Thus this Amendment supersedes Article 45, which provided for compulsory and free education of children up to 14 years of age as a Directive Principle of State Policy. It has now become obligatory to provide free and compulsory education to children in the age group of 6-14. The amended Act requires governments in the states and union territories to enact laws for the enforcement of this right within one year from the commencement of the Act.

The Indian Supreme Court in the case of *Maneka Gandhi v. Union of India*⁵ has held that

Universal Declaration of Human Rights was adopted by the United Nations General Assembly on December 10, 1948 while debates in the Indian Constitution were going on. Hence, it must be assumed that the makers of the Indian Constitution, in framing Part III of the Constitution on the Fundamental Rights were influenced by the provisions of the Universal Declaration. It is therefore legitimate for the Court to refer to the comparable provisions of the Universal Declaration in construing the intent and scope of the relevant text of Part III of the Constitution.

Most of the Articles of the Universal Declaration of Human Rights, 1948 and the International covenants are the building blocks of our constitutional framework. The Universal Declaration of Human Rights indicates two sets of Rights- traditional Civil and Political rights (Art.2-21) and the two new Economic and Social Rights (Art. 22-28). The Constitution of India incorporates the first two sets of rights under Fundamental Rights (Art. 12-35 of the Constitution) and the second set under Directive Principle of State Policy (Art. 36-51). It was in this light that the fundamental rights incorporated in Part III of the Constitution had been described by Dr. S. Radhakrishnan as a pledge to our people and a pact with the civilized world.⁶ It must therefore be held that Part III and IV essentially form a basic element of the Constitution, without which its identity will completely

AIR 1978 SC 597
Sen, Shanker, *Human Rights in a Developing Society*, New Delhi: APH Publishing Corporation, 1998, p.26

change and it is on this account that a number of provisions in part III and part IV are fashioned on the Universal Declaration of Human Rights.⁷

3 Exercise of Judicial Activism through Public Interest Litigation (PIL) in India

The peculiarity of the Constitution of India, as in comparison to other Constitutions, lies in the fact that despite being a wholesale combination of different documents, it has never limited itself to one aspect or one document. It has been a Living Constitution, a breathing Patriarch, whose foundation is not like a rock, as being static, but is dynamic, flexible and accumulative to the various provisions that may be required to face the changing need of the hour. The mechanism for this change is well based, inter alia, upon the stipulation of Judicial Activism, which is also one of the responsibility of the Judiciary, to interpret the Constitution in the interest and well-being of those people of the Nation.

The forerunner to this cause has been the Supreme Court, which has often and consistently read the provisions of the Universal Declaration, so as to include and provide the basic and primary rights to the people of India. The Hon'ble Court, while interpreting the provisions of the constitution, has not limited the scope of the various articles to what was laid and understood by the framers of the Constitution and for the betterment and well-being of the Country as a whole, the Court has read the Directive Principles of State Policy in the Fundamental rights. In this process of deciding case after case on the aspect of human rights of the citizens, the Court has consistently read the scope of Human Rights as in consonance with the provisions of the Universal declaration, along with the other International Covenants, to which India is a party.

Being the final interpreter of the Constitution, it can be rightly said that judiciary itself is the body that decides the limits of its power. Interestingly, it has taken a long arduous way in crystallizing such powers often resulting in activism and overreach since the making of the Indian Constitution till date and the process remains ongoing. The best illustrative example that reveals the height of this

⁷, V.D.Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*, Lucknow: Eastern Book Company, 7th edition, 1997, p.350.

process is *Keshavanand Bharti v. State of Kerala* case⁸. Further, innovations in the field of Public Interest Litigations (PIL) also signify the courage of conviction and the courage of confusion through which the Supreme Court of India has transformed itself into a Supreme Court for Indians.

Public Interest Litigations (PIL) serves a vital role in the civil justice system. It offers a ladder to justice to the disadvantaged sections of the society, provides an avenue to enforce diffused or collective rights, and enable civil societies to not only spread awareness about human rights but also allows them to participate in government's decision making. It facilitates an effective realization of collective, diffused rights for which individual litigation is neither efficient nor a practicable method. The range and scope of PIL is vast as it is a mechanism to agitate any socio-economic public issue before the court which can be brought within the legal and constitutional mould. It constitutes the major source of judicial activism since there is nothing that fetters the jurisdiction of the courts for entertaining them.

The concept of PIL can be understood as being concomitant to article 32 with regard to Supreme Court and to article 226 with regard to High Court. A PIL writ petition can be filed in the Supreme Court under article 32 only if a question concerning the enforcement of a fundamental right is involved. Under article 226, a writ petition can be filed in a High Court whether or not a fundamental right is involved.

6.3.1 Background and Meaning of the Concept of Judicial Activism

The term "Judicial Activism" is commonly understood as being a mere extension of the power of Judicial Review in some intellectual quarters. This is inferable from the very work of Professor Sathe in his celebrated book *Judicial Activism in India* where he introduces the work as being a monograph about judicial review and its role in democracy.⁹ Emphasizing the traditional role of judiciary under the Indian Constitution and the manner in which the power of judicial review was exercised by the erstwhile judges; Sathe elaborates as to how the judiciary gradually started gaining more and more momentum over a period of time. He calls such gaining of momentum as Searching Judicial Vigilance and further

Supra n.1.

S.P. Sathe, *Judicial Activism in India*, Oxford University Press, 2nd edition, p.1.

defines it as Judicial Activism .He is also of the view that Activism, however, can easily transcend the border of judicial review and turn into populism and excessivism.¹⁰ This makes the present chapter relevant in the scheme of this work, as it offshoots the need to actually ascertain the limits within which the power of Judicial Review‘ must be exercised in order to maintain harmony between the judicial organ of the state on the one hand and the other two co-equal organs of the state on the other.

Judicial Activism is the concept that originated in the U.S. It is the process in which Judiciary uses the concept of judicial review to tell unconstitutionality of the legislature and executive orders. Inactiveness of legislature and the Executive makes compels the Judiciary to be more active. We adopted the concept of United States but there is a difference. In U.S. judicial review is in due course of law but in India it is a procedure established by law. No doubt, Judicial Activision is a valuable weapon which can do a great deal to society, if properly used but it may harm the society if recklessly used. The issue of Judicial Activism has now been put on National Agenda. Now it is jumping upon the arena of the Executive and the Legislature. On survey, every participant endorsed the need of Judicial Activism but within their limitation and not to ignore the law just to make the masses happy.

There are two models of judicial review. One is a technocratic model in which judges act merely as technocrats and hold a law invalid if it is ultra vires the powers of the legislature. In the second model, a court interprets the provisions of the constitution liberally and in the light of the spirit underlying it keeps the constitution abreast of the times, through dynamic interpretation. A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individuals is said to be an activist court.

Judicial activism can be positive as well as negative. A court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist. The decision of the U.S. Supreme Court in the case

¹⁰*Ibid.*

of *Dred Scott v. Standard*¹¹, or *Lochner v. New York*¹², were examples of negative judicial activism, whereas the decision of that court in *Brown v. Board of Education*¹³, is an example of positive activism. In *Dred Scott's case*¹⁴ U.S. Supreme Court upheld slavery as being protected by the right to property; In *Lochner*, a law against employment of children is violate of the due process clause of the constitution; and In *Brown*, it was held that segregation on the ground of race was unconstitutional and void.

Activism is related to change in power relations. A judicial interpretation that furthers the rights of the disadvantaged sections or imposes curbs on absolute power of the State or facilitates access to justice is a positive activism. Judicial activism is inherent in judicial review. Whether it is positive activism or negative activism depends upon one's own vision of social change. Judicial activism is not an aberration but normal phenomenon and judicial review is bound to mature into judicial activism. Judicial Activism also has to operate within limits. These limits are drawn by the limits of the institutional viability, legitimacy of judicial intervention, and recourses of the court. Since through judicial activism, the court changes the existing power relations, judicial activism also a constitutional court becomes an important power centre of democracy.

The term "Judicial Activism" has no unanimously agreed definition amongst the authorities as it is understood differently in different spheres, depending upon individual view point. Professor Baxi rightly points out that there can be no objective definition of whether or not a decision is an instance of Judicial Activism'. According to him¹⁵:

*"Judges are evaluated as activists by various social groups in terms of their interests, ideologies and values...Quite often, the label is attached to a judge who himself may not consider him as an activist".*¹⁶

60 US 393 (1856)
198 US 45 (1904)
347 U.S 483 (1954): 98 L.Ed. 873
Supra n.11.

Upendra Baxi, *Courage, Craft andContention: The Indian Supreme Court in the. Eighties* , N.M.Tripathi, 1985,p.5.

¹⁶*Ibid.*

According to Black's Law Dictionary, judicial activism is a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Judicial activism can also be defined as when a Court takes some legislative power away from legislators. Judicial Activism to define broadly, is the assumption of an active role on the part of the judiciary.¹⁷

Judicial activism means going beyond normal constraints of the judiciary. According to Justice J.S. Verma, judicial activism is an "active process of implementation of the rule of law, essential for the preservation of a functional democracy". However, in a vibrant democratic system, it can also be seen as a phenomenon to curb executive tyranny and legislative misuse of power. The judicial activism in India can be witnessed with reference to the review power of the Supreme.

6.3.2 Evolution of the Concept of Judicial Activism in India

For a very long time, the Indian judiciary had taken an orthodox approach to the very concept of judicial activism. However, it would be wrong to say that there have been no incidents of judicial activism in India. Some scattered and stray incidents of judicial activism took place from time to time. But they did not come to the limelight as the very concept was unknown to India. However, the history of judicial activism can be traced back to 1893 when Justice Mehmood of the Allahabad High Court delivered a dissenting judgment which sowed the seed of activism in India.¹⁸ It was a case of an under-trial who could not afford to engage a lawyer. So the question was whether the court could decide his case by merely looking at his papers. Justice Mehmood held that the pre-condition of the case being heard (as opposed to merely being read) would be fulfilled only when somebody speaks. So he has the widest possible interpretation of the relevant law and laid the foundation stone of judicial activism in India.

The Supreme Court of India started off as a technocratic Court in the 1950's but slowly started acquiring more power through constitutional interpretation. In fact the roots of judicial activism are to be seen in the Court's early assertion

Chaterjee Susanta, For Public Administration' *Is judicial activism really deterrent to legislative anarchy and executive tyranny?*, The Administrator, Vol. XLII, April-June 1997, p. 9.

¹⁸Balkrishna, Ref. to the Article, *When seed for Judicial Activism was sowed*, —The Hindustan Times, New Delhi, dated 01-04-96, p.9.

regarding the nature of judicial review. In *A.K.Gopalan v.State of Madras*¹⁹, although the Supreme Court conceived its role in a narrow manner, it asserted that its power of judicial review was inherent in the very nature of the written constitution. The Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid. The posture of the Supreme Court as a technocratic Court was slowly changed to be activist Court.

In *Sakal Newspapers Private Ltd. v. Union of India*²⁰, it held that a price and page schedule that laid down how much a newspaper could charge for a number of pages was being violative of freedom the press. The Court also conceived a doctrine of giving preferred position to freedom of speech and expression, which includes freedom of the press, over the freedom to do business. The Supreme Court held that a newspaper was not only a business; it was a vehicle of thought and information and therefore could not be regulated like any other business. In *Balaji v.State of Mysore*²¹ the Supreme Court held that while the backward classes were entitled to protective discrimination, such protective discrimination should not negate the right to equality and equal protection of law. It held that backwardness should not be determined by caste alone but by secular criteria though caste could be one of them, and that the reserved seats in an educational institution should not exceed fifty per cent of the total number of seats. These are examples of judicial activism of the early 1960s.

In these early years of the Indian Supreme Court, the inconvenient decisions of the Supreme Court were overcome through the device of constitutional amendments.

The first, the fourth and the seventeenth constitutional amendments removed various property legislations from the preview of judicial review. Therefore, a debate on the scope of the Parliament's power to amend the Constitution started. A question was raised before the Court in 1951 in *Shankari Prasad v. Union of*

¹⁹AIR 1951 SC 27
(1962) 3 SCR 842
AIR 1963 SC 649

*India*²², whether Parliament could use its constituent power under Article 368 so as to take away or abridge a fundamental right. The court unanimously held that the constituent power was not subjected to any restriction. That question was again raised in *Sajjan Singh v. State of Rajasthan*²³, and this time two judges responded favourably, though there was a minority view.

During the late 1970s and early 1980s, under the leadership of Justices P.N. Bhagwati, V.R. Krishna Iyer, and other activist justices, the Court transformed its role in governance through a new activism championing the causes of social justice and human rights for the poor and oppressed classes of India. In a series of decisions, the Court reinterpreted Article 32 of the Indian Constitution to expand standing doctrine for PIL claims against government illegality and governance failures. These decisions led to a large influx of PIL claims in the 1980s. Responding to these procedural innovations and reforms, public interest lawyers, NGOs, journalists, and human rights advocates began to file PIL suits in order to remedy human rights violations and governance failures.

From 1977 to 1989, the Court assumed an active role in challenging bureaucratic agencies, and state and local governments in cases involving the repression of human rights, social injustice, and environmental degradation. During this period, however, the Court was less assertive in challenging the actions and policies of the executive and legislative branches of the Central Government.

After *Maneka Gandhi's case*,²⁴ the Court changed its mood towards activism. The development of judicial activism was the result of a catalyst action. The blending of judicial review with human rights jurisprudence resulted in tremendous results. The development of Public Interest Litigation (PIL) into the mainframe of legal process acted as a catalyst to this process. It resulted in the birth of an essential corollary of review viz. judicial activism. Though in the beginning, the application of activism was only to improve the conditions of the poor, gradually it was used to make directive principles as enforceable rights. Due to the increased expectation of the public and the increased demand for

AIR 1951 SC 458

AIR 1965 SC 845

²⁴*Supra* n.5.

improving the administration, the court used public interest litigations to fill every lacunae. The undisputed relation of activism with the problems and processes of political development made an eminent writer define judicial activism as “the way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of the State, manned by members of the ruling class.”²⁵ Whatever may be the definition, the realization of the fact that fundamental rights can have no meaning for the majority of Indians unless a new socio economic order is raised on the foundation of directive principles, and in order to fulfill the inherent duty of the court to help the poor to reap the benefits of economic and political entitlements, urged the Court to expand the horizons of judicial activism. The activist Court delivered many verdicts expanding the scope of right to life under Article 21. The court held the right to speedy trial as an essential part of the right to life and liberty under Article 21.²⁶ The inhuman conditions that prevailed in protective homes, trafficking in women, importation of children for homosexual purposes, nonpayment of wages to bonded labourers, and the inhuman conditions of prisoners in jail were held to be gross violations of Article 21²⁷ and directions were issued for the protection and preservation of human rights of female prisoners.²⁸ The Court further expanded the scope of Article 21 by including right against handcuffing,²⁹ the right against custodial violence,³⁰ the rights of the arrested,³¹ the right of the female employees against sexual harassment in working place,³² etc. within it. The court also ensured a pollution free environment and established the link between environment development and human rights.³³ The court even developed a new environmental health jurisprudence through its judicial creativity and later incorporated the theory of sustainable development ensuring green belts and open spaces for maintaining

Upendra Baxi, *Judicial Activism, Governmental Lawlessness and Political Development in India*, 1985, p. 10.

²⁶*Hussainara Khatoon (I-VI) v. Home Secretary, State of Bihar, Patna*, (1980) 1 SCC

81 ²⁷*Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308

²⁸*Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96

²⁹*T. V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68

Nilabati Behera v. State of Orissa, (1993) 2 SCC 746

³¹*D. K. Basu v. State of West Bengal* (1997) 1 SCC 416

³²*Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *Appareal Export Promotion Council v. A. K. Chopra*, (1999) 1 SCC 759

³³*Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598

ecological balance,³⁴ forbidding stone crushing activities near residential complexes,³⁵ earmarking a part of the reserved forests of advises to ensure their habitat and means of livelihood,³⁶ compelling the local bodies to perform their statutory obligation for protecting the health of the community,³⁷ compelling the industrial units to set up effluent treatment plants,³⁸ directing installation of air pollution controlling devices for preventing air pollution³⁹ etc. The court even granted compensation under Article 32 for the deprivation of the fundamental right to life and liberty caused by the unlawful acts of the instrumentalities of the State.⁴⁰ Thus, as corrective machinery, the court achieved many beneficial results, due to the then identified Constitutional obligations viz. the protection of human rights.⁴¹

The expansion of ‘judicial review’ (which is often described as ‘judicial activism’) has of course raised the popular profile of the higher judiciary in India. There are two conceptual objections against the justifiability to enforce positive obligations or aspirational rights. The first is that if judges devise strategies to enforce the directive principles, it amounts to an intrusion into the legislative and executive domain. The articulation of newer fundamental rights is the legislature’s task within which the judiciary should refrain from intervening. Further these obligations were enumerated as directive principles by the framers on account of practice considerations of heavy cost. Therefore judiciary must exercise restraint.

6.3.3 Origin and Development of Public Interest Litigation (PIL) in India

Two judges of the Indian Supreme Court (Bhagwati and Iyer JJ.)⁴² prepared the groundwork, from mid-1970s to early 1980s, for the birth of PIL in India. This included modifying the traditional requirements of locus standi, liberalising the

³⁴*M. C. Mehta v. Union of India*, (1996) 4 SCC 351

³⁵*M. C. Mehta v. Union of India*, (1992) 3 SCC 256

³⁶*Banwasi Seva Ashram v. State of Uttar Pradesh*, (1993) 2 SCC 612

³⁷*B. L. Wadehra v. Union of India*, (1996) 2 SCC 594

Satish Chander Shukla v. State of Uttar Pradesh, (1992) Supp (2) SCC 94

³⁹*M. C. Mehta v. Union of India*, 1994 Supp (3) SCC 717

⁴⁰*Rudul Sah v. State of Bihar*, (1983) 4 SCC 141; *Sebastian M. Hongray v. Union of India*, (1984)

SCC 32; *Bhim Singh v. State of Jammu and Kashmir*, (1985) 4 SCC 677

A. S. Anand. *Protection of Human Rights*, (1997) 7 SCC (Jour) 11.

Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 1993, 44 Mercer Law Review 611, 614–615.

procedure to file writ petitions, creating or expanding fundamental rights, overcoming evidentiary problems, and evolving innovative remedies.

Modification of the traditional requirement of standing was sine qua non for the evolution of PIL and any public participation in justice administration. The need was more pressing in a country like India where a great majority of people were either ignorant of their rights or were too poor to approach the court. Realising this need, the Court held that any member of public acting bona fide and having sufficient interest has a right to approach the court for redressed of a legal wrong, especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights at stake.

Later on, the Supreme Court in *S.P. Gupta v Union of India*⁴³ held that, where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.

The court justified such extension of standing in order to enforce rule of law and provide justice to disadvantaged sections of society. Furthermore, the Supreme Court observed that the term “appropriate proceedings” in Article 32 of the Constitution does not refer to the form but to the purpose of proceeding so long as the purpose of the proceeding is to enforce a fundamental rights, any form will do.⁴⁴ This interpretation allowed the Court to develop epistolary jurisdiction by which even letters or telegrams were accepted as writ petitions. Once the hurdles posed by locus standi and the procedure to file writ petitions were removed, the judiciary focused its attention to providing a robust basis to pursue a range of issues under PIL. This was achieved by both interpreting existing fundamental rights widely and by creating new fundamental rights. Article 21 “no person shall be deprived of his life or personal liberty except according to the procedure established by law” proved to be the most fertile provision to mean more than

⁴³AIR 1982 SC 149
Ibid.

mere physical existence⁴⁵ it includes right to live with human dignity and all that goes along with it.

The Supreme Court has played this vital role of social justice and human rights while exercising its writ-jurisdiction. It is well-settled principle of the Commonwealth law that an aggrieved person only may approach to court. This rule is called rule of locus standi. Thus, ordinarily, only the affected person should approach the courts. However, this rule limits access of justice to several underprivileged sections of society as they may not be able to approach the court even if their rights are abridged. This may be because of ignorance or their weak financial position.

6.3.3.1 Liberalisation of the Scope of Locus Standi in India

The Supreme Court, in order to make access to justice equal for all classes of citizens a reality is endeavouring to dismantle the barriers of poverty that exist between poor man and the justice/judicial system. And this task is accomplished by liberalising the scope of locus standi and developing Public Interest Litigation (PIL) wherein the courts are now allowing even the third parties to vindicate the socio-economic rights of the unprivileged and weaker sections of the society.

Public interest litigation or social interest litigation today has great significance and drew the attention of all concerned. The traditional rule of "Locus Standi" that a person, whose right is infringed alone can file a petition, has been considerably relaxed by the Supreme Court in its recent decisions. Now, the court permits public interest litigation at the instance of public spirited citizens for the enforcement of constitutional- legal rights.

Justice Krishna layer in *Fertilizer Corporation Kamgar Union v. Union of India*⁴⁶, enumerated the following reasons for liberalization of the rule of Locus Standi:-

Exercise of State power to eradicate corruption may result in unrelated interference with individuals' rights.

Social justice wants liberal judicial review administrative action.

⁴⁵*Kharak Singh v State of UP*, AIR 1963 SC 1295

⁴⁶AIR 1981 SC 344

Restrictive rules of standing are antithesis to a healthy system of administrative action.

Activism is essential for participative public justice".

Therefore, a public minded citizen must be given an opportunity to move the court in the interests of the public. Further, the Supreme Court in *S.P. Gupta vs. Union of India*⁴⁷, popularly known as Judges Transfer Case, Bhagwati J . firmly established the validity of the public interest litigation. Since then, a good number of public interest litigation petitions were filed.

In view of the operations by the courts on a wider canvass of judicial review, a potent weapon was forged by the Supreme Court by way of public interest litigation (PIL) also known as social action litigation. The Supreme Court has ruled that where judicial redress is sought in respect of a legal injury or a legal wrong suffered by persons, who by reason of their poverty or disability are unable to approach the court for enforcement of their fundamental rights, any member of the public, acting bonafide, can maintain an action for judicial redress. Thus, the underprivileged and the downtrodden have secured access to court through the agency of a public-spirited person or organization. This weapon was effectively used by the Supreme Court and the high courts, being Constitutional courts, to a large extent from 1980 onwards. The decision of the Supreme Court in *Sunil Batra v. Delhi Administration*⁴⁸; *Municipal Council, Ratlam v. Vardhichand*⁴⁹; *Akhil Baratiya Soshit Karamchhari Sangh, Railway v. Union of India*⁵⁰ and umpteen number of decisions thereafter by the Supreme court and more particularly the decision of the supreme court in *S. P. Gupta's case*⁵¹ represent watersheds in the development of PIL and liberalization of the concept of locus standi to make access to the courts easy. The principle underlying order 1 rule 8, Code of Civil Procedure has been applied in public interest litigation to entertain class action and at the same time to check misuse of PIL. The appointment of amicus curiae in these matters ensures objectivity in the

⁴⁷*Supra* n.43.

⁴⁸AIR 1980 SC 1579

⁴⁹AIR 1980 SC 1622

AIR 1981 SC 298

⁵¹*Supra* n.43.

proceedings. Judicial creativity of this kind has enabled realization of the promise of socio-economic justice made in the preamble to the Constitution of India.

One of the earliest cases of public interest litigation was reported as *Hussainara Khatoon (I) v. State of Bihar*⁵². This case was concerned with a series of articles published in a prominent newspaper – the Indian Express which exposed the plight of under trial prisoners in the state of Bihar. A writ petition was filed by an advocate drawing the Court’s attention to the deplorable plight of these prisoners. Many of them had been in jail for longer periods than the maximum permissible sentences for the offences they had been charged with. The Supreme Court accepted the dilution of locus standi and allowed an advocate to maintain the writ petition. Thereafter, a series of cases followed in which the Court gave directions through which the ‘right to speedy trial’ was deemed to be an integral and an essential part of the protection of life and personal liberty. Soon thereafter, two noted professors of law filed writ petitions in the Supreme Court highlighting various abuses of the law, which, they asserted, were a violation of Article 21 of the Constitution. These included inhuman conditions prevailing in protective homes, long pendency of trials in court, trafficking of women, importation of children for homosexual purposes, and the non-payment of wages to bonded laborers among others. The Supreme Court accepted their locus standi to represent the suffering masses and passed guidelines and orders that greatly ameliorated the conditions of these people.

In another matter, a journalist, Ms. Sheela Barse, took up the plight of women prisoners who were confined in the police jails in the city of Bombay. The court took cognizance of the matter and directions were issued to the Director of College of Social Work, Bombay to visit the Bombay Central Jail and conduct interviews of various women prisoners in order to ascertain whether they had been subjected to torture or ill-treatment. Based on his findings, the Court issued directions such as the detention of female prisoners only in designated female lock-ups guarded by female constables and that accused females could be interrogated only in the presence of a female police official.⁵³

⁵²AIR 1979 SC 1369

⁵³*Supra* n.28.

6.3.3.2 Epistolary Jurisdiction: A New Dimension in Public Interest Litigation (PIL)

Public interest litigation acquired a new dimension – namely that of ‘epistolary jurisdiction’ with the decision in the case of *Sunil Batra v. Delhi Administration*⁵⁴, it was initiated by a letter that was written by a prisoner lodged in jail to a judge of the Supreme court. The prisoner complained of a brutal assault committed by a Head Warder on another prisoner. The Court treated that letter as a writ petition, and, while issuing various directions, opined that: “...technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found”.⁵⁵

In *Municipal Council, Ratlam v. Vardichand*⁵⁶, the Court recognized the locus standi of a group of citizens who sought directions against the local Municipal Council for removal of open drains that caused stench as well as diseases. The Court, recognizing the right of the group of citizens, asserted that if the:

*“...centre of gravity of justice is to shift as indeed the Preamble of the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men.”*⁵⁷

In *Paramand Katar v. Union of India*⁵⁸, the Supreme Court accepted an application by an advocate that highlighted a news item titled “Law Helps the Injured to Die” published in a national daily, The Hindustan Times. The petitioner brought to light the procedural difficulties which came in availing urgent and life-saving medical treatment to persons injured in road and other accidents. The Supreme Court directed medical establishments to provide instant

⁵⁴Supra n.48.

⁵⁵Id.

⁵⁶Supra n.49.

⁵⁷Id.

AIR 1989 SC 2039

medical aid to such injured people, notwithstanding the formalities to be followed under the procedural criminal law.

The Supreme Court has met the changing needs of society by the extensive liberalization of the rule of locus standi which gave birth to a flexible public interest litigation system. A powerful thrust to public interest litigation was given by a 7-judge bench in the case of. *S.P. Gupta v. Union of India*⁵⁹ The judgment recognized the locus standi of bar associations to file writs by way of public interest litigation. In this particular case, it was accepted that they had a legitimate interest in questioning the executive's policy of arbitrarily transferring High Court Judges, which threatened the independence of the judiciary. Explaining the liberalization of the concept of locus standi, the court opined:

*“It would now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him.”*⁶⁰

The unique model of public interest litigation that has evolved in India not only looks at issues like consumer protection, gender justice, prevention of environmental pollution and ecological destruction, it is also directed towards finding social and political space for the disadvantaged and other vulnerable groups in society. The Courts have given decisions in cases pertaining to different kinds of entitlements and protections such as the availability of food, access to clean air, safe working conditions, political representation, affirmative

⁵⁹*Supra* n.43.

⁶⁰*Id.*

action, anti-discrimination measures and the regulation of prison conditions among others.

For instance, in *People's Union for Democratic Rights v. Union of India*⁶¹, a petition was brought against governmental agencies which questioned the employment of underage labourers and the payment of wages below the prescribed statutory minimum wage-levels to those involved in the construction of facilities for the then upcoming Asian Games in New Delhi. The Court took serious exception to these practices and ruled that they violated constitutional guarantees. The employment of children in construction-related jobs clearly fell foul of the constitutional prohibition on child labour and the non-payment of minimum wages was equated with the extraction of forced labour. Similarly, in *Bandhua Mukti Morcha v. Union of India*⁶², the Supreme Court's attention was persists despite the constitutional prohibition. Among other interventions, one can refer to the *Shriram Food & Fertilizer case*⁶³ where the Court issued directions to employers to check the production of hazardous chemicals and gases that endangered the life and health of workmen. It is also through the vehicle of PIL, that the Indian Courts have come to adopt the strategy of awarding monetary compensation for constitutional wrongs such as unlawful detention, custodial torture and extra-judicial killing by state agencies.

However, over the years, the social action dimension of PIL has been diluted and eclipsed by another type of "public cause litigation" in courts. In this type of litigation, the court's intervention is not sought for enforcing the rights of the disadvantaged or poor sections of the society but simply for correcting the actions or omissions of the executive or public officials or departments of government or public bodies. Examples of this type of intervention by the Court are innumerable. A recent example of this approach was the decision in *People's Union for Civil Liberties v. Union of India*⁶⁴, where the Court sought to ensure compliance with the policy of supplying mid-day meals in government-run primary school. There had been widespread reports of problems in the implementation of this scheme such as the pilferage of food grains. As a response

AIR 1982 SC 1473
(1997) 10 SCC 549
M.C.Mehta v. U.O.I., 1987 SCR (1) 819
Writ Petition (Civil) 196 of 2001

to the same, the Supreme Court issued orders to the concerned governmental authorities in all States and Union Territories, while giving elaborate directions about the proper publicity and implementation of the said schemes. The apex court has also championed the cause of pavement dwellers in *Olga Tellis v. Bombay Municipal Corporation*⁶⁵.

In the realm of environmental protection, many of the leading decisions have been given in actions brought by renowned environmentalist M.C. Mehta viz., strict liability for the leak of Oleum gas from a factory in New Delhi, directions to check pollution in and around the Ganges river, the relocation of hazardous industries from the municipal limits of Delhi, directions to state agencies to check pollution in the vicinity of the Taj Mahal and several afforestation measures. A prominent decision was made in a petition that raised the problem extensive vehicular air pollution in Delhi. The Court was faced with considerable statistical evidence of increasing levels of hazardous emissions on account of the use of diesel as a fuel by commercial vehicles. The Supreme Court decided to make a decisive intervention in this matter and ordered government-run buses to shift to the use of Compressed Natural Gas (CNG), an environment-friendly fuel. This was followed some time later by another order that required privately-run 'autorickshaws' (three-wheeler vehicles which meet local transformational needs) to shift to the use of CNG. At the time, this decision was criticized as an unwarranted intrusion into the functions of the pollution control authorities, but it has now come to be widely acknowledged that it is only because of this judicial intervention that air pollution in Delhi has been checked to a substantial extent.

In the interest of public the Supreme Court has given directions for parking charges, wearing of helmets in cities, cleanliness in housing colonies, disposal of garbage, control of traffic in New Delhi, made compulsory the wearing of seat belts, ordered action plans to control and prevent the monkey menace in cities and towns, ordered measures to prevent accidents at unmanned railway level crossings, prevent ragging of college freshmen, for collection and storage of blood in blood banks, and for control of loudspeakers and banning of fire crackers.

⁶⁵ (1985) 3 SCC 545; AIR 1986 SC 180

In recent orders, the Supreme Court has directed the most complex engineering of interlinking rivers in India. The court has passed orders banning the pasting of black film on automobile windows. On its own, the Court has taken notice of Baba Ramdev being forcibly evicted from the Ramlila grounds by the Delhi Administration and censured it. The Court has ordered the exclusion of tourists in the core area of tiger reserves. All these managerial exercises by the Court are hung on the dubious jurisdictional peg of enforcing fundamental rights under Article 32 of the Constitution. In reality, no fundamental rights of individuals or any legal issues are at all involved in such cases. The court is only moved for better governance and administration, which does not involve the exercise of any proper judicial function.

The Supreme Court has made an order even in a military operation. In 1993, the Court issued orders on the conduct of military operations in Hazratbal Shrine, Kashmir where the military had as a matter of strategy restricted the food supplies to hostages. The Court ordered that the provision of food of 1,200 calorific value should be supplied to hostages. Commenting on this, an Army General wrote: "For the first time in history, a Court of Law was asked to pronounce judgment on the conduct of an ongoing military operation. Its verdict materially affected the course of operation."

In the same way the inclusion of the whole spectrum of rights and entitlements such as 'social equality' and religious freedom', various civil liberties and protections against arbitrary actions by the state are now identified as core elements of citizenship and violations provoke a high standard of scrutiny both by the judiciary as well as civil society groups. The inclusion of entitlements such as universal adult franchise have greatly reduced the coercive power of casteist and feudal social structures and empowered political parties that represent historically disadvantaged sections such as the Scheduled Castes (SC) and Scheduled Tribes (ST) have played a major role in social transformation of India.

Even though practices such as untouchability, forced labour and child labour have not been totally eradicated, our constitutional provisions prohibiting the same are the bedrock behind legal as well as socio-political strategies to curb the same. The Supreme Court of India has further internalized the importance of

laying down clear normative standards which drive social transformation. Its interventions through strategies such as the expansion of Article 21 and the use of innovative remedies in public Interest Litigation (PIL) cases has actually expanded the scope and efficacy of constitutional rights by applying them in previously unremunerated settings.

Furthermore, the Courts allow group and interests with unequal bargaining power in the political sphere to present their case in an environment of due deliberation. The Courts have come to recognize and enforce rights for the most disadvantaged sections in society through an expanded notion of ‘judicial review’.

6.4 Fundamental Rights: Magna Carta of India

Part III of the constitution contains a long list of fundamental rights. This chapter of the constitution of India has very well been described as the Magna Carta of India. The inclusion of the chapter on fundamental rights in the constitution of India is in accordance with the modern democratic thought, which ideally seeks to preserve which is an indispensable condition of a free society. The aim of having a declaration of fundamental rights is that certain elementary rights, such as, right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majority in legislature of the country should not have a free hand in interfering with these fundamental rights.

In order to ensure that fundamental rights did not remain empty declarations, the founding fathers made various provisions in the Constitution to establish an independent judiciary. And the provisions related to fundamental rights and independent judiciary together provided a firm constitutional foundation to the evolution of Public Interest Litigation in India. Part III of the Constitution lays down various fundamental rights and also specifies grounds for limiting these rights. “As a right without a remedy does not have much substance”⁶⁶, the remedy to approach the Supreme Court directly for the enforcement of any of the Part III rights has also been made a fundamental right.⁶⁷ The holder of the

M.P. Jain, “The Supreme Court and Fundamental Rights”, S.K. Verma and Kusum (eds), Fifty Years of the *Supreme Court of India—Its Grasp and Reach*, New Delhi: Oxford University Press, 2000, pp.1.
Article 32 of the Constitution of India.

fundamental rights cannot waive them.⁶⁸ Nor can the fundamental rights be curtailed by an amendment of the Constitution if such curtailment is against the basic structure of the Constitution.

The major landmark decision which led to the widening concept of Article 21 of the Constitution of India is *Maneka Gandhi v. Union of India*⁶⁹, wherein a broad interpretation was adopted. In *Maneka case*⁷⁰, a number of progressive propositions were made to make Article 21 more meaningful. The earlier view that Article 21 was a Code by itself was rejected. Articles 14, 19 and 21 were held to have close connection. According to Judge Krishna Iyer, no article pertaining to a Fundamental Right is an island in itself. Just as a man is not dissectible into separate limbs, cardinal rights in an organic constitution have a synthesis.

6.5 Human Rights: An Expansion of Article 21 and Other Provisions of Part III of the Constitution of India

Ever-widening horizon of Article 21 is illustrated by the fact that the Apex Court in India, has read into it, inter alia, the right to health, livelihood, free and compulsory education up to the age of 14 years, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and various rights of under-trials, convicts and prisoners. It is important to note that in a majority of cases the judiciary relied upon directive principles of state policy for such extension. The judiciary has also invoked Article 21 to give directions to government on matters affecting lives of general public, or to invalidate state actions, or to grant compensation for violation of fundamental rights.

6.5.1 Right to Live With Human Dignity

In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*⁷¹, the subject matter under consideration regarded the right of a detainee. The petitioner-detainee in that case was a British national and was arrested and detained in the Central Prison, Tihar. While in Jail, the detainee experienced a number of difficulties in meeting with her lawyer, her relations, and she was

⁶⁸*Bheshwar Nath v CIT AIR 1959 SC 149; Nar Singh Pal v Union of India, AIR 2000 SC 1401*

⁶⁹*Supra* n.5.

⁷⁰*Ibid.*

⁷¹(1981) 1 SCC 608

allowed to meet her young daughter only once a month. The restrictions on interviews with her lawyer and daughter were imposed by the authorities by virtue of Clause 3(b)(i)(ii) of the Conditions of detention, issued in exercise of the powers conferred under Section 5 of the COFEPOSA Act. The detainee challenged the constitutional validity of the aforesaid provision and prayed that the jail authorities be directed to permit her to have interviews with her lawyer and members of her family without complying with the restrictions laid down in the aforesaid clause.

The Supreme Court, while allowing the petition, observed that obviously the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. The Supreme Court held, But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, viz. the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. Of course, the magnitude and the content of the components of this right would depend upon the extent of the economic development of the country, but it must in any view of the matter, include right to the basic necessities of life and also the right to carry on such functions, and activities as constitute the bare minimum expression of the human self.

According to Judge Bhagwati, in *Fransis Coralie case*⁷²,

*[w]e think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as, adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and missing and coming along with fellow human beings.*⁷³

⁷²*Id.*

⁷³*Id.*

Similarly, in *P.Rathinam v. Union of India*⁷⁴, the Supreme Court interpreted "life" as the right to live with human dignity and the same does not connote continued drudgery. It takes within its fold some of the fine graces of civilization which makes life worth living and that the expanded concept of life would mean the tradition, culture and heritage of the person concerned.

6.5.2 Right to Earn a Livelihood

In *Olga Tellis v. Bombay Municipal Corporation*⁷⁵, the petitioners before the Apex Court lived on either side of the pavements or in slum areas in the city of Bombay. The then Chief Minister of Maharashtra had made an announcement that all pavement dwellers in the city of Bombay will be evicted forcibly and deported to their respective places of origin or removed to places outside the city of Bombay. The Chief Minister, in furtherance of this announcement, directed the Commissioner of Police to provide necessary assistance to the Bombay Municipal Corporation to demolish the pavement dwellings and deport the pavement dwellers. The announcement was made on the apparent justification that it was a very inhuman existence; the structures were flimsy and open to the elements, and during the monsoon, there was no way these people could live comfortably.

These pavement and slum dwellers approached the Supreme Court relying on their rights under Article 21 of the Constitution of India which guarantees that no person shall be deprived of his life except according to procedure established by law. The pavement/slum dwellers did not contend that they have a right to live on the pavements, but they contended that they have a right to life, a right which cannot be exercised without the means of livelihood. The Supreme Court held that the question which we have to consider is whether the right to live includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right of life conferred by Article 21 of the Constitution is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one

(1994)3 SCC 394

⁷⁵*Supra* n.65.

aspect of the right of life. An equally important facet of that right is the right to livelihood, because no person can live without the means of living – that is the means of livelihood. If the right to livelihood is not treated as a part of livelihood to the point of abrogation, such deprivation would not only denude the life of its effective content and meaningfulness, but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.⁷⁶

The Supreme Court held further that in view of the fact that Article 39(a) and 41 of the Constitution of India require the State to secure to the citizens an adequate means of life and the right work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to livelihood. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21 of the Constitution of India.⁷⁷

6.5.3 Right to Shelter

In *Chameli Singh v. State of UP*⁷⁸, the facts were that the agricultural land of the petitioners was sought to be acquired for construction of houses for Dalits. Notification under Section 4(1) of the Land Acquisition Act, 1894 was issued and declaration under Section 6 was also published, simultaneously there was a dispensation with the inquiry under Section 5-A of the Act. The Appellants before the Supreme Court contended, among other grounds, that on account of acquisition, the appellants will be deprived of their lands, which is the only source of their livelihood. This, they argued, would violate Article 21 of the Constitution. In that context, the Supreme Court held in the aforesaid case that - Shelter for a human being, therefore, is not a mere protection of his life and limb.

⁷⁶*Ibid.*

⁷⁷*Ibid.*
(1996) 2 SCC 549

It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light pure air and water, electricity, sanitation and other civil amenities like roads so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head, but includes the right to all of the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live, should be deemed to have been guaranteed as a fundamental right.

In *Shantistar Builders v. Narayan K. Totame*⁷⁹, the respondent had filed a writ petition under Article 226 of the Constitution before the Bombay High Court challenging permission to the builders to escalate the rates in respect of construction permitted on exempted land under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. The High Court observed that the petition had become infructuous, but directed monitoring of the same. This direction in regard to monitoring had been challenged by the builder in the appeal by special leave.

The Supreme Court held that basic needs of man have traditionally been accepted to be three: food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to a decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every aspect: physical, mental and intellectual.⁸⁰

The Constitution aims at ensuring the fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that every citizen be ensured of living in a well-built comfortable house, but a

AIR 1996 SC 786
⁸⁰*Id.*

reasonable home, particularly for people in India, can even be mud-built thatched house, or a mud-built fire-proof accommodation.⁸¹

6.5.4 Right to Gender Justice and Prevention of Sexual Harassment

In *Apparel Export Promotion Council v. A.K. Chopra*⁸², the respondent was working as a private secretary to the chairman of the council. It was alleged that he tried to molest a female employee of the Council. The woman was working as clerk-typist at the relevant time. Even though she was not trained to take dictation, the respondent insisted that she should go with him to the business center at the Taj Palace Hotel to take dictation from the chairman. Under pressure from the respondent, she went with him. The respondent tried to molest the woman physically in the lift, and the woman had to save herself by pressing the emergency button of the lift. In the Departmental Enquiry, the authority found that the respondent acted against moral sanctions and that his acts against the woman did not withstand the test of decency and modesty. Considering the fact that the actions of the respondent were subversive of good discipline and not conducive to proper working in the organization where there were a number of female employees, the Council removed respondent from service.

The respondent filed a writ petition and the single judge allowed the writ petition, holding that the respondent tried to molest and not that the respondent had in fact molested the complainant. The Division Bench, in a Letters Patent Appeal filed by the Council, upheld the decision of the single judge. In the Special leave petition preferred by the Council, the Supreme Court set aside the decisions of the High Court and thereby affirmed the punishment of removal from service inflicted on the respondent.

The Supreme Court held that the action of the respondent projected unwelcome sexual advances, and such an action would be squarely covered by the term "sexual harassment". The Supreme Court held that the observations made by the High Court to that since the respondent did not "actually molest" the female employee, but only "tried to molest" her did not warrant his removal from service. This is contrary to reality and the High Court thus could lose its sanctity

⁸¹*Id.*
AIR 1999 SC 625

and credibility. The behaviour of the respondent, according to the Supreme Court, did not cease to be outrageous for want of an actual assault or touch by the superior officer.

The Apex Court observed that there is no gain saying that each incident of sexual harassment at the place of work results in violation of the fundamental right to gender equality and the right to life and liberty – the two most precious fundamental rights guaranteed by the Constitution of India. As early as 1993, at the ILO Seminar held at Manila, it was recognized that sexual harassment of women at the workplace was a form of "gender discrimination against women".

The Supreme Court opined that the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse, and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated, and that there can be no compromise with such violations, admits of no debate.

The Supreme Court, while dealing with gender justice, in *Bodhisattwa Gautam v. Subhra Chakraborty*⁸³, directed the petitioner to pay a monthly maintenance of 1000 Indian Rupees to the respondent, Subhra, pending the prosecution a case. The respondent lodged a complaint against petitioner for the offences punishable under Sections 312, 420, 493, 496 and 498A of the Penal Code. The complaint revealed that there was initially a period of romance between the parties during which the petitioner used to visit the house of the respondent. On one occasion he told her that he was in love with her. He ultimately succeeded, on the basis of assurances to marry her, in developing a sexual relationship with her, and the respondent became pregnant. On the insistence of the appellant, the respondent agreed to an abortion. Ultimately, the appellant deceived the respondent.

Appellant filed an application under Section 482 Cr.P.C. for quashing the prosecution. The High Court dismissed the application, and hence Special Leave Petition was filed by the appellant. While dismissing the SLP, the Supreme Court *suo motu* issued notice to the appellant as to why he should not be asked to pay

(1996) 1 SCC 490

reasonable compensation per month to the respondent during pendency of the prosecution proceedings. On being *prima facie* satisfied about the allegations made in the complaint, the matter was disposed of by providing that the appellant shall pay to the respondent a sum of Rs.1000 every month as interim compensation during the pendency of the prosecution.⁸⁴

The Supreme Court observed that unfortunately, a woman in our country belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments. They have, therefore, been the victim of tyranny at the hands of men with whom they fortunately under the Constitution enjoy equal status. Women also have the right to file and the right to liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honorable and peaceful life.⁸⁵

An important step in the area of gender justice was the decision in *Vishaka v. State of Rajasthan*⁸⁶. The petition in that case originated from the gang-rape of a grassroots social worker. In that opinion, the court invoked the text of the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) and framed guidelines for establishing redressal mechanisms to tackle sexual harassment of women at workplaces. The decision came under considerable criticism for encroaching into the domain of the legislature. It must be remembered that meaningful social change, like any sustained transformation, demands a long-term engagement. Even though a particular petition may fail to secure relief in a wholesome manner or be slow in its implementation, litigation is an important step towards systemic reforms.

6.5.5 Right to Good Health

In *Vincent Panikurlangara v. Union of India*⁸⁷, the petitioner sought a prohibition against the import, manufacture, sale and distribution of drugs banned by the Drugs Consultative Committee; the petitioner also asked for cancellation of all licenses authorizing import, manufacture, sale and distribution of such drugs. He

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Supra* n.2.
(1987) 2 SCC 165

also sought a direction to the Central Government to constitute a high-powered authority to investigate the hazards suffered by people of the country on account of such drugs being in circulation, and to suggest remedial measures including awarding compensation. He further prayed directions should be given for framing strict regulations to ensure standards of drug quality and to ensure the weeding out of some injurious drugs from the market.

The petitioner alleged that the drug industry in India is dominated by multinational corporations originally based in the USA, UK, Federal Republic of Germany, Sweden, Japan, and France. According to the petitioner, these corporations have large resources and make huge profits. The control exercised by the Indian government on such corporations is minimal and inadequate. The disease-prone sub-continent of India has been used as pasture ground by these corporations.⁸⁸

The Hathi Committee appointed by the Central Government in its Report submitted in 1974, highlighted the havoc played by these corporations in the Indian scene and pleaded for nationalizing the drug industry in the best interest of the Indian people. The recommendation has not been accepted by the government. According to the petitioner, several drugs banned in the West, after appropriate analytical research are routed into India and on account of India's lack of control and its sluggish enforcement of Indian law, conveniently find their way into the market. What is poison to the human body in the West is equally poison to the people in India, but not knowing the repercussions thereof on people, such drugs freely circulate and are even prescribed for patients.⁸⁹

The Apex Court held that a healthy body is the very foundation for all human activities. In a welfare State, therefore, it is the obligation of the State to create and sustain conditions congenial to good health. The Division Bench of the apex Court referred to some decisions where it decided that it is the fundamental right of everyone in this country, assured under the interpretation given to Article 21, to live with human dignity, free from exploitation. This right derives from the

⁸⁸*Id.*

⁸⁹*Id.*

Directive Principles of State Policy, and particularly clauses (e) and (f) of Articles 39, 41 and 42 of the Constitution.⁹⁰

The Supreme Court also observed that maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of society, of which the Constitution makers envisaged. Attending to public health, as opined by the Supreme Court, therefore is of high priority – perhaps one of the top priorities.⁹¹

In *Consumer Education & Research Centre v. Union of India*⁹², the Supreme Court was concerned by the occupational health hazards and disease of the workmen employed in asbestos industries. The petitioner, an accredited association, filed a petition seeking remedial measures for the protection of the health of the workers engaged in mines and asbestos industries, with adequate mechanisms for diagnosis and control of asbestosis.

The Supreme Court allowed the writ petition and directed the concerned industries to maintain and keep maintaining the health records of every worker up to a minimum of 40 years from the beginning of employment, or 15 years after retirement or cessation of employment, whichever is later. The Supreme Court directed that each and every worker should be insured and, among other things, directed the Inspector of Factories to send all the workers, examined by the ESI Hospital concerned, for re-examination by the National Institute of Occupational Health to detect whether all or any of them are suffering from asbestosis.⁹³

The Supreme Court held that right to health, medical aid to protect the health and vigour to a worker while in service or post-retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48-A of the Constitution of India, and all related articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person.

⁹⁰*Id.*

⁹¹*Id.*

(1995)3 SCC 42

⁹³*Id.*

6.5.6 Right to Ecology/Environmental Protection

The Court utilized PIL to take on central government agencies and state and local government actors in a series of cases involving human rights and the environment. The Court's increased activism in these decisions that did not involve high-stakes or politically controversial issues could be understood as a strategic approach on the part of the justices of the Court. The distinction between activism and assertiveness is therefore a crucial one in terms of the Indian Court's post-Emergency-era power.

This dynamic is well illustrated in the Court's intervention in environmental cases. During this period, senior advocates such as M.C. Mehta brought numerous environmental PILs, in these and other cases, the Court held that the right to life in Article 21 of the Indian Constitution included the right to clean air, clean water, and a healthy environment, and that pollution and industrial hazards infringed upon this right. The Court was active in developing new standards and legal rules to enable the Court to enforce existing environmental laws. For example, the Court effectively developed new doctrines of tort law, adopted the doctrine of strict liability, and invoked equitable and remedial powers to enforce existing statutes dealing with environmental degradation.

The Court in these cases sought to compel the Central and state governments to take actions to implement a set of environmental regulations governing air and water pollution that Parliament had enacted in the early to mid-1980s. In 1985, the Central Government of Rajiv Gandhi created the Ganges River Authority, which was charged with developing a "Ganges Action Plan" for cleaning the river and reducing pollution. The Plan called for the construction of new sewage treatment plants along the river and its main tributaries.

In 1986, the government enacted the Environmental (Protection) Act of 1986, which empowered the Central Government to promulgate regulations to govern polluting industries, and shut down those facilities that failed to comply with those new environmental regulations. The Act built on earlier laws enacted by Parliament in the 1970s and early 1980s that established Pollution Control Boards ("PCBs") at the Central and state government level under the Department of Environment.

Another crucial intervention was made in *Council for Environment Legal Action v. Union of India*⁹⁴, wherein ‘Polluter Pays’ principle was evolved. In *S. Jagannath v.U.O.I*⁹⁵, the Supreme court gave directions to tackle ecological degradation in coastal areas. In recent years, the India, and a special ‘Green bench’ has been constituted to give directions to the concerned governmental agencies to maintain judicial supervision in order to protect our ecological resources from rampant encroachments and administrative apathy. The Court continued its activism in the areas of air and water pollution and exercised broad remedial powers, closing factories and commercial plants found to be in violation of environmental laws. To enable the monitoring of these cases to ensure compliance, the Court maintained them on the docket. After monitoring the situation for three years, the Court in the *Taj Mahal Pollution Case*⁹⁶ ordered industries either to switch to natural gas as an industrial fuel, or relocate from the Taj Mahal “Trapezium” area.

In the *Delhi Vehicular Pollution Cases*⁹⁷, the Court issued a series of orders requiring that buses and other vehicles convert to clean natural gas to help reduce pollution in Delhi. In 1991, the Court ordered the establishment of a high powered committee to make assessments and recommendations regarding measures to reduce pollution, including levels of sulphur and other pollutants. In 1998, the Court issued a far-reaching order mandating the conversion of the Delhi Transport Corporation’s fleet of diesel-fueled buses to compressed natural gas (“CNG”), and setting a timeline for such conversion. Four years later, in April 2002, the Court expressed its frustrations with the failure of government agencies to implement those orders, and issued a new order directing the immediate conversion of the buses. Despite persistent resistance in the early 1990s, the Court secured some compliance in this case from the Central and Delhi Governments, and as of August 2014, Delhi had the largest fleet of CNG buses in the world. This was due in part to the emergence of a strong movement for clean air led by a coalition of advocacy groups, and aided by extensive media attention to the problem of pollution in India.

AIR 1996 SC 1446
AIR 1997 SC 811
(1997)2 SCC 353
(1991) 2 SCC 353

6.5.7 Accountability and the Right to Information

Beginning in the mid-1990s, the national media and civil society groups played a key role in exposing corruption in the Central Government. In the mid-1990s, several reform groups joined together as part of the National Campaign for the People's Right to Information ("NCPRI"). The Campaign was organized by Aruna Roy, Shekhar Singh, and other groups, such as the Mazdoor Kisan Shakti Sangathan (a workers' and farmers' advocacy organization). This movement pushed for right-to-information legislation and reforms aimed at promoting governmental accountability.

Responding to growing agitation over perceived corruption and criminality, the Central Government ordered the Law Commission of India to review the Representation of the People Act of 1951 in order to "make the electoral process more fair, transparent, and equitable and to reduce the distortions and evils that [had] crept into the Indian electoral system" and to recommend reforms.⁹⁸

In a 1999 report, the Law Commission recommended that candidates with prior criminal convictions be prevented from running for seats in the Lok Sabha.⁹⁹ The report also recommended that all Lok Sabha candidates be required to disclose prior criminal records, and a statement of the financial assets of the candidate and the candidate's family.

The NCPRI movement also included litigation in the High Courts and the Supreme Court. In 1999, the Association for Democratic Reforms filed a PIL claim in the Delhi High Court, seeking directives to implement the recommendations of the Law Commission report, and orders requiring the Election Commission to implement the proposed disclosure requirements.¹⁰⁰ In a significant decision, the Delhi High Court held that citizens had a fundamental right to receive information regarding the criminal activities and financial assets of candidates.¹⁰¹ The Delhi High Court then ordered the Election Commission to issue new disclosure requirements regarding candidates' criminal records,

⁹⁸*Union of India v. Association for Democratic Reforms*, (2002) 5 SCC 294

Law Commission of India, 117th Report on Reform of the Electoral Laws (1999), available at <http://www.lawcommissionofindia.nic.in/lc170.htm>

¹⁰⁰*Supra* n.98.

¹⁰¹*Id.*

financial assets, and educational background for Lok Sabha and State Legislative Assembly.¹⁰²

The BJP government appealed this decision to the Supreme Court, and the Congress Party also intervened in the action. On appeal, the People's Union for Civil Liberties joined the action, filing a PIL writ petition in support of heightened disclosure requirements.

The Court upheld most of the Delhi High Court's decision with some minor modifications in the disclosure requirements, and issued directions to the Election Commission to promulgate these revised disclosure requirements. The Commission issued disclosure requirements in conformity with the Court's decision soon thereafter.

The Government responded by attempting to restrict and override the Court's decision, and, in August 2002, the Government enacted the Representation of the People (Amendment) Ordinance. Section 33B of this new law was meant to overturn the Supreme Court's earlier decision in *Association for Democratic Reforms*¹⁰³. Section 33B provided:

*Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election which is not required to be disclosed or furnished under this Act or the rules made thereunder.*¹⁰⁴

In *People's Union for Civil Liberties v. Union of India*¹⁰⁵, the Court struck down Section 33B of the Act as unconstitutional, and held that Section 33B exceeded Parliament's legislative authority under Article 19(1)(a).

Ultimately, the Court's orders were implemented in the 2003 and 2004 elections. And finally in 2005, Right to Information Act came into force in India. It provides access to information to all the citizens of India, to the information which are held by the Public Authorities. Thus the Act ensures a greater accountability and transparency in the governance.

¹⁰²*Id.*

¹⁰³*Supra* n. 98.
Representation of the People Act, 1951.
AIR 2003 SC 2363

6.5.8 Right to Food

In *People's Union for Civil Liberties v. Union of India*¹⁰⁶, the Court recognized that the right to food was an element of the right to life in Article 21 and therefore justiciable, and that the government had a positive duty to help prevent malnutrition and starvation. Since 2001, the Court has issued a series of orders directing state governments to implement Central Government welfare programs, including national grain subsidies for the poor, a mid-day meal program in schools, and the Integrated Childhood Development Services plan ("ICDS"). The ICDS included immunization, nutrition, and pre-school education programs. The Court appointed commissioners to help oversee these orders, and recently ordered that the Indian Government pay 1.4 million rupees to combat starvation and malnutrition through the implementation of the ICDS.¹⁰⁷ Compliance with these orders has been inconsistent across states.

6.5.9 Right against Custodial Torture

The Court has also actively asserted a role in addressing issues of police custodial violence and police reform. In response to PILs documenting widespread cases of custodial violence and killing by police, the Court in the *D.K. Basu case*¹⁰⁸, established a set of national guidelines to govern how the police take suspects into custody and interrogate suspects, and then issued orders to state governments to implement these guidelines. Compliance with these orders has been poor, as the state has faced significant resistance from state governments and police bureaucracies.

In the *Prakash Singh Case*¹⁰⁹, the Court issued guidelines for national police reform, and ordered the creation of a National Police Commission to oversee the implementation of these guidelines. Again, however, the Court has faced significant resistance from state governments and bureaucracies in the implementation of these directives.

¹⁰⁶(2007) 1 SCC 719

¹⁰⁷*Id.*

¹⁰⁸*Supra* n.31

¹⁰⁹ Writ Petition (civil) 310 of 1996

6.5.10 Right to Compensation

In *Rudal Sah v. State of Bihar*¹¹⁰, Supreme Court through Chief Justice Chandrachud held, "Article 21, which guarantees the right to life and liberty will be denuded of its significant content if the power of this court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured is to mulct its violators in the payment of monetary compensation." There must be direct and proximate nexus between the complaint and the arrest for the award of compensation under sec. 358 of the Cr. P.C. Any person is entitled to compensation for the loss or injury caused by the offence, and it includes the "wife, husband, parent and child" of the deceased victim.

In *Sarwan Singh's case*¹¹¹ court held that in awarding such compensation, the court is to take into consideration various factors such as capacity of the accused to pay, the nature of the crime, the nature of the injury suffered and other relevant factors. "Power to award compensation to victims should be liberally exercised by courts to meet the ends of justice... in addition to the conviction; the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of accused. It is not alternative to but in addition thereto. The payment of compensation must be reasonable. The quantum of compensation depends upon facts, circumstances, the nature of the crime, the justness of the claim of the victim and the capacity of the accused to pay. If there are more than one accused, quantum may be divided equally unless their capacity to pay varies considerably. Reasonable period for payment of compensation, if necessary by instalment may be given. In a certain case the Court held that where the amount fixed was repulsively low so as to make it a mockery of the sentence, it would be enhanced; the financial capacity of the accused, enormity of the offence, extent of damage caused to the victim, are the relevant considerations in fixing up the amount. The court in *Balraj v. State of U.P.*¹¹² held that the power to award compensation under section 357 (3) is not ancillary to other sentences but it is in addition thereto.

¹¹⁰*Supra* n.40.
AIR 1957 SC 637
AIR 1995 SC 1935

Universal declaration of Human Right, 1948 under Article 5 says that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and also Article 8 of Universal Declaration of Human Rights and Article 14 of International covenant on civil and political Rights in Provides for compensation for violation of fundamental Rights.

The court has also granted monetary compensation to victims of custodial violence in many cases. In a landmark judgment of *Nilabati Behra case*¹¹³ the apex court awarded compensation of Rs. 1,50,000/- to the mother of deceased who died in police custody due to torture. In *D.K. Basu v. State of West Bengal*¹¹⁴, the Apex court held that compensation can be granted under the public law by the Supreme Court and High Court in addition to private law remedy for tortuous action and punishment to wrong doer under criminal law for established breach of fundamental rights.

6.6 Directive Principles of State Policy: Ideal of Socio- Economic Rights in India

The directive principles of state policy contained in Part IV of the constitution (Articles 36-51) set out the aims and objectives to be taken up by the States in the governance of the country. The directive principles are the ideals which the union and state governments must keep in mind while they formulate policy or pass a law. They lay down certain social, economic and political principles, suitable to peculiar conditions prevailing in India.

Dr. B. R. Ambedkar in the constituent assembly emphasized on the objective to bring about economic democracy and the idea to achieve it. He said that:

“Having regard to the fact there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used, in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reaching of the idea of economic democracy, to strike in their own way, to persuade the electorates that it is the best way of reaching economic democracy, the fullest opportunity to act in the

¹¹³Supra n.30.

¹¹⁴Supra n.31.

*way in which they want to act. It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing. It is therefore, no use saying that the directive principles have no value. In any judgment the directive principles have a great value; for they lay down that our ideal is economic democracy.”*¹¹⁵

Part IV of the Constitution commences with Article 37. According to Article 37, the directive principles, though they are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making law, they are expressly made non-justifiable. On the other hand, fundamental rights are enforceable by the courts under Article 32 and the courts are bound to declare as void any law that is inconsistent with the fundamental rights.

6.6.1 The Early Notions of Judicial Interpretation of Directive Principles in India

In *State of Madras v. Srimathi Champakam Dorairajan*¹¹⁶, the Supreme Court observed that “The directive principles of state policy which by Article 37 are expressly made unenforceable by courts cannot override the provisions of Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. Directive principles of state policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights.” It held the chapter on fundamental rights as sacrosanct and in case of any conflict between fundamental rights and directive principles, the fundamental rights would prevail.

The Court’s attitude in this case reflected the strict adherence to the enforceability of fundamental rights and unenforceability of directive principles. It reinstated the non-rigid nature of directive principles in the constitution and highlighted their major drawback; that of non-justifiability. The *Champakam Dorairajan case*¹¹⁷ defined the status of the directive principles as subordinate to that of fundamental rights.

¹¹⁵ *Constituent Assembly Debates, Vol. III. At p. 494-95.*
AIR 1951 SC 226

¹¹⁷ *Id.*

This strict approach continued in *Muir Mills v. Suti Mills Mazdoor Union*¹¹⁸, where the Directive principles were invoked in argument over workmen's rights to bonus payments. Muir Mills was not even a question of enforcement, as it involved only a question of interpretation. Nonetheless, the Court refused to use the Principles even as interpretive guides, preferring to adhere instead to traditional common law employment concepts of wages and bonuses.

In this early phase of the Court's history, therefore, the Directive Principles were a classic example of what James Madison referred to as "parchment barriers". In the case of, *Mohd. Hanif Quareshi & Others v. The State Of Bihar*¹¹⁹ the petitioners, who were engaged in the butcher's trade and its subsidiary undertakings, challenged the constitutional validity of three Acts that together put a ban on the slaughter of animals; cows and her progeny; cows, buffaloes, heifers, bullocks and bulls, respectively. No exception was made in these Acts for bona fide religious practices. The three Acts were enacted in pursuance of the directive principle of state policy contained in Article 48 of the constitution. The petitioners challenged the validity of the Acts on the ground that they were violative of their fundamental rights under Articles 14, 19(1) (g) and 25 of the Constitution. The court held that the directive principles laid down in Part IV of the constitution have to conform to and run subsidiary to the fundamental rights in Part III.

The approach of the court in dealing with matters relating to conflicts between fundamental rights and directive principles was rigid. The principles applied by the courts around that time were streamlined to strictly interpret Article 37 and make a clear stand on the supremacy of the fundamental rights. This approach makes us question the real intention of the constituent assembly in including the directive principles of state policy in the constitution.

In his initial constituent assembly speech Dr. Ambedkar repudiated the objection that the Directive principles were no more than pious wishes, arguing that no legal force did not imply no binding force. Ambedkar's use of the word "binding" (as opposed to "political" or "moral"), a word that is equally at home in both a legal and a non-legal context, seems to indicate that the Principles,

AIR 1955 SC 170
AIR 1958 SC 731

while falling well short of enforceability, were not meant to be legally irrelevant either.¹²⁰

6.6.2 Development of Socio-Economic Rights Through Judicial Interpretation in India

The Courts' attitude underwent a change in the subsequent years as it revised the yardsticks for determining the validity of the directive principles. The development of a broad minded and open ended outlook took time to develop and was not uniform initially. The development should be traced chronologically to best understand the revolution in the judiciary's mindset.

In *State of Bombay v. Balsara*¹²¹, of consumption of intoxicating drink except for medical purposes to support its d the Supreme Court gave weight to Article 47 which directs the state to bring about prohibition decision that the restriction imposed by the Bombay Prohibition Act was a reasonable restriction on the right to engage in any profession or carry on any trade. This was a positive step towards recognizing the importance of directive principles in the governance of the country while achieving humanitarian objectives.

When the court dealt with Zamindari abolition cases its attitude was considerably modified. In *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh*¹²², the court held that our Constitution gives protection to the right of private property by article 19(1)(f) not absolutely but subject to reasonable restrictions to be imposed by law in the interest of the general public under clause (5) and grants the State the power, if it may so exercise, under Article 31, to deprive the owner of his property by authority of law subject to payment of compensation if the deprivation is by way of acquisition or requisition of the property by the State. It is thus quite clear that a fresh outlook which places the general interest of the community above the interest of the individual pervades our Constitution. it further observed that 'it cannot be overlooked that the directive principles set forth in Part IV of Constitution are not merely the policy of any particular political party but are intended to be principles fixed by the Constitution for directing the State policy whatever party may come into power.'

¹²⁰ *Constituent Assembly Debates, Vol. VII.*
AIR 1951 SC 318
1952 SCR 885

In *Re Kerala Education Bill*¹²³, the Supreme Court observed that though the directive principles cannot override the fundamental rights, the court should not completely ignore them in their interpretation of fundamental rights. While reaffirming the primacy of the fundamental rights, the Court nonetheless opened the gates for Directive principles to play a tangible, if subsidiary role in interpretation, holding that the “scope and ambit” of the fundamental rights should be determined in such a harmonious way, that full effect is given both to Part III and Part IV.

In the aftermath of *In Re Kerala Education Bill*, the Court made the Directive principles an integral part of any enquiry into the validity of fundamental rights restrictions. *Jugal Kishore v. Labour Commissioner*¹²⁴ referred to directive principles of state policy, citing no less than three of the Principles to hold that notice requirements and other restrictions upon employers’ discretion were restrictions in interests of the general public. Similarly, in *Chandrabhawan Boarding & Lodging Bangalore v. State of Mysore*¹²⁵, the Court upheld state minimum wage legislation, cursorily dismissing the 19(1) (g) claims of the employers by stating that ‘Freedom of trade does not mean freedom to exploit.’ In *Chandrabhawan*, the Court observed that the bill of rights and the directive principles were “complementary and supplementary” to each other.

In *Kesavanda Bharti v. State of Kerala*¹²⁶, the Supreme Court said that fundamental rights and directive principles aim at the same goal of bringing about a social revolution and establishment of a welfare state and they can be interpreted and applied together. They are supplementary and complimentary to each other. It can well be said that directive principles prescribed the goal to be attained and the fundamental rights laid down the means by which that goal is to be achieved. The same sentiments were echoed in the case of *Minerva Mills v. Union of India*¹²⁷, where it was stated that there is no conflict between the directive principles and the fundamental rights. They were said to be complementary to each other. It is not necessary to sacrifice one for the other. Chandrachud J. speaking for the majority observes:

AIR 1957 SC 956

¹²⁴AIR 1958 Pat 442

¹²⁵AIR 1970 SC 2042

¹²⁶*Supra* n.1 ¹²⁷*Ibid.*

*“But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner, the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal human freedoms.”*¹²⁸

The judgment in *Minerva Mills*¹²⁹ was reduced to the status of obiter which later created confusion regarding the validity of directive principles. The confusion was removed by the Supreme Court in *State of Tamil Nadu v. L. Abu Kavur Bai*¹³⁰. The Court held that although the directive principles are not enforceable yet the Court should make a real attempt at harmonizing and reconciling the directive principles and the fundamental right and any collision between the two should be avoided as far as possible.

In view of this, the courts took over the responsibility to interpret the provisions of the constitution in such a way so as to ensure the implementation of the directive principles and to harmonize the social objectives underlying the directives with the individual rights.

In *Tamil Nadu Freedom Fighters v. The Government Of Tamil Nadu*¹³¹ the court made an interesting observation when a registered society moved the court seeking to restrain the State of Tamil Nadu from manufacturing and thereby doing business or trade in the so-called cheap liquor inspired by Article 47. ‘The question in the instant case is not whether the court can direct the State to implement the directive principle of State policy but whether the State can ignore the directive principle and make a law which is opposed to the State policy. There can be no State policy which is opposed to public interest. Everything which is in consonance with the directive principle of State policy in Part IV of the Constitution must ordinarily be in the public interest.

This case reflected the progressive mind-set of the judiciary. Directive principles were no longer left to be dead letters in the constitution, but were now being recognized for their indispensable nature in the process of governance. The court highlighted the need for the State to conform to directive principles in its law making process. The focus was shifted from the court’s responsibility of

¹²⁸*Ibid* at 1807

¹²⁹*Id.*
AIR 1984 SC 626
(1993) 2 MLJ 254

determining the status of the directive principles to the State's responsibility of not ignoring them. Public interest was yet again emphasized to be the driving force in all legislations and public dealings.

A case similar to *Mohd. Hanif Qureshi case*¹³² came to light in the year 2006 in *State of Gujarat v. Mirazpur Moti Kureshi Kassab Jamat*¹³³. However this case was principally different in terms of the judgment as the Court did not degrade directive principles to a status subsidiary to that of fundamental rights. Instead the seven Judge constitutional Bench of the Supreme Court following its number of earlier decisions held that directive principles are relevant in considering the reasonability of restrictions imposed on fundamental rights. It is a constitutional mandate under Article 37 that in making laws the state shall apply the directive principles. The opinion of the judges in this case was in sharp contrast to that opined by judges in *Mohd. Hanif Qureshi case*¹³⁴. It definitely was a welcome change.

The Courts were no longer focused on just the fundamental rights, but a creative combination of directive principles and fundamental rights. In this process, the Court infused the concept of social justice into fundamental rights and did away with the rigid conception of them being only individual rights.

Articles 38 and 39 embody the jurisprudential doctrine of 'distributive justice'. The constitution permits and even directs the State to administer what may be termed 'distributive justice'. The concept of distributive justice in the sphere of law-making connotes, inter alia, the removal of economic inequalities rectifying the injustice resulting from dealings and transactions between unequals in society. Article 38(1) provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice- social, economic and political- shall inform all the institutions of national life. This directive only reaffirms what has already been said in the Preamble according to which the function of the Republic is to secure to all its citizens social, economic and political justice.

¹³²*Supra* n.119.
(2005) 8 SCC 534

¹³⁴*Id.*n.132.

Pursuant to Article 39 (d), Parliament enacted the Equal Remuneration Act, 1976. The directive principle contained in Article 39 (d) and the Act passed thereto could be judicially enforced by the court.

The Supreme Court in *Randhir Singh v. Union of India*¹³⁵ observed that though not a fundamental right, without the right to equal pay for equal work, the concept of equality as a fundamental right would be meaningless. Dealing with the plea of equal pay for equal work, the Court observed:

*“But, it certainly is a constitutional goal... Directive Principles, as have been pointed out in some of the judgments of this Court have to be read into fundamental right as a matter of interpretation... To the vast majority of the people the equality clause will have some substance if equal work means equal pay.”*¹³⁶

The court therefore construed Article 14 and 16 in the light of the preamble and Article 39 (d) and held that “pay for equal work is deducible from those Articles and may be applied properly applied to cases of unequal scales of pay based on no classification or wrong classification”.¹³⁷

In another landmark judgment, *Unnikrishnan v. State of A.P.*¹³⁸, the Supreme Court held that the ‘Right to education’ up to the age of 14 years is a fundamental right within the meaning of Article 21 of the constitution, but thereafter the obligation of the State to provide education is subject to the limits of its economic capacity. The Court declared that “the right to education flows directly from right to life.” The Constitution (86th Amendment) Act, 2002 substituted a new article for Article 45 which provides that “the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.” This has been necessitated as a result of making the right to education of children up to 14 years of age a fundamental right. Through this judgment the court raised the status of a directive principle to that of a fundamental right, essentially signifying its fundamental importance in achieving social justice.

(1995) 5 SCC 730

¹³⁶*Id.*

¹³⁷*Id.*

AIR 1997 SC 699

6.7 Criticism of Judicial Activism

The concept of judicial activism has been put under scanner by the critic since its inception. It has been criticized on several counts. One such criticism is that the PIL strategy is a status quo approach of the court to avoid any change in the system and so it is a painkilling strategy which does not treat the disease. It is argued that the problems of the poor, disadvantaged and the deprived cannot be solved by any trickle down method, therefore whatever the court is doing in PIL is merely symbolic, simply to earn a legitimacy for itself which it has lost over the years.

The critics have further argued that because of judicial activism, separation of power has been under stake. The judiciary is interfering in the field of executive and several times it has become difficult for executive to deal with new kind of problem with new strategy as it is anticipated that judiciary will struck down this type of strategy.

It is further argued that by extending its jurisdiction through PIL the court is trying to bite more than what it can chew. Lawyers have started complaining that much of the court's time is being consumed by PIL and hence for the court a postcard are more important than a fifty-page affidavit. It is further argued that at a time when the figures of pending cases before the courts are astronomical, this new area of litigation would spell a total collapse of the judicial system in India as it would open floodgates of litigation. However, the history of PIL in India does not support this apprehension. Contrary to the popular belief fresh PIL filing has registered a decline in the subsequent years.

According to one opinion, the misuse of PIL has reached ridiculous limits and petitions are being filed all over the country before the writ courts for matters like student and teacher strike, shortage of buses, lack of cleanliness in hospitals, irregularities in stock exchange, painting of road signs, Dengue fever, examinations and admissions in universities and college etc. one can go on but the list will not be exhaustive. Classical case came up when PIL petition was filed in Delhi High Court to seek direction to the United Front Government at the centre (1997) to form a coalition cabinet with the congress. A petition (1999) was filed for invalidating no-confidence vote against the Vajpayee Government.

Power and publicity apart, many judges have to entertain PIL because of the liberalization of the rule of locus standi and the concept of social justice for the poor, oppressed and exploited sections of the society. Thus indiscriminate use of this strategy is bringing it into disrepute because it has become the privilege of the privileged to have access to the court. In fact, majority of the petitions either should not have been filed or should not have been entertained. PIL must be confined to cases where justice is to be reached to that section of the society which cannot come to the court due to socio-economic handicap or where a matter of grave public concern is involved.

The former Chief justice of India, justice Ahmadi has stated “Sometimes this Activism has the potential to transcend the borders of Judicial Review and turn into populism and excessive Activism according to him is “populism when doctrinal effervescence transcends the institutional capacity of the judiciary to translate the doctrine into reality, and it is excessive when a court undertakes responsibilities normally discharged by other coordinate organs of the government”.

Conservatives tend to argue that judicial activism is the process of ignoring, or at least selectively choosing precedent in order to hand down rulings which dramatically expand personal freedoms. They also complain that the doctrine of stare decisis is sometimes used to trump up the original meaning (or, in some cases, the original intent) of the text, or that the text is given so broad a construction so as to render it almost infinitely malleable. To others, judicial activism implies going beyond the normal constraints applied to jurists and the Constitution gives jurists the right to strike down any legislation or rule against any precedent if it goes against the Constitution. Thus, ruling against majority opinion or judicial precedent is not necessarily judicial activism unless it is active, specifically in terms of the Constitution. Many are critical of judicial activism as an exercise of judicial power, which displaces existing law or creates more legal uncertainty than is necessary, whether or not the ruling had some constitutional, historical or other basis. This, it is argued, violates the doctrine of separation of powers. Whatsoever may be the case, one can negate the fruits of justice which the common public got due to this enhanced and activist role of the judiciary.

6.8 A Sum Up

Our Founding Fathers while drafting the Preamble gave precedence to Justice over Liberty, equality and fraternity by placing these philosophical terms in that particular order. Unless there is justice, liberty is meaningless. Justice and liberty together secure equality. There can be no fraternity unless there is justice, liberty and equality. In the chain of philosophical thoughts underlining the Constitution, the most significant is the concept of Justice. Duly honouring justice lays the foundation for the welfare and progress of society. It holds civilized beings and civilized nations together. In this scheme of things the role of judiciary becomes very important.

Judiciary, which is one of the three important pillars of our democracy, is the final interpreter of the Constitution and laws. It helps maintaining the social order by swiftly and effectively dealing with those on the wrong side of the law. As an upholder of the Rule of Law and enforcer of the right to liberty, the role of the Judiciary is sacrosanct. The faith and confidence people have reposed in the Judiciary is testimony to the fact that the Judiciary has since 1950 responded to the need of the hour. For justice to have meaning to the people, it must be accessible, affordable and quick.

The judiciary has played a crucial role in evolving itself from its conventional role of interpreting the statute as legislated to the enhanced role of delivering justice to the masses by creative interpretation of the existing law and in absence of it making law to meet the needs of the society. In this process judiciary created a Magical Wand named Public Interest Litigation for delivering justice to the backward, poor, denied, downtrodden, destitute, deprived, depraved, disadvantaged handicapped, have-nots, half hungry, half clad millions, ignorant, illiterate, indigent, incapable, little Indian, lost and lonely, unaware, forlorn, forgotten, exploited, lowly and lost, weak, vulnerable and underprivileged class of society.

The judiciary took time, but it did eventually broaden its perspective in order to achieve the constitutional goals enshrined as 'Directive Principles of State Policy'. The journey was not a smooth one with cases like *Champakam Dorairajan*, *Mohd. Hanif Qureshi* and the likes; completely disregarding the

importance of the directive principles. But a paradigm shift in the judiciary's approach was seen with the cases like in *Re Kerala Education Bill*, *Abu Kavar Bai*, *Kesavananda Bharti* etc.

With the development of the judicial ideology regarding the status of directive principles over the years, some directive principles were elevated to the status of fundamental rights. Such a change is nothing short of a judicial miracle in a country where during the drafting of the constitution, directive principles were being considered to be scrapped altogether. The development process was a slow and dragged one but the end result has been worth the constitutional struggle.

The changed approach was developed by a new judicial technique of construing the provisions contained in Part III of the Constitution. The technique was of giving fundamental rights a wider scope with the help of the concepts contained in directive principles. The court began to integrate the concepts of Part IV of the constitution with the fundamental rights, thereby creating a wide dimension which focused on delivering justice and equality in totality.

The judicial inclusion of socio-economic objectives as fundamental rights can be criticized as an unviable textual exercise, which may have no bearing on ground-level conditions though the unenforceability and inability of state agencies to protect such aspirational rights could have an adverse effect on public perceptions about the efficacy and legitimacy of the judiciary. Also, a question arises whether poor enforcement is a sufficient reason to abandon the pursuit of rights whose fulfillment enhances social and economic welfare. At this point, one can recount Roscoe Pound's thesis on law as an agent of social change. The express inclusion of legal rights is an effective strategy to counter-act social problems in the long-run. At the level of constitutional protection, such rights have an inherent symbolic value which goes beyond empirical considerations about their actual enforcement.

However now with the rapid growth of the Indian economy it can be said that the government has enough resources to make the directive principles enforceable. Therefore the judiciary has stepped up to give preference to the directive principles over fundamental rights in order to ensure justice

Judicial activism in India encompasses an area of legislative vacuum in the field of human rights. Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the 'rule of law'. The judiciary, however, can act only as an alarm clock but not as a timekeeper. After fiving the alarm cell it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution.

It would be seen that judicial activism which is the search for the spirit of law, has been profitably used by powerless minorities, such as bonded labour, prison inmates, under trial prisoners, sex workers and such other powerless minority groups as are crusading for protection of human rights of women and children or seeking redressal against governmental lawlessness, or relief against developmental policies which benefit the haves at the cost of the have-nots.

While exercising the power of judicial review, exercise proper restraint and base their decisions on recognized doctrines or principles of law, judicial activism and judicial restraint are two sides of the same coin. It is therefore essential to remember that judicial restraint in the exercise of this functions is of equal importance for the judiciary while discharging its judicial obligations under the Constitution. With a view to see that judicial activism does to become 'judicial adventurism', the courts must act with caution and proper restraint. They must remember that judicial activism is to an unguided missile and failure to bear this in mind would lead to chaos. People would, thus, not know which organ of the state to look to for ensuring check on the abuse or misuse of power.

Though there are lots of criticism against judicial activism, in spite of that no one would suggest to abolish the strategy which the courts have innovated to reach justice to the deprived section of the society. Anything contrary would be like suggesting the abolition of marriage in order to solve the problem of divorce. This socio-economic movement generated by court has at least kept alive the hope of the people for justice and thus has weaned people away from self –help or seeking redress through a private system of justice .It is necessary for sustaining the democratic system and the establishment of a rule of law in society. Therefore, one has to be both adventurous and cautious in this respect and the judiciary has to keep on learning mostly by experience.

Recently, the legislatures in India has taken certain initiatives that seek to make socio-economic rights enforceable in India like, the Right of Children to Free and Compulsory Education Act, 2009; the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), 2005 and the National Food Security Act, 2013 etc. They seek to make the right to education, right to work, right to food enforceable. All these rights have previously been subject matters of cases brought by civil society groups before the Indian Supreme Court. And in all these cases, the Indian judiciary had made these rights enforceable through the right to life even before these Acts were formulated.

Public Interest litigation must not be allowed to degenerate into Private Publicity or Political or Paise Interest litigation. Finding the delicate balance between ensuring justice and maintaining institutional legitimacy is the continuing challenge before the higher judiciary.

Needless to emphasise that the strategy of PIL must be used by the courts carefully, prudently and with discrimination because any discriminate use of it would bring it into contempt both from the public and the government

.Therefore, the correct approach of the court in PIL cases should be a judicious mix of restraint and activism determined by the dictates of existing realities. Any misuse of this strategy must be strongly discouraged by the courts.

CHAPTER-7

CONCLUSION AND SUGGESTIONS

To-day our jurisprudence, the advances made by natural justice for exceed old frontiers and if judicial creativity be lights penumbral areas it is only for improving the quality of government by injecting fair play into its wheels... Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity.¹³⁹

-Hon'ble Supreme Court

The power of judicial review is an integral part of Indian Constitutional system and without it, there will be no government laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution.

Judicial review is the constitutional weapon to interpret and enforce the fundamental law which is the solemn will of the sovereign people and to adjudicate the constitutional violations and declare the legislative law void if it is in derogation of the Constitution. It is a great institution for maintaining and preserving harmony between the rulers and the ruled and is highly instrumental in the creation of an ideal society by fulfilling the economic and social needs, by applying the Constitution to life and by reconciling the conflicting claims of the various elements in the society. Thus to create harmony between the fundamental law and the legislative law is the ultimate aim and object of judicial review in a modern democracy.

The origin of the power of judicial review of legislative action may well be traced to the classical enunciation of the principle by Chief Justice John Marshall

¹³⁹*Mohinder Singh Gill v. Chief Election Commissioner*, AIR 1985 SC 851

of the US Supreme Court in the year 1803, in *Marbury v. Madison*. But the origins of the power of judicial review of legislative action have not been attributed to one source alone. So when the Framers of our Constitution set about their monumental task, they were well aware that the principle that courts possess the power to invalidate duly-enacted legislations had already acquired a history of nearly a century and a half.

The essence of a federal Constitution is the division of powers between the central and the State government. This division is made by a written Constitution which is the supreme law of the land. There must be an independent and impartial authority to decide disputes between the Centre and the States or the States inter se. This function has been entrusted to the Supreme Court. It is the final interpreter and the guardian of the Constitution. This power is of paramount importance in a federal constitution judicial review.

Where Parliamentary sovereignty prevails and the legislature enacts atrocious, tyrannous and unjust laws or laws in violation of the constitution, the remedy available to the people is to remove the Government itself, or to get such law repealed by constitutional agitations, or to attract the mind of the legislatures by strong public opinion to amend or repeal such laws. But where the constitutional supremacy is in force, people have another effective remedy also, i.e. of challenging the legality of the law in law courts and in such case, they may not have any necessity of ending the Government itself. The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual reviews just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eye of law.

In the democratic state the court is the essential organ for maintaining the fundamental object of the constitution and for keeping the legislature within the limits assigned to its authority by the constitution for saving the people from the dangers of democratic tyranny and for materializing the aim of the constitution of establishing a harmonious and cohesive society based on ideal common morality.

In England, unlike other jurisdictions, Parliament is supreme. Hence only the actions and decisions of public authorities can be reviewed by the judiciary. The laws passed by the Parliament cannot be reviewed by the judiciary, except in

circumstances where it is contrary to the law of European Union. Though India follows the Parliamentary form of democracy, it is the constitution which is supreme. Therefore, not just legislation, but even a constitutional amendment which seeks to change the “basic structure” of the constitution can be called in question (for review) before the courts. The Constitution ensures that an administrative action is subject to judicial review by providing for a comprehensive scheme of judicial control over the administration under Article 32, 136, 226, and 227.

The Constitution of India while conferring power of judicial review of legislative action upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review.

The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. The judges of the superior courts have been entrusted with the task of upholding the constitution and to this end, have been conferred the power envisaged by the constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations.

In all history, no republic had as rich a heritage of the system of judicial review as in India. The nascent Republic of India possessed enormous sources, materials and precedents from its own as well as from several other countries which afforded it magnificent opportunity to build up a unique tradition for a new democracy based on constitutional supremacy. The roots of judicial review go long back into ancient India, ancient and medieval Europe, pre-Revolution England, and into Colonial and Post-Constitution regimes in the United States of

America and of certain other countries which had a heritage of judicial review from the United States, such as Canada, Australia, Ireland, etc.

India which had the heritage of the Rule of Law from ancient India acted strenuously and assiduously towards establishing the judicial control of the legislative powers. As a result the provisions for judicial review were incorporated in the Constitution itself. This facilitated the task of the Judiciary and relieved it of much strain. But subsequent governmental activates concerns constitutional amendments, curbing the fundamental rights and taking away of the power of judicial review to a considerable extent, have greatly jerked the democratic ideals and standards of the national. But, recent decisions of the Supreme Court of India in upholding the individual rights and liberties have yielded great pressures on the political discretions of the authorities in power.

In adopting the principle of judicial restraints in judicial review the Indian Judiciary has relied upon the American precedents. But circumstances in the two countries are mostly dissimilar. In the United States of America there was no specific provision of judicial review in the Constitution and the American Judges had to take great pains in establishing the system of judicial review and as such judicial restraint is too severe and stringent there. The Indian Judges have to evolve some more progressive models for judicial restraint. As for instances, in India, as in America, the court cannot take up the constitutional question suo moto nor can there be a case to decide the validity of a legislative Act if any party is not directly and positively affected by the Act. This system requires a complete modification. If the citizen by its very start had to check the injury the matter can be permitted to the taken to the court of law by any one and at any time. If the constitutionality can be challenged only in a case before the court, it becomes a matter of chance only, as it is possible that the lawyer engaged in that particular case may fail on detect unconstitutionality or a litigant may not be available to challenge the constutionality for a pretty long time. When a legislature has no right to enact any law in violation of the Constitution such law should be challengble in a court of law in any case and by any one and there should not be any impediment to it.

The Constitutional law is mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental function among them and the definition of their mutual relation. No doubts our Constitution Makers have incorporated Fundamental Rights in Part III and made them immune from interfere by laws made by the State. However, it is difficult in the absence of clear indication to the contrary, to support that they also intended to make those rights immune from constitutional amendment. The terms of Article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intension clear by adding the proviso to that effect. Thus, there are two Articles each of which is widely phrased but conflicts in its operation with the other. Harmonious construction requires that one should be read as control and qualified by the other. Therefore, in the context of Article 13, “law” must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Article 13(2) does not affect amendments under Article 368.”

A constitution which is drawn up to meet the needs of the society at a given time cannot be adequate to meet the changing needs of the modern welfare state. It is realized that a Constitution however carefully projected into the future cannot aspire to make permanent the political solutions. Hence, the necessity of providing for a process of Constitutional amendment which is kept sensibly elastic is neither too rigid to invite with changing conditions revolutionary rupture, nor too flexible to allow basic modifications without the consent of the qualified majorities. The framers of the Indian Constitution, drawing upon the experience of other federal constitutions, have tried to avoid the defects revealed and difficulties experienced in the prescribed modes of the amendments of those constitutions. The amending process was devised having regarded the political conditions and the concept of the framers of the Indian Constitution as regard the role which a Constitution has to play in molding the life of the people, and in the achievement of a welfare state. It is devised to facilitate readjustment in the context of the forces generated by the British rule, to recognize the constituent

units on a rational basis, to achieve unity of the nation by economic, political and emotional integration and at the same time to provide for state autonomy already enjoyed by the units under the Government of India Act, 1935.

The framers of our Constitution took great care to provide for an independent and impartial judiciary as the interpreter of the Constitution and as the custodian of the rights of the citizens. The role that our judiciary has played over the years in ensuring the Rule of Law in general and in providing socio-economic justice to the people at large have been extremely noteworthy. We have had and have many outstanding judges and eminent members of the legal fraternity, who have contributed and are contributing immensely towards strengthening the edifice of Rule of Law in our Country.

The independence of the Judiciary which is a basic feature of the Constitution, compliments of separation of powers. This means in situational independence with institutional immunity, insulation and autonomy, primarily from the executive. The first instance of interference by the Executive, as far as the Supreme Court was concerned, was the suppression of senior judges namely Justice Hegde, Shelat and Grover and the appointment of Justice A. N. Ray as the Chief Justice of India. The superseded judges resigned in protest. In 1975 as a result a Supreme Court decision in *Indira Gandhi v. Raj Narain*, which upheld the decision of the Allahabad high Court declaring Prime Minister Indira Gandhi's election as void, Emergency was declared and the powers of judicial review were severely curtailed.

The year 1976 also saw the enactment of the 42nd Constitutional Amendment which introduced Articles 323-A and 323-B which was an effort to curb the independence of Judiciary. Article 323-A empowers the Parliament and Article 323-B the State Legislature to create tribunals which could adjudicate upon disputes which were previously subject to the jurisdiction of the High Court or the Supreme Court. There was provision made for transferring pending cases from the High Court to these specialized tribunals. The power of adjudications so transferred included the power of judicial review which allows Judges of the High Court and the Supreme Court to determine the legality of executive action and the validity of legislation passed by the Legislature.

It is unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary an intention to destroy the same by an indirect method. The Indian Supreme Court while liberally interpreting the rights could not stop at merely those rights that had been recognized as judicially enforceable rights known as civil liberties. The Constitution of India includes socio-economic rights such as the right to primary education (Article 45), the right to adequate means of livelihood [Article 39(1)] or the right to work (Article 41) in the directive principles of state policy contained in Part IV of the Constitution. These social and economic rights have been recognized in the Universal Declaration of Human Rights [Article 23(1), right to work [Article 23(3)] right to just and favorable remuneration; (Article 26) right to education and in the International Covenant of Economic, Social and Cultural Rights [Article 7(a) right to fair wage and Article 6 right to work]. It was generally felt and it is true also that these rights cannot be effectively made enforceable through judicial process. They require legislative and executive action.

The Indian Supreme Court and the High Court's expanded judicial access in furtherance of its activist role by entertaining letters from persons interested in opposing illegal acts, allowing social activist organizations or individuals to take up; cudgels on behalf of the poor and disadvantaged sections who possessed neither knowledge nor resources for activating the legal process;; and permitting citizens to speak on behalf of a large unorganized by silent majority against bad governance, wrong development, or environmental degradation. The wide definition of 'life and liberty' as interpreted by the Courts helped various types of issues to come before the Courts. The doors opened by the Constitutional Courts in pursuance of its determination to keep open the legal process more participatory and democratic led to the PILs being used liberally for various types of relief, such as for protecting the fundamental; rights of under trial prisoners in jails, amelioration of the conditions of detention in protective homes for women, for medical check-up of remand home inmates, prohibition of traffic in women and relief for their victims, for the release of bonded labour, enforcement of other labour laws, e.g. full and direct payment of wages to workers or prohibiting the employment of children in construction work, acquisition of cycle-rickshaws by

licensed rickshaws pullers, relief against custodial violence to women prisoners while in police lock up, for environmental protection, for enforcement of gender equality and protection from sexual harassment and the likes.

It must be borne in mind that in the light of multiple scams which have surfaced in the present political regime, not even once has the judiciary made any attempt to step into the shoes of political Executive and appoint a new Prime Minister or any other Minister. Reciprocally, it is expected that the Executive either political or administrative, will not have any role to play in the appointment of High Court or the Supreme Court Judges.

Parliamentary democracy was identified by our Founding Fathers to be the most suitable system of governance, as they perceived that only a democratic set up based on Parliamentary system with a federal structure would be able to solve effectively the myriad socio-economic problems that the nation faced at the time of independence and would be able to deal with our vast array of diversity on all fronts of our national existence.

One of the characteristic features of several constitutional systems across the world is the doctrine of separation of powers, providing for the functions of the three primary organs of the State – the Executive, the Legislature and the judiciary to be carried out by separate bodies. The system envisages an Executive with governing powers; an elected Legislature with the three main functions of representing popular will, enforcing the accountability of the Government and making laws; and the judiciary, to administer civil and criminal justice both between private persons and as between private persons and the state. It also entails that none of these organs should be vested with absolute or unbridled powers, so that no organ or individual assumes power of despotic proportions.

Our Constitution makers provided in our constitution, that all the three organs of the state, namely, the Legislature, the Judiciary and the Executive would have their distinct roles to play. Through the provisions of the Constitution, they enumerated their powers and responsibilities to be the facilitators of national weal, leaving hardly any scope for doubt or confusion in their mutual relationship.

The doctrine of separation of powers is an integral part of the evolution of democracy itself. The doctrine, which provides for checks and balances amongst the organs of the state, is one of the most characteristic features of our constitutional scheme.

Our great leaders who framed our Constitution were able to foresee that excessive power, if vested with any of the three organs of State, could possibly lead to unwarranted situations of conflict, which could compromise the quality and content of our democracy itself. Accordingly, they visualized that all organs of the State would need to co-exist harmoniously in a joint and participatory role and with mutual respect amongst them, so that they could work in a smooth and co-ordinate manner in the areas demarcated for them, for the larger national well-being. In our constitutional scheme, there is no exclusive primacy of any one organ nor does any organ have absolute power, which is anathema to democracy.

As the Supreme representative and law-making body, the Legislature has been accorded a pre-eminent position in our constitutional set up. The power to make laws, its control over the nation's purse, the Executive being made accountable to the popular house, its role in the election and impeachment of the head of State as well as in the removal of incumbents of high constitutional offices, its constituent powers, and its powers during an emergency, testify to such pre-eminence. Yet, the Legislature must function within the confines as laid down by the Constitution.

By its very representative character, in a democracy, no organ other than the legislature is better placed to understand the people's priorities. It is expected of the people's representative bodies to voice people's problems, their demands, their urges and aspirations, and, in the ultimate analysis, to protect and promote their fundamental democratic rights.

All institutions of governance in a democracy are expected and are indeed required to remain accountable to the people directly or indirectly. It is this notion of abiding account ability to the people, which holds the day to the success and sustenance of democracy. Elaborate procedure has been laid down for the Legislature to discharge its function of enforcing the accountability of the Executive to the Legislature and thereby to the elected representatives of the

people and ultimately to the people themselves. The Members of the Legislature on their turn remain accountable to the people, as they have to face the electorate every five years and their tenure depends on the people's verdict.

Preamble of the Indian Constitution itself promises to secure justice which is social, economic and political. Therefore Constitution enhanced the conventional role of judiciary to deliver social, economic as well as political justice to all its subjects. The Indian Constitution assigned the functional role to the Supreme Court in its various provisions from Articles 131 to 147. Supreme Court is given plenary powers under Article 142 to make any order for doing complete justice in any cause or matter and a mandate in the Constitution under Article 144, to all authorities, Civil and Judicial, in the territory of India to act in aide of the Supreme Court. Article 32 provides remedies for enforcement of Fundamental Rights.

There was a lot of appreciation when our Supreme Court was pleased to hold that justice can be provided, through an innovative procedure, to the oppressed citizens, especially those belonging to the vulnerable sections of the community, who have no means, no facilities and, in fact, no possibility on their own to approach the Court, even in cases of glaring injustice and discrimination, by giving a liberal meaning to the concept of locus standi, without in any way, entering into the areas preserved for the legislature or the executive. I was one of many, who felt greatly excited by the possibility of judicial redress to those who were till then the oppressed victims with no hope of redressal.

There are umpteen instances where judiciary has intervened in matters entirely within the domain of the executive, including policy decisions. An important instance has been the direction of the Supreme Court on the Central Government for providing food grains to the poor people free of cost prompting the Prime Minister to remind the Court that it should not deal with policy decisions.

No one can question the Courts concern for the well-being of the people, which obviously includes their right to have food security. But what can the Court do to ensure it? The Court clarified that it made an order and not gave any suggestion. Every Court order should be implementable by processes known in and provided by laws themselves. But except making an extremely popular "decision," which

received a lot of public approbation, it did not really serve any purpose as an “order” of the Court. Populism should not influence judicial interventions.

It is often seen that the judiciary is applauded for its “activism.” The issue involved, however, is more serious than the perception of a section of the people, who have access to the media. It is about the very basis of our constitutional scheme of power-relationship. Self-restraint is the primary balancing element in the exercise of judicial power.

Almost all votaries of judicial activism, including the Humble judges themselves, while exercising power in such assumed jurisdiction justify it on the supposed failure of the legislature or the executive authorities in taking proper action to mitigate the people’s grievances or to find solutions to people’s problems.

Now, in such a case, can any other organ of the State take up on itself the right to exercise judicial powers on the pleas that judiciary has not adequately been able to do so? Obviously neither the legislature nor the executive can do so, because it has no such power under the Constitution. We can assess the validity of some contentions by extreme examples. So, in my submission, no organ under the Constitution can take upon itself the function of any other organ on the ground that there is supposed malfunctioning or non-functioning or inadequate functioning of that particular organ.

In a democratic set up, the space and role of every institution is expected to be clearly earmarked in the Constitution that creates it. It is in the effective discharge of those functions, that it serves the people for whom the institutions are meant. This can be accomplished without intruding into or trivializing the role of the co-ordinate institutions or without undermining the importance of fundamental democratic process. To my mind, when institutions succeed in functioning strictly within the domain assigned to each, not only do they grow in public esteem, but they also create the ideal conditions for the effective functioning of the entire system.

Undoubtedly, the people look up to the Courts, which are temples of justice, with great expectation, hope and confidence. Similarly, people look up to the Parliament and State Legislatives, of which the Executive is a part, also with expectation and hope, because under the Constitution, the Parliament is the

supreme legislative institution of the country, the people's institution par excellence, through which laws for the people are made and executive accountability is enforced. We must recognize that Constitution is the supreme law and no organ of the State should go beyond the role assigned to it by the Constitution. It is the duty of all concerned, including the legislature, the Executive and the judiciary, to ensure that this balance is scrupulously adhered to. No organ can be the substitute of another. Visionary leaders of our country strove all through their life to preserve and protect this lofty ideal of our constitutional system, and ideal which needs repeated reiteration, as it has an eternal bearing on our parliamentary policy and constitutional and democratic framework.

Issues like intolerance, divisiveness, corruption, confrontations and disrespect for dissent are increasingly vitiating our socio political system. The cynicism that is creeping into the minds of the people, especially the youth, about the functioning of our democratic structure is undoubtedly a matter of grave concern. The greatest challenge of good governance is to bridge the gap between the expectations of the people and the effectiveness of the delivery mechanisms.

Both in spirit and in letter, the constitutional scheme of separation of powers and, with it, the checks and balances, that are indispensable to democratic governance, will be respected, and the spirit of moderation and the mutual respect, animated by a common commitment to the Constitution are followed in all cases and our efforts are fully directed towards improving the social and economic conditions of our people, which they have a right to expect that of us.

The court in India and specially the Supreme Court, has assumed a unique position by discharging the function of judicial review and giving constitutional decisions of wider importance to the nation. The court in India has to shape the destiny of the nation by its constitutional decision which have great impact on the individual and the social life. "The tendency to view the court as unique and relatively isolated body is largely the result of its power of judicial review, they act as a major instrument of social equilibrium and within their sphere of jurisdiction fulfill function that cannot adequately be performed by any other organ of Government.

The basic structure doctrine of the Supreme Court should not be seen as an interpolation that challenges the supremacy of the Constitution. It should also not be seen as an artificial construct based on the physical structure of the Constitution. It should be seen as an attempt to identify the moral philosophy on which the Constitution is based. Seen in that manner, the Supreme Court may well be able to isolate some parts of the Constitution, albeit small ones, as being inconsistent with rest. For reasons of propriety and mutual respect under the separation of powers doctrine, the Court will obviously strain hard to not have to do that explicitly.

Our judiciary in many occasions rightly held, that if it comes to the notice of the Court that some fundamental right of the citizens has been impaired by any legislative enactment, relief for the declaration of unconstitutionality cannot be denied merely on a technical plea. The court being the constitutional protector of the rights of the people, the relief, in genuine case of constitutional violations, flows as a matter of natural consequence. Even the political thinkers have appreciated the stand taken by the Supreme Court. As Moraji Desai observed – “Our Constitution has invested the Supreme Court with the duty of preserving and defending our fundamental rights against precisely such errors and inroads and we must say the court has discharged the duty with dignity, courage and erudition. (The Statesman, Friday, February 13, 1970, at p. 9.)

There is no denying the fact that there have been occasions when judicial pronouncements have not been palatable to the governments and the legislatures in India. The exercise of the power of judicial review has at times generated controversies and tensions between the courts, the executive and the legislature. For example, the judicial pronouncements in the area of property relations, legislative privileges and constitutional amendments have been controversial and have even led to several constitutional amendments which were undertaken to undo or dilute judicial rulings which the central government did not like. But, in spite of all these hurdles, the institution of judicial review has a vibrancy of its own and has even been declared as the basic feature of the constitution.

Even though our Constitution does not accept strict separation of powers, it provides for an independent judiciary with extensive jurisdiction over the acts of the legislature and the executive. Independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not

only to the judges but also to the people at large who seek judicial redress against perceived legal injury or executive excess. Judicial review is the basic structure, independent judiciary is the cardinal feature, and an assurance of faith enshrined in the Constitution. The need for independent and impartial judiciary is the command of the constitution and call of the people.

Sometimes, it is argued that the strength of the courts has weakened other parts of the government. This legal debate raises the important and inevitable question that how far this statement holds true about judicial review powers and capacities of the Indian Judiciary. The Indian Constitution, like other written Constitutions, follows the concept of 'Separation of powers' between the three sovereign organs of the Constitution. The Doctrine of Separation of powers stated in its rigid form means that each of the organ of the Constitution, namely, executive, legislature and judiciary should operate in its own sphere and there should be no overlapping their functioning. The Indian Constitution has not recognized the doctrine of separation of powers in its absolute form but the functions of the different organs have been clearly differentiated and consequently it can very well be said that our constitution does not contemplate assumptions, by one organ of the functions that essentially belong to another.

The power of judicial review has in itself the concept of Separation of Powers an essential component of the rule of law, which is a basic feature of the our Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf, by the courts. The power of judicial review is incorporated in Article 226 and 227 of the Constitution insofar as the High Courts are concerned. In regard to the Supreme Court Article 32 and 136 of the Constitution, the judiciary in India has come to control by judicial review every aspect of government and public function.

The legislature may remove the defect, which is the cause for invalidating the law by the court by appropriate legislation if it has power over the subject matter and component to do so under the constitution. The primary duty of the judiciary is to uphold the constitution and the laws without fear or favor, without being biased by the political ideology or economic theory. Interpretation should be in

consonance with the constitutional provisions, which envisage a republic democracy.

The constitution-makers have reposed great confidence and trust in Indian Judiciary by conferring on it such powers as have made it one of the most powerful judiciary in the world. The Supreme Court has from time to time indulged in genuine and needful judicial activism and judicial review. It gave birth to the famous and most needed "Doctrine of Basic Structure".

The ultimate scope of judicial review depends upon the facts and circumstances of each case. The dimensions of judicial review must remain flexible. It is cardinal principle of our constitution that no one howsoever highly placed and no authority lofty can claim to be the sole judge of its power under the constitution. The rule of law requires that the exercise of power by the legislature or by the judiciary or by the government or by any other authority must be conditioned by the constitution. Judicial review is thus the repository of the supreme law of the land. It is a vital principle of our constitution which cannot be abrogated without affecting the basic structure of the Constitution.

Judicial Review of constitutional amendments may seem involving the court in political question, but it is the court alone which can decide such an issue. The function of interpretation of a constitution being thus assigned to the judicial power, the question whether the subject of law is within the ambit of one or more powers of the legislature conferred by the constitution would always be a question of interpretation of the Constitution.

It is true that the courts have the wide powers of judicial review of constitutional and statutory provisions. These powers, however, must be exercised with great caution and self-control. The courts should not step out of the limits of their legitimate powers of the judicial review.

Judicial activism is defined as the shaping of the basic law through a bold act. It is a conscience choice of the judges exercised with the power of judicial review to meet the needs of changing time. The voluntary practices of spreading awareness through legal aid movements, social action groups, Lok Adalats, PILs, is what judicial activism is all about. It is because of judicial activism that courts

take suo motto (on their own) initiatives in certain cases. Fast track courts and speedy trials are examples of the same.

Judicial activism is a part of the evolution process of judicial review. It has provided a moral leadership to the existing judiciary system because of which it is a symbol of hope for the people, as they are at the receiving end of the law making process.

Judicial review has not only strengthened the three organs of the state but has also emphasised how important it is to keep the laws dynamic so that they prove to be useful with every phase. This power of review has significantly highlighted that judiciary is not only a legal structure but also political structure having its roots in particular socio-economic-political context.

More and more emphasis was being given on the International Standards, so as to secure the citizens the same rights and freedoms that were available to their foreign counterparts in their respective countries. Thus began the trend of making a constant reverence to the provisions of Universal Declaration, as and when a case involving violation of rights guaranteed under Part III and Part IV was brought before the Court. The Hon'ble Supreme Court looked into the serious issues arising from the proliferation of economy and the increasing production pollution (as a result of industrial and other ancillary activities) and dealt with them by reading the various documents, along with the Universal Declaration and extending the scope and purview of the constitutionally granted freedoms. of inclusion of International law principles to Municipal law, was one of the causes for the change.

Under the heading of Economic, Social and Cultural Rights, all governments are expected to try progressively to improve the living conditions of their citizens. For example, they should try to guarantee the right to food, clothing, housing and medical care, the protection of the family and the right to social security, education and employment. They are to promote these rights without discrimination of any kind. The conventional wisdom had been that human rights are indivisible, meaning that respect for civil and political rights could not be divorced from the enjoyment of economic, social and cultural rights. Expressed

another way, authentic economic and social development could not exist without the political freedom to participate in that process, including the freedom of dissent.

Role of judiciary has always been to deliver justice to the matters which are brought in front of it. Conventionally this role was perceived as to deliver justice by strictly following the laws in vogue. But fulfilment of the promise given in preamble to secure Justice (social, economic and political) to all its citizens was not possible by the judiciary while strictly following its conventional role of interpreting law as legislated. It required a broader interpretation by judicial creativity and judicial activism to bring a social change keeping public interest in view.

The Court has for all practical purposes disregarded the separation of powers under the Constitution, and assumed a general supervisory function over other branches of governments. The temptation to rush to the Supreme Court and High Courts for any grievance against a public authority has also deflected the primary responsibility of citizens themselves in a representative self-government of making legislators and the executive responsible for their actions.

At the same time, judicial activism should not lead to the dilution of separation of powers which is the Constitutional scheme. Each organ of our democracy must function within its own sphere and must not take over what is assigned to the others. The balance of power between the three organs of the state is enshrined in our Constitution. The Constitution is supreme. The equilibrium in the exercise of authority must be maintained at all times. The exercise of powers by the legislature and executive is subject to judicial review. However, the only check possible in the exercise of powers by the judiciary is self-imposed discipline and self-restraint by the judiciary itself.

Judiciary in India enjoys a very significant position since it has been made the guardian and custodian of the Constitution. It not only is a watchdog against violation of fundamental rights guaranteed under the Constitution and thus insulates all persons, Indians and aliens alike, against discrimination, abuse of State power, arbitrariness etc. The Supreme Court has, over the years, elaborated the scope of fundamental rights consistently, strenuously opposing intrusions into

them by agents of the State, thereby upholding the rights and dignity of individual, in true spirit of good governance. In case after case, the Court has issued a range of commands for law enforcement, dealing with an array of aspects of executive action in general.

The Supreme Court of India has earned a global reputation for its superior standards and lofty ideals. Landmark judgments passed by this Court have not only strengthened the legal and constitutional framework of our country but are widely cited by the Judiciary in many other countries seeking to build progressive jurisprudence. The Bench of the Supreme Court is known for its intellectual wisdom and legal scholarship. The Supreme Court has over the years been served by Judges who have provided intellectual depth, vigour and vitality necessary to create a world-class institution. I am confident this Court will always remain a sentinel of justice.

The power of judicial review is confined not merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution. As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened. Judicial has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statute are found to be violative of any article of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and the High Courts are empowered to strike down the said provisions.

The scope of judicial review in India is not as wide as in USA. The American Supreme Court can declare any law unconstitutional on the ground of its not being in “due process of law”, but the Indian Supreme Court has no such power. In India, outside the limitation imposed on the legislative powers, Parliament and State legislature are supreme in their respective legislative fields and the Court has no authority to question the wisdom or policy of the law duly made by the

appropriate legislature. Another reason is because the Indian Supreme Court has consistently refused to declare legislative enactments invalid on the ground that they violate the natural, social or political rights of citizens, unless it could be shown that such injustice was expressly prohibited by the Constitution.

Judicial Review, a concept of Rule of Law, is the check and balance mechanism to maintain the separation of powers. Separation of power has rooted the scope of Judicial Review. It is a great weapon in the hands of the courts to hold unconstitutional and unenforceable any law and order which is inconsistent or in conflict with the basic law of the land. The two principal basis of judicial review of administrative actions are “Theory of Limited Government” and “Supremacy of constitution” with the requirement that ordinary law must confirm to the Constitutional law.

The power of judicial review is an integral part of Indian Constitutional system and without it, there will be no government laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. In judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or order is made. A court of law is not exercising appellate power and it cannot substitute its opinion for the opinion of the authority deciding the matter.

It is a cardinal principle of Indian Constitution that no one howsoever highly placed and no authority lofty can claim to be the sole judge of its power under the Constitution. The rule of law requires that the exercise power by the legislature or by the judiciary or by the government or by any other authority must be conditioned by the Constitution. Judicial review is thus the touchstone and repository of the supreme law of the land. In recent times, judicial review of administrative action has become extensive and expansive. The traditional limitations have vanished and the sphere of judicial scrutiny is being expanded. Under the old theory, the courts used to exercise power only in cases of absence or excess or abuse of power. As the State activities have become pervasive and

giant public corporations have come in existence, the stake of public exchequer justifies larger public audit and judicial control.

The power of judicial review has in itself the concept of separation of powers an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf by the courts. The power of Judicial Review is incorporated in Article 226 and 227 of the Constitution insofar as the High Courts are concerned. In regard to the Supreme Court Articles 32 and 136 of the Constitution, the judiciary in India has come to control by judicial review every aspect of governmental and public function.

Today, we find that in third world countries, there are large number of groups which are being subjected to exploitation, injustice and even violence. In this climate of conflict and injustice, judges have to play a positive role and they cannot content themselves by invoking the doctrine of self-restraint and passive interpretation. The judges in India have fortunately a most potent judicial power in their hands, namely the power of judicial review. The judiciary has to play a vital and important role not only in preventing the remedying abuse and misuse of power but also in eliminating exploitation and injustice.

Notably, over the decades, the Supreme Court has affirmed that both the Fundamental Rights and Directive Principles must be interpreted harmoniously. It was observed in the *kesavananda Bharati case*, that the directive principles and the fundamental rights supplement each other and aim at the same goal of bringing about a social revolution and the establishment of a welfare State, the objectives which are also enumerated in the Preamble to the Constitution.

This approach of harmonizing the fundamental rights and directive principles has been successful to a considerable extent. The Supreme Court has interpreted the 'protection of life and personal liberty' as one which contemplates socio-economic entitlements especially in public interest cases.

In post-independence India, the inclusion of explicit provisions for 'judicial review' were necessary in order to give effect to the individual and group rights guaranteed in the text of the Constitution. Dr. B.R. Ambedkar, who chaired the

drafting committee of our Constituent Assembly, had described the provision related to the same as the 'heart of the Constitution'. Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void.

While judicial review over administrative action has evolved on the lines of common law doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the constitutionality of legislative as well as administrative actions to protect and enforce the fundamental rights guaranteed in Part III of the Constitution. The higher courts also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations since Article 246 of the Constitution read with the 7th Schedule, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures.

Hence the scope of judicial review before Indian courts has evolved in three dimensions – firstly, to ensure fairness in administrative action, secondly to protect the constitutionally guaranteed fundamental rights of citizens and thirdly to rule on questions of legislative competence between the center and the states. The power of the Supreme Court of India to enforce these fundamental rights is derived from Article 32 of the Constitution. It gives citizens the right to directly approach the Supreme Court for seeking remedies against the violation of these fundamental rights.

It is now established law that the courts while exercising jurisdiction under article 32 and 226 of the Constitution can award compensating and exemplary cost for the violation of a person's fundamental rights and for the abuse of power by the State. In *Nilabati Behra v. State of Orissa*, the court held that a claim in public law for compensation for violation of human rights and abuse of power is an acknowledged remedy for the enforcement and protection of such rights. In such a situation, the court observed, that leaving the victim to the remedies available in

civil law limits the role of constitutional courts as protector or guarantors of fundamental rights of the citizens. Thus courts are under an obligation to make the State or its servants accountable to the people by compensating them for the violation of their fundamental rights.

Judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and also they try to provide every citizen what has been promised by the Constitution under the Directive Principles of State Policy. All this is possible thanks to the power of judicial review.

In other words, Rule of Law presupposes division of powers and a system of checks and balances intended to prevent authoritarian and arbitrary exercise of public power. It is in this context that the legal system becomes relevant for Rule of Law. In a written Constitution, the Judiciary exercising powers of judicial review performs a significant role in the maintenance of Rule of Law by resolving disputes between the citizen and the state. The complementarily of constitutional institutions and their capacity to function within their legitimate jurisdictions enable Rule of Law to be a living reality in constitutional governance.

The Supreme Court and the High Court's engaging concurrent jurisdiction in determining constitutionality of administrative action and of legislation, enjoy vast powers of what is called "judicial review", a vital instrument for preventing arbitrariness in State action. Given the range and scope of powers under judicial review, the Indian Supreme court is possibly the world's most powerful court safeguarding Rule of Law in the world's largest democracy.

Rule of Law is imperative for a democratic regime in which equality, basic rights and popular will are respected. Rule of a law does not exist where arbitrary exercise of power prevails. Government by the "Rule of Law" envisages judicial review as an inevitable projection of the fundamental principles implicit in the doctrine. Public law enforces the proper performance by public bodies of their public duties.

Administrative Law is a branch of Public Law concerned with the various organs of government engaged in administering public policies. This is the concept of

legal control of government under the Rule of Law. A constitutional guarantee of rights, as in India, wherein constitutional remedy is also guaranteed under Article 32 in the Supreme Court and under Article 226 in the High Courts, transforms the court's power into a constitutional mandate for the protection and enforcement of the rights. Rule of Law is firmly entrenched in this manner.

Upholding Parliament's power under Article 368 to amend the Constitution and place laws in the Ninth Schedule, the Court said it was a limited power, which was subject to judicial review. Deciding a reference made by a five member constitution bench on the justifiability of laws placed in the Ninth Schedule after April 24, 1973 (when the Supreme Court propounded the 'basic structure doctrine' in the *Keshavananda Bharati*, will be open to challenge. Laying down the tests to be adopted to examine the validity of laws placed in the Ninth Schedule, the Court said it would have to be seen if the law in question violated any fundamental right.

Thus, the Supreme Court has upheld Parliament's power to place a law in the Ninth Schedule. But it said such laws are open to judicial scrutiny and do not enjoy blanket protection. The process of judicial review, thus, is neutralising and nationalising influence over various interest groups and classes in the community to keep them sufficiently balanced.

In a democracy, the power is held by the majority and these vast powers can be misused to suppress the minority. By virtue of the power of judicial review, the Judiciary protects the minority over majority against the capricious, tyrannical and whimsical power of the State. In the ultimate analysis, the aged criticisms against the process of review like usurpation of powers by the Judiciary, overthrowing of separation of powers, etc. need not be answered since judicial review is the only potent weapon to check the omnipotent Legislature and the Executive from arbitrariness. Moreover, the existence of legislative reprobation of judicial power under the protective umbrella of the IX Schedule, asserts the significance of judicial review.

It is needless to say that the judiciary and the judicial decisions, over the years, have shaped the Indian polity to a great extent. The role played by the judiciary has been pivotal in ensuring a process of fairness in governance and

administration. Thus, be it the pragmatic interpretation of Article 19 or Article 21 or propounding doctrines of equality, the judicial decisions in India have infiltrated through every strata of the society. Judiciary, as one understands, is the edifice of a strong democracy as it endeavours not merely to interpret the black letter of the law but also adopting an activist stance of creatively interpreting it to suit the needs of the society. Our Constitution does not use the expression 'freedom of information' in Article 19 but it is declared by the judiciary that it is included in Article 19(1) (a) which guarantees freedom of speech and expression. The primary object of the judiciary is to provide justice to each and every individual in the country and put a cap on growing corruption.

In recent times, judicial review of administrative action has become extensive and expansive. The traditional limitations have vanished and the sphere of judicial scrutiny is being expanded. Under the old theory, the courts used to exercise power only in cases of absence or excess or abuse of power. As the State activities have become pervasive and giant public corporations have come in existence, the stake of public exchequer justifies larger public audit and judicial control.

Judicial Review, a concept of Rule of Law, is the check and balance mechanism to maintain the separation of powers. Separation of power has rooted the scope of Judicial Review. It is a great weapon in the hands of the courts to hold unconstitutional and unenforceable any law and order which is inconsistent or in conflict with the basic law of the land. The two principal basis of judicial review of administrative actions are "Theory of Limited Government" and "Supremacy of constitution" with the requirement that ordinary law must conform to the Constitutional law.

The Supreme Court of India has earned a global reputation for its superior standards and lofty ideals. Landmark judgments passed by this Court have not only strengthened the legal and constitutional framework of our country but are widely cited by the Judiciary in many other countries seeking to build progressive jurisprudence.

In view of the present study and findings derived from this work, conclusion that can be safely drawn as follows:

I. The Constitution of India established 'rule of law' in the country and entrusted the responsibility of "watching" the functioning of national institutions, "policing" the corridors of power and "balancing" various national interests to the judiciary. The judiciary is therefore the balancing force and has "a socio-economic destination and a creative function." In order to enable it to discharge its constitutional obligation, it was made 'independent' and this characteristic was treated as 'basic' to the constitutional scheme. The Supreme Court decision in *Keshavanand Bharti's case* in 1973, brought out this important facet of the judiciary and clarified that it formed part of the 'basic structure' of the Constitutional scheme.

The judiciary is separate and independent of the executive to ensure impartiality in administration of justice. The judiciary has a pivotal central role to play in our thriving democracy and shuns arbitrary executive action. The higher judiciary has been empowered by the constitution to pronounce upon the legislative competence of the law making bodies and the validity of a legal provision. The range of judicial review recognized in the higher judiciary in India is the widest and most extensive known to any democratic set up in the world.

The concept of judicial Review has its foundation on the doctrine that the constitution is the supreme law. It has been so ordained by the people, and in the American conception, it is the ultimate source of all political authority. The constitution confers only limited source powers on the legislature. If the legislature consciously or unconsciously oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to indicate and presence inviolate the will of the people as expressed in the constitution.

IV. The rule of law is the bedrock of democracy, and the primary responsibility for implementation of the rule of law lies with the judiciary. This is now a basic feature of every constitution, which cannot be altered even by the exercise of new powers from parliament. It is the significance of judicial review, to ensure that democracy is inclusive and that there is accountability of everyone who wields or exercises public power. As Edmund Burke said: "all persons in positions of power ought to be strongly and lawfully impressed with an idea that "they act in

trust,” and must account for their conduct to one great master to those in whom the political sovereignty rests, the people.

V. The expanded role of the power of judicial review has been given the title of ‘judicial activism’ by those who are critical of this expanded role of the judiciary. The main thrust of the criticism is that the judiciary by its directives to the administration is usurping the functions of the legislatures and of the executive and isruining the country. What these critics of the judiciary overlook is that it is the tardiness of legislatures and the indifference of the executive to address itself to the complaints of the citizens about violations of their human rights which provides the necessity for judicial intervention.

VI. In cases where the executive refuses to carry out the legislative will or ignores or thwarts it, it is surely legitimate for courts to step in and ensure compliance with the legislative mandate. When the court is apprised of and is satisfied about gross violations of basic human rights it cannot fold its hands in despair and look the other way. The judiciary can neither prevaricate nor procrastinate.

VII. Recently the country has seen instances of beneficial judicial activism to a great extent. It cannot be disputed that judicial activism has done a lot to ameliorate the conditions of the masses in the country. It has set right a number of wrongs committed by the states as well as by individuals. The courts have innovated to reach justice to the deprived section of the society. Anything contrary would be like suggesting the abolition of marriage in order to solve the problem of divorce.

VIII. Moreover, socio-economic movement generated by court has at least kept alive the hope of the people for justice and thus has weaned people away from self –help or seeking redress through a private system of justice .It is necessary for sustaining the democratic system and the establishment of a rule of law in society. Therefore, one has to be both adventurous and cautious in this respect and the judiciary has to keep on learning mostly by experience.

IX. The Apex Court of India has continuously been interpreting the mandate for good governance enshrined in the Constitution on the altar of contemporary situations and challenges facing the country, whether due to global winds of

change or from within. This has not been merely an exercise in interpretation of laws or legal order, much less an exercise in edifying jurisprudence; it has captured the ethos of our developing society as it has evolved from the colonial shackles to a social order replete with the essence of human dignity, of aspirations of a populace maturing into a sovereign, socialist, secular, democratic republic as mandated by the makers of our Constitution.

X. The law grows to meet the demands of the ever growing society. Hence the Supreme Court has found Article 21 to incorporate the substantive freedom that serves as means to remove major areas such as poverty, poor economic opportunities as well as systematic social deprivation. A most significant feature of expansion of article 21 has been that many of the Non justifiable Directive Principles have been converted into enforceable fundamental rights by the hands of judges. Guarantees of economic opportunities and protection against social deprivations.

XI. One may find the activist role of the judiciary resulting in law-making also. But when there was no law to regulate the adoption of children by foreigners, in 1984 in *Lakshmi Kant Pandey v. Union of India*, the Supreme Court laid down directions for regulating such adoptions and these directions have been in force for more than nineteen years. Similarly when women's organization approached the Supreme Court with a request to lay down guidelines as to how sexual harassment of working women could be combated, the Supreme Court in the year 1997 in *Vishaka v. State of Rajasthan*, responded by laying down guidelines and also declaring them to be the law made by it under Article 141 of the Constitution. These guidelines were followed throughout the country until the Legislature came up with suitable legislation in 2013, i.e., the Sexual Harassment of Women at Workplace (Prevention, Prohibition And Redressal) Act, 2013, to create an environment of safe working for the working women's.

XII. Liberty and Equality have well survived and thrived in India due to the proactive role played by the Indian judiciary. The rule of law, one of the most significant characteristics of good governance prevails because India has an independent judiciary, which has been fearless in advocating the cause of the underprivileged, the cause of deprived, the cause of such sections of society as

are ignorant or unable to secure their rights owing to various handicaps, an enlightened public opinion and vibrant media that keeps all the agencies of the State on their respective toes

XIII. The Supreme Court has, over the years, elaborated the scope of fundamental rights consistently, strenuously opposing intrusions into them by agents of the State, thereby upholding the rights and dignity of individual, in true spirit of good governance. In case after case, the Court has issued a range of commands for law enforcement, dealing with an array of aspects of executive action in general.

XIV. Even though law is a changing phenomenon which changes with the changing aspirations of time and society, several age old laws are unable to work in par with the emerging modern trends. Here Judiciary plays an important role by 'filling the lacunae' and adapting the old laws to the new society.

XV. The judiciary has, thus, been rendering judgments which are in tune and temper with the legislative intent while keeping pace with time and jealously protecting and developing the dimensions of the fundamental human rights of the citizens so as to make them meaningful and resulting in many reforms such as humanitarian treatment of the prisoners and the undertrials. The doctrine of equality has been employed to provide equal pay for equal work. Ecology, public health and environment are receiving attention of the courts. Exploitation of children, women and labour is receiving the concern it deserves. The executive is being made more to realise its responsibilities.

XVI. PIL serves a vital role in the civil justice system. It offers a ladder to justice to the disadvantaged sections of the society, provides an avenue to enforce diffused or collective rights, and enable civil societies to not only spread awareness about human rights but also allows them to participate in government's decision making. It facilitates an effective realization of collective, diffused rights for which individual litigation is neither efficient nor a practicable method. The range and scope of PIL is vast as it is a mechanism to agitate any socio-economic public issue before the court which can be brought within the legal and constitutional mould.

XVII. In the present era of Globalization where international regulatory regimes

such as WTO and GATT are working parallel to the constitutional and other domestic regimes. It becomes necessary to develop constitutional interpretations that can make the private entities that are largely international in character performing public functions without popular mandate that comes through elections liable under the domestic laws of the nation. This further included the application of present constitutional principles to the private entities that were developed with the State entities in view. Thus, in recent years the judiciary has widened its field of operation by declaring judicial review as a basic feature of the Constitution and the Apex Court has not merely interpreted the language of the Constitution but also pronounced on issues which involve matters of policy.

XVIII. The court alone is competent to determine the nature and extent of the good or evil or effect, on the fundamental rights of state action. The function of the court in judicial review is to alert the Parliament of limitations on its powers, and the scope of progressiveness and democratic socialism, and for such function the court cannot be criticised of adopting any spirit of conservatism.

IX. Recently, the legislatures in India has taken certain initiatives that seek to make socio-economic rights enforceable in India like, the Right of Children to Free and Compulsory Education Act, 2009; the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), 2005 and the National Food Security Act, 2013 etc. They seek to make the right to education, right to work, right to food enforceable. All these rights have previously been subject matters of cases brought by civil society groups before the Indian Supreme Court and the Indian judiciary had made these rights enforceable through the right to life even before these Acts were formulated.

Taking into consideration the findings as mentioned above, the following points of suggestions may be put forth:

The independence of the judiciary shall be guaranteed by the State as enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restriction, improper

influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by judiciary, in accordance with the law.

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures or the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

Misapplication of the PIL jurisdiction can be avoided if it is remembered that PIL is basically the well principles of judicial review by courts of actions of Government and public authorities, with the modification of Courts allowing the petitioner applicant to approach the court on behalf of other persons who themselves are unable to come to the Court because of ignorance of the difficulty and cost of litigation. In such cases the Court relaxes the strict rule of locus stand on the applicant and also relaxes proximity formalities. It is therefore important to note that except for procedural relaxation, the PIL jurisdiction should not exceed the permissible limits are of judicial review by the court over the actions or omissions of Government legislatures or public bodies, or transcend the basic separate powers underlined by the Constitution.

The parameters of intervention must be strictly formulated by the Supreme Court and observed, otherwise the concept of judicial review which is so necessary in India will become diffused, unprincipled, encroaching into the functions of other branches of government and ineffective by its indiscriminate use.

The courts are further required not to interfere in policy matters and political questions unless it is absolutely essential to do so. Even then also the courts

should interfere on selective grounds only. Moreover, mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional.

The courts should not refuse to interfere when it is required under the limited scope of judicial review. Such check through judicial review is vital so that the edifice of rule of law is not shattered, and should not be given away. Just to illustrate, the judiciary intervened to tackle sexual harassment as well as custodial torture, but it did not intervene to introduce a uniform civil code, and to provide a humane face to liberalisation-disinvestment policies.

Finally, the researcher is of the opinion that all the three organs including the judiciary are responsible to the people, who are the ultimate sovereigns. Thus, all the three organs must work harmoniously to promote and protect the fundamental rights of the people of India.

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APPENDIX A

RELEVANT PROVISION OF THE CONSTITUTION OF INDIA REFERRED IN THE RESEARCH WORK

THE CONSTITUTION OF INDIA

Preamble

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a ¹[SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the ²[unity and integrity of the Nation];

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Article 12- Definition

In this Part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 2, for “SOVEREIGN DEMOCRATIC REPUBLIC” (w.e.f. 3-1-1977).

Subs. by s. 2, Ibid., for “unity of the Nation” (w.e.f. 3-1-1977).

Article 13- Laws inconsistent with or in derogation of the fundamental rights

—

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

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

In this article, unless the context otherwise requires,—

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

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

³[(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

Article 14-Equality before law-

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Equality

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Ins. by the Constitution (Twenty-fourth Amendment) Act, 1971, s. 2.

No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

access to shops, public restaurants, hotels and places of public entertainment;
or

the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Nothing in this article shall prevent the State from making any special provision for women and children.

⁴[(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

⁵[(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]

Article 16- Equality of opportunity in matters of public employment-

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Added by the Constitution (First Amendment) Act, 1951, s. 2.

Ins. by the Constitution (Ninety-third Amendment) Act, 2005, s. 2 (w.e.f. 20-1-2006).

No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office ⁶ [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

⁷[(4A) Nothing in this article shall prevent the State from making any provision for reservation ⁸[in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.]

⁹[(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.]

Article 19 - Protection of certain rights regarding freedom of speech, etc.

Subs. by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch., for “under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State”.

Ins. by the Constitution (Seventy-seventh Amendment) Act, 1995, s. 2.

Subs. by the Constitution (Eighty-fifth Amendment) Act, 2001, s. 2, for certain words (w.e.f. 17-6-1995).

Ins. by the Constitution (Eighty-first Amendment) Act, 2000, s. 2 (w.e.f. 9-6-2000).

All citizens shall have the right— (a) to freedom of speech and expression; to assemble peaceably and without arms; (c) to form associations or unions; to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; ¹⁰[and] (g) to practise any profession, or to carry on any occupation, trade or business.

[(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of 4 [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.]

Article 20- Protection in respect of conviction for offences.

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

No person shall be prosecuted and punished for the same offence more than once.

No person accused of any offence shall be compelled to be a witness against himself.

Article 21- Protection of life and personal liberty-

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Ins. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 2 (w.e.f. 20-6-1979).
Subs. by the Constitution (First Amendment) Act, 1951, s. 3, for cl. (2) (with retrospective effect).

Article 21-A- Right to education-

¹²[21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.]

Article 22- Protection against arrest and detention in certain cases

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

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

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

Article-23-Prohibition of traffic in human beings and forced labour-

Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article-24-Prohibition of employment of children in factories, etc.- No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Ins by the Constitution (Eighty-sixth Amendment) Act, 2002, s. 2 (which is not yet in force, date to be notified later on).

¹³[Saving of Certain Laws]

Article 31A - Saving of laws providing for acquisition of estates, etc.-

¹⁴[31A. ¹⁵[(1) Notwithstanding anything contained in article 13, no law providing for— (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by ¹⁶[article 14 or article 19]:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:]

¹⁷[Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law

Ins. by the Constitution (Forty-second Amendment) Act, 1976, s. 3 (w.e.f. 3-1-1977).

Ins. by the Constitution (First Amendment) Act, 1951, s. 4 (with retrospective effect).

Subs. by the Constitution (Fourth Amendment) Act, 1955, s. 3, for cl. (1) (with retrospective effect).

Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 7, for “article 14, article 19 or article 31” (w.e.f. 20-6-1979).

Ins. by the Constitution (Seventeenth Amendment) Act, 1964, s. 2.

for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.]

Article 13B- Validation of certain Acts and Regulations-

¹⁸[**31B.** Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.]

Article 31C - Saving of laws giving effect to certain directive principles-

¹⁹[**31C.** Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing ²⁰[all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by ²¹[article 14 or article 19]; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Ins. by the Constitution (First Amendment) Act, 1951, s. 5.

Ins. by the Constitution (Twenty-fifth Amendment) Act, 1971, s. 3 (w.e.f. 20-4-1972).

Subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 4, for "the principles specified in clause (b) or clause (c) of article 39" (w.e.f. 3-1-1977).

Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 8, for "article 14, article 19 or article 31" (w.e.f. 20-6-1979).

Article 32- Remedies for enforcement of rights conferred by this Part-

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

The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

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

The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 37- Application of the principles contained in this Part-

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

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 of 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;

²²[(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.]

Article 39A- Equal justice and free legal aid-

²³[**39A.** 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.]

²⁴[**Article 45- Provision for early childhood care and education to children below the age of six years.**—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.]

Article 50-Separation of judiciary from executive-

The State shall take steps to separate the judiciary from the executive in the public services of the State.

Subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 7, for cl. (f) (w.e.f. 3-1-1977).

²³Ins. by s. 8, *Ibid.* (w.e.f. 3-1-1977).

Ins. by the Constitution (Eighty-sixth Amendment) Act, 2002.

Article 53- Executive Power of the Union.

The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

Nothing in this article shall—

(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or

(b) prevent Parliament from conferring by law functions on authorities other than the President .

Article 73-Extent of executive power of the Union-

Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

Article -74- Council of Ministers to aid and advise President-

[(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:]

²⁶[Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]

The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

Article 102- Disqualifications for membership-

A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

²⁷[*Explanation.*—For the purposes of this clause] a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

Subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 13, for cl. (1) (w.e.f. 3-1-1977).

Ins. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 11 (w.e.f. 20-6-1979).

Subs. by the Constitution (Fifty-second Amendment) Act, 1985, s. 3, for “(2) For the purposes of this article” (w.e.f. - 3-1985)

²⁸[²⁸(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.]

Article 103- Decision on questions as to disqualifications of members-

²⁹[²⁹**103.** (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause of article 102, the question shall be referred for the decision of the President and his decision shall be final.

Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.]

Article 105- Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof-

Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined,

Ins. by s. 3, *ibid.* (w.e.f. 1-3-1985).

Art. 103 has been successively subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 20 (w.e.f. 3-1-1977) and the Constitution (Forty-fourth Amendment) Act, 1978, s. 14 to read as above (w.e.f. 20-6-1979).

³⁰[shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.]

The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to Penalty for sitting and voting before making oath or affirmation under article 99 or when not qualified or when disqualified. Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament. 106. Members of either House of Parliament shall be entitled to receive such salaries and allowances as may from time to time be determined by Parliament by law and, until provision in that respect is so made, allowances at such rates and upon such conditions as were immediately before the commencement of this Constitution applicable in the case of members of the Constituent Assembly of the Dominion of India.

Article 121-Restriction on discussion in Parliament-

No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.

Article 122- Courts not to inquire into proceedings of Parliament-

The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

No officer or Member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 15, for certain words (w.e.f. 20-6-1979).

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

³¹[Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.]

Article 132- Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases-

An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, ³²[if the High Court certifies under article 134A] that the case involves a substantial question of law as to the interpretation of this Constitution.

³³(2) * * * *

Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided .

³¹Subs. by the Constitution (Seventh Amendment) Act, 1956, s. 5, for the proviso.

Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 17, for “if the High Court certifies” (w.e.f. 1-8-1979).

Cl. (2) omitted by s. 17, *ibid.* (w.e.f. 1-8-1979).

Explanation.—For the purposes of this article, the expression “final order” includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

Article 133- Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.

³⁴[(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India ³⁵[if the High Court certifies under article 134A—]

- (a) that the case involves a substantial question of law of general importance; and
- (b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.]

Notwithstanding anything in article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided.

Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Article 136- Special leave to appeal by the Supreme Court-

Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Subs. by the Constitution (Thirtieth Amendment) Act, 1972, s. 2, for cl. (1) (w.e.f. 27-2-1973).

Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 18, for “if the High Court certifies—” (w.e.f. 1-8-1979).

Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

Article 134- Appellate jurisdiction of Supreme Court in regard to criminal matters-

An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(c) ³⁶[certifies under article 134A] that the case is a fit one for appeal to the Supreme Court:

Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.

Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

Article 141- Law declared by Supreme Court to be binding on all courts-

The law declared by the Supreme Court shall be binding on all courts within the territory of India.

³⁶Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 19, for “certifies” (w.e.f. 1-8-1979).

Article 142- Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.-

The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order¹ prescribe.

Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Article 143- Power of President to consult Supreme Court-

If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

The President may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the ³⁷[said proviso] to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

Subs. by s. 29 and Sch., *ibid.*, for "said clause.

Article 144- Civil and judicial authorities to act in aid of the Supreme Court-

All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.

Article 212- Courts not to inquire into proceedings of the Legislature-

The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.

[Article 226- Power of High Courts to issue certain writs-

(1) Notwithstanding anything in article every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions orders or writs, including ³⁹[writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.]

The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court

Subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 38, for art. 226 (w.e.f. 1-2-1977).

Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, s. 30, for the portion beginning with the words “writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quowarranto* and *certiorari*, or any of them” and ending with the words “such illegality has resulted in substantial failure of justice” (w.e.f. 1-8-1979).

exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

⁴⁰[(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

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

⁴¹[(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.]

Article 227- Power of superintendence over all courts by the High Court.

⁴²[(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.]

Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

Subs. by s. 30, *ibid.*, for cls. (3), (4), (5) and (6) (w.e.f. 1-8-1979).

Cl. (7) renumbered as cl. (4) by the Constitution (Forty-fourth Amendment) Act, 1978, s. 30 (w.e.f. 1-8-1979).

Cl. (1) has been successively subs. by the Constitution (Forty-second Amendment) Act, 1976, s. 40 (w.e.f. 1-2-1977) and the Constitution (Forty-fourth Amendment) Act, 1978, s. 31, to read as above (w.e.f. 20-6-1979).

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor. (4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

Article 245- Extent of laws made by Parliament and by the Legislatures of States-

Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246- Subject-matter of laws made by Parliament and by the Legislatures of States-

Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of

the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).

Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as

Parliament has power to make laws with respect to any matter for any part of the territory of India not included ⁴³[in a State] notwithstanding that such matter is a matter enumerated in the State List.

Article 247- Power of Parliament to provide for the establishment of certain additional courts-

Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List.

Article 248- Residuary powers of legislation-

Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Article 249- Power of Parliament to legislate with respect to a matter in the State List in the national interest-

Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter.

Subs. by s. 29 and Sch., *ibid.*, for “ in Part A or Part B of the First Schedule

enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein:

Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.

A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

Article 250- Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation-

Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

Article 251- Inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States-

Nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the

said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

Article 252- Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State-

If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

Article 253- 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.

Article 254- Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State Legislation for giving effect to international agreements.

Article 323A- Administrative Tribunals-

Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

A law made under clause (1) may—

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

- (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
- (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
- (d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);
- (e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
- (f) repeal or amend any order made by the President under clause (3) of article 371D;
- (g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Article 323B- Tribunals for other matters -

The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.

The matters referred to in clause (1) are the following, namely:—

- (a) levy, assessment, collection and enforcement of any tax;
- (b) foreign exchange, import and export across customs frontiers;
- (c) industrial and labour disputes;
- (d) land reforms by way of acquisition by the State of any estate as defined in article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;

- (e) ceiling on urban property;
- (f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in article 329 and article 329A;
- (g) production, procurement, supply and distribution of food-stuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;
- ⁴⁴[(h) rent, its regulation and control and tenancy issues including the right, title and interest of landlords and tenants;]
- ⁴⁵[(i)] offences against laws with respect to any of the matters specified in sub-clauses (a) to ⁴⁶[(h)] and fees in respect of any of those matters;
- ⁴⁷[(j)] any matter incidental to any of the matters specified in sub-clauses (a) to ⁴⁸[(i)].
- (3) A law made under clause (1) may—
- (a) provide for the establishment of a hierarchy of tribunals;
- (b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
- (c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
- (d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals;
- (e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

Ins. by the Constitution (Seventy-fifth Amendment) Act, 1993, s. 2 (w.e.f. 15-5-1994).
 Sub-clauses (h) and (i) re-lettered as sub-clauses (i) and (j) by s. 2, *ibid.* (w.e.f. 15-5-1994).
 Subs. by s. 2, *ibid.*, for “(g)” (w.e.f. 15-5-1994).
Supra n.34.
 Subs. by s. 2, *ibid.*, for “(h)” (w.e.f. 15-5-1994).

The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Explanation.—In this article, “appropriate Legislature”, in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance.

Article 368-⁴⁹[Power of Parliament to amend the Constitution and procedure therefor]

⁵⁰[(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.]

⁵¹[(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 and by a majority of not less than two-thirds of the members of that House present and voting, ⁵²[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—

Subs. by the Constitution (Twenty-fourth Amendment) Act, 1971, s. 3, for “Procedure for the amendment of the Constitution”.

Ins. by s. 3, *Ibid.*

Art. 368 renumbered as cl. (2) thereof by s. 3, *ibid*

Subs. by s. 3, *ibid.*, for “it shall be presented to the President for his assent and upon such assent being given to the Bill,”.

- (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
(e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

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

⁵⁴[(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.

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.]

Ins. by the Constitution (Twenty-fourth Amendment) Act, 1971, s. 3.

Cls. (4) and (5) were ins. in article 368 by s. 55 of the Constitution (Forty-second Amendment) Act, 1976. This section has been declared invalid by the Supreme Court in *Minerva Mills Ltd. and Others Vs. Union of India and Others* (1980) 2 SCC 591

APPENDIX B

5

SCOPE OF THE JUDICIAL REVIEW OF LAWS IN THE NINTH SCHEDULE OF THE CONSTITUTION: RECENT APPROACH OF THE SUPREME COURT

Sangeeta Mandal*

INTRODUCTION

The Ninth Schedule was included in the Indian Constitution by the Constitution (First Amendment) Act, 1951, along with Article 31B. It provides that none of the Acts and Regulations included in the Ninth Schedule to the Constitution shall be deemed to be void on the ground that they are inconsistent with any of the rights conferred by Part III of the Constitution. In effect, the sole purpose of the Ninth Schedule read with Article 31B is to save the Acts passed by the legislature from the power of judicial review of the courts. Recently, on 11-1-2007 in *I.R.Coelho (Dead) by LRs v. State of Tamil Nadu*, the Nine-Judge bench headed by Justice Y.K. Sabharwal, C.J.I., after a reference being made to it by a five-judge bench has unanimously pronounced upon the constitutional validity of the Ninth-Schedule laws that, in the post-1973 era, they are open to attack for causing the infraction which affects the basic structure of the Constitution. Such laws will not get the protection of the Ninth Schedule for escaping the judicial scrutiny and are open to challenge in the courts of law. It is an unanimous judgment of the nine judge bench of the Supreme Court of India, wherein the court is confronted with a very important yet not very easy task of determining the nature and character of the protection provided by Article 31B of the Constitution of India to the laws added to the Ninth Schedule by amendments made after 24th April 1973, the date on which the judgment was pronounced in the famous *Kesavananda Bharti's* case propounding the doctrine of Basic structure of the Constitution to test the validity of constitutional amendments. The judgment in this case put an end to the politico-legal controversy by holding the Parliament's amending power subject to Judicial Review in line with *Kesavananda Bharti's* decision that the violation of Doctrine of Basic Structure will never be tolerated. The judgment upholds the right of the judicial review and the supremacy of judiciary in interpreting laws.

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The purpose of this paper is to discuss the scope of power of judicial review of the courts in relation to the laws included in the Ninth Schedule and analysis the development of law made in this by the judiciary.

HISTORICAL BACKGROUND OF THE NINTH SCHEDULE

Judicial review of constitutional amendments had its genesis in cases arising out of property rights. In the Constitution of India the right to property was recognized in Part III as a fundamental right under Article 19 (f) and no property could be acquired except for a public purpose and on payment of compensation¹.

Soon after the commencement of the Constitution in 1950, some state governments initiated proposals for incorporation of laws relating to agrarian reforms. These laws contained provisions for the abolition of zamindari system, as well for the compulsory acquisition of property for public purpose. One such measure was the Bihar Land Reforms Act, 1950, enacted by the Bihar Legislature. The Bihar Land Reforms Act, 1950 provided for the acquisition by the state of the estates and tenures of the three leading 'zamindars' of the Bihar province. The Act was challenged in Kameshwar

Singh v. State of Bihar² before the Patna High Court. The High Court struck down the Bihar Land Reforms Act, 1950 as unconstitutional and void as it contravened the provisions of Article 14 and Article 19(1)(f) of the Constitution. The Central Government felt that such judicial pronouncements would endanger the whole zamindari abolition programme. To overcome the difficulty, a new provision, Article 31A was added by the Constitution (1st Amendment) Act, 1951. Article 31A provides that no law providing for acquisition of any 'estate' or any right therein, extinguishment or modification of any such right shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14 or 19 of the Constitution. Article 31A was introduced into the Constitution with retrospective effect from the date of commencement of the Constitution, i.e., January 26, 1950.

Besides Article 31A, the Constitution (1st Amendment) Act, 1951 also added a new provision, Article 31B, along with the Ninth Schedule to the Constitution. Article 31B immunizes the laws included in the Ninth Schedule, from attack on the ground of their inconsistency with any of the fundamental rights. The Ninth Schedule and Articles 31A and 31B are a novel, innovative and drastic technique of constitutional amendment. Article 31B gives blanket protection to all items in the Ninth Schedule and is receptive in nature. Even If a statute has already been declared unconstitutional, if included within the schedule, it is deemed to be constitutional from the date of its inception.

Article 31 of the Constitution of India, 1950.

2. AIR 1951 Pat. 91.

The Ninth Schedule was, thus, introduced in order to bring in reforms to rationalize the agrarian structure, and thus change the economic base of the political power. Articles 31A, 31B and 31C made agrarian reforms a task to be implemented by the states under the Constitution. However, the objectives and effectiveness of the Ninth Schedule came under a scanner from the very beginning.³

In *Shankari Prasad v. Union of India*⁴, the Supreme Court upheld the constitutional validity of the Ninth Schedule. The question before the Supreme Court was whether an amendment of the Constitution made under Article 368 was included in term "law" in Article 13? The Court, upholding the constitutionality of the 1st Amendment, observed that "law" in Article 13 did not include an amendment enacted under Article 368. The Supreme Court distinguished between the ordinary legislative power and the constitutional power. In the context of Article 13, "law" must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constituent power. The Supreme Court, thus, laid down that Article 368 conferred constituent power on Parliament, in the exercise of which it could amend every provision of the Constitution, including the fundamental rights. Article 31A was again amended with retrospective effect by the Constitution (4th Amendment) Act, 1955, which further extended the scope of the word 'estate' which now includes any 'jagir', 'inam', or 'maufi' or other similar grant and in the State of "Madras and Kerala janman right. It inserted certain state Acts in the Ninth Schedule. The amendment remained unchallenged because of decision in *Shankari Prasad* case.

The Constitutional validity of the Acts added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964 was challenged in petitions filed under Article 32 of the Constitution. Upholding the constitutional amendment and repelling the challenge in *Sajjan Singh v. State of*

*Rajasthan*⁵ the law declared in *Sankari Prasad* was reiterated. It was noted that Articles 31A and 31B were added to the Constitution realizing that State legislative measures adopted by certain States for giving effect to the policy of agrarian reforms have to face serious challenge in the courts of law on the ground that they contravene the fundamental rights guaranteed to the citizen by Part III. The Court observed that if pith and substance test is to apply to the amendment made, it would be clear that the Parliament is seeking to amend fundamental right solely with the object of removing any possible obstacle in the fulfillment of the socio-economic policy. The Court

Kaur, Sarbjit. *Judicial Review and Ninth Schedule of the Constitution*, Journal of Constitutional and Parliamentary Studies, 2006, vol. 40, pg. 315- 342.

AIR 1951 SC 458.

AIR 1965 SC 845.

further noted that the impugned act does not purport to change the provisions of Article 226.

Then came the celebrated judicial pronouncement in I C. Golak Nath v.

State of Punjab⁶. In this case, the constitutional validity of the Constitution-1st Amendment, 1951, 4th Amendment, 1955 and 17th, Amendment, 1964 was again examined by the Supreme Court. The Supreme Court by a majority of 6:5 overruled its earlier decisions in Shankari Prasad and Sajjan Singh and held that Parliament had no power to amend the fundamental rights, It was observed by the Court that Article 368, as its marginal note showed, in terms, only prescribed the various procedural steps in the matter of amendment of the Constitution, but did not confer power on Parliament either expressly or impliedly to amend the Constitution. The Court held that an amendment was a legislative process and an amendment of the Constitution was made only by the legislative process with ordinary majority or with special majority, as the case may be, and that an amendment could be nothing but "law" within the meaning of Article 13.

The Supreme Court further declared that Parliament would have no power in future, i.e., from the date of Golak Nath decision on February 27, 1967, to amend any provision of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

EVOLUTION OF DOCTRINE OF BASIC STRUCTURE

The doctrine of basic structures of the Constitution is a relatively recent innovation in India .It is a judicial invention and a product of what is termed 'creative jurisprudence'.

To nullify the effect of Golak Nath and to provide unlimited power to Parliament to amend any part of the Constitution including fundamental rights, the Constitution (24th Amendment) Act, 1971 was enacted⁷. In the same year the Parliament passed 25th and 26th Constitutional Amendment Acts. The Constitution (29th Amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting therein two Kerala Amendment Acts in furtherance of land reforms.

The validity of all these Amendments were challenged in Kesavananda Bharati v. State of Kerala.⁸ The main question involved was the extent of amending power of Parliament under Article 368 of the Constitution. A special Bench of 13 judges was constituted to hear the case. The Court by a majority

AIR 1967 SC 1643.

By Constitution (24th Amendment) Act, 1971, Article 13 was amended and after clause (3), the following clause was inserted as Article 13(4): "13(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

AIR 1973 SC 1461.

upheld the Constitutional validity of the 24th Amendment and the 29th Amendment and overruled Golak Nath which denied Parliament the power to amend fundamental rights. The Court observed that the 24th Amendment merely made explicit which was implicit in the unamended Article 368. However, the judges differed along themselves as to the extent or the scope of the power of amendment of Parliament. Seven of the thirteen judges observed that the power of amendment of Parliament under Article 368 was subject to certain implied and inherent limitation and that in the exercise of its amending power, Parliament could not amend the basic structure or framework of the Constitution. While the other six judges (Ray, Palekar, Mathew, Beg, Dwivedi, and Chandrachud, JJ) were of the opinion that there was no limitation on the power of Parliament to amend the Constitution.

Khanna, J. appears to have reconciled the two divergent views and took a middle path and thus tilted the balance in forming the majority decision with Sikri, C.J., Shelat, Hegde, Grover, Jaganmohan Reddy, Mukheriea, JJ. Khanna, J. held that Parliament had wide power of amending the Constitution under Article 368, it extended to all the provisions of the Constitution, including those relating to fundamental rights, but the amending power is not unlimited and it did not include the power to destroy or abrogate the basic structure or framework of the Constitution. The majority Supreme Court thus evoked the theory of basic structure. However, the seven majority judges did not say it with precision as to what constituted the basic structure, which was beyond the amending power of Parliament under Article 368. According to them the basic foundation of the basic features could be easily discernible from the preamble, as well as, from the whole scheme of the Constitution.

The Supreme Court had an occasion to refer to the doctrine or basic structure in *Indira Nehru Gandhi v Raj Narain*⁹, popularly known as Election Case, wherein for the first time the Challenge to the constitutional amendment was not in respect of right to property or social welfare, the challenge was with respect to electoral Laws. In this case, the appellant, Mrs. Indira Nehru Gandhi, the then Prime Minister filed an appeal before the Supreme Court against the judgment of the Allahabad High Court, in which the High Court had invalidated the election of the appellant to Lok Sabha, on the ground of having committed corrupt practice under the Representation of the People's Act, 1951. During the pendency of the appeal before the Supreme Court, Parliament enacted the Constitution (39th Amendment) Act, 1975. The 39th Amendment, inter- alia, inserted a new Article 329A in the Constitution, to nullify the effect of the High Court judgment and also withdrawing the jurisdiction of all courts, including the Supreme Court, over disputes relating to the elections involving the Speaker and the Prime Minister including the present appeal pending before the Supreme Court. Clause (4) of the new

AIR 1975 SC 2299.

Article 329A, which is directly concerned with this appeal, stated that no law made prior to the commencement of 39th, Amendment, in so far as it related to election petitions would apply or should be deemed to have applied to election of the Prime Minister to either House of Parliament. It further provided that such election would not be deemed to be void or even to have become void and that notwithstanding any decision of any court before 39th Amendment, declaring such election to be void. Though all five judges delivered concurring judgments to strike down clause (4) of Article 329A and declared judicial review, free and fair election, rule of law and right to equality as constituting the basic feature of Constitution, their views on the issue of judicial review are replete with variations. Beg, J. clearly expressed his view that judicial review was a part of basic structure of the Constitution.

Article 368 was amended by the Constitution (42nd Amendment) Act, 1976. It inserted in Article 368, clauses (4) and (5) Art. 368 Clauses (4) and (5) provides that amendment under this article shall not be called in question in any court on any ground and it declares that there shall be no limitation on the power of Parliament to amend the Constitution.

In *Minerva Mills v. Union of India*¹⁰, the Court struck down clauses (4) and (5) and Article 368 finding that they violated the basic structure of the Constitution. Bhagwati, J. in this case observed that clause (4) of Article 368 would result in enlarging the amending power of the Parliament contrary to dictum in *Kesavananda Bharti's* case. The learned judge said: "So long as clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in *Kesavanda Bharti's* case would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review.

These decisions illustrate that the theory of basic structure helps to protect the core of the Constitution from the onslaughts of legislatures.

NINTH SCHEDULE LAWS - SCOPE AND EXTENT OF IMMUNITY FROM JUDICIAL REVIEW

Article 31B read with the Ninth Schedule provides what is generally described as a protective umbrella to all Acts which are included in the Schedule, no matter of what character, kind or category they may be. However, question arises whether the Acts which are included in the Ninth

10. AIR 1980 SC 1789.

Schedule on or after 24th April, 1973, on which date the judgment in Kesavananda Bharati¹¹ was rendered, would also enjoy that protection under Article 31B. This question was answered by the Supreme Court in Waman Rao v. Union of India¹². According to which, amendment to the Constitution made on or after April 24, 1973, by which the Ninth Schedule has been amended from time to time by the inclusion of various Acts and Regulations therein, are open to challenge on the ground that they or anyone or more of them, are beyond the constituent power of Parliament since they damage the basic or essential features of the Constitution. In this case the constitutional validity of the Maharashtra Land (Ceilings on Holdings) Reform Act, 1961 was challenged on the ground that it violated Articles 14, 19 and 31 of the Constitution. The Court upheld the constitutional validity of the Act as its provisions could not be deemed to be void on the ground that they were inconsistent with or abridged any of the rights conferred by Article 14, 19 or 31.

The Constitution Bench of the Supreme Court that had decided Waman Rao had also decided Maharao Sahib Sri Bhim Ji v. Union of India¹³, wherein the validity of the Urban Land (Ceiling and Regulation) Act, 1976, added to the Ninth Schedule by the constitution (40th Amendment) Act, 1976 was 111 question on the ground of its inconsistency with the fundamental rights contained in Articles 14, 19, and 31 of the Constitution. The majority held section 27(1) of the impugned Act, insofar as, it imposed a restriction on the transfer of any urban or unbanishable property as violative of Articles 14 and 19 (1)(f) respectively. When the said Act was enforced in February 1976, Article 19(1)(f) was part of fundamental rights chapter and it was omitted therefrom only in 1978 by 44th Constitutional Amendment Act and made instead only a legal right under Article 300A.

WHETHER THE NINTH SCHEDULE HAS BEEN MISUSED?

Ever since the First Amendment, the Ninth Schedule has been relied upon to amend the constitution multiple times over. The 4th amendment inserted six acts to the 9th schedule. The 17th amendment added 44 more acts. The 29th amendment brought in two acts from Kerala. In 1975 Indira Gandhi's infamous abuse of executive power leading upto emergency saw the 39th amendment adding certain central enactments.

Originally, sixty-four laws were added to the Ninth Schedule. It was again amended by the 4th and 17th Constitution, (Amendment) Acts 1955 and 1964 respectively by which certain more Acts were added to the Ninth Schedule. The Constitution (29th Amendment) Act, 1972, added Kerala

Supra note 8.

AIR 1981 SC 274.

AIR 1981 SC 234.

Land Reforms Acts, 1969 and the Kerala Land Reforms Act, 1971, to the Ninth Schedule. The validity of this amendment was upheld by the Supreme Court in *Kesavananda Bharati*¹⁴. The Constitution (34th Amendment) Act, 1974, amended the Ninth Schedule for the fourth time and added 17 land reform laws.

On the basis of progressive legislation any laws can be included in the Ninth Schedule and thus the very purpose of judicial review as provided in Article 13 for the protection of fundamental rights would be frustrated. The Constitution (42nd Amendment) Act, 1976, further added 64 central and state land reform laws to the Ninth Schedule.

The Constitution (66th Amendment) Act, 1990 again amended the Ninth Schedule and inserted 55 Land Reform Acts into the Schedule. After this amendment, the total number of Acts included in the Schedule had, increased to

The Constitution (75th Amendment) Act, 1994 has been passed by Parliament to bring Tamil Nadu Act providing for 69 percent reservation for backward classes under the Ninth Schedule to the Constitution and thus to take the legislation out of the ambit of judicial review. This is not justified as the object of the Ninth Schedule is to protect only the land reform Acts from being challenged in the court of law and not a law for reservation of backward classes. This is clear misuse of Ninth Schedule of the Constitution for political purpose. However, the constitutional validity of Tamil Nadu Reservation Act was challenged before the Supreme Court in *I.R. Coelho*¹⁵.

What takes the cake however is the 78th amendment, which was about not just immunity to laws in 9th schedule, which was suspect, but amendments to those laws and making those amendments immune.¹⁶ After this amendment the total number of Acts included in the Schedule has risen to 284.

THE NINTH SCHEDULE LAWS NOW OPEN TO JUDICIAL REVIEW

The fundamental question discussed by the Supreme Court in *I.R.Coelho*¹⁷ is whether on and after 24th April, 1973 when basic structure doctrine was propounded, it is permissible for parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so, what is its effect on the power of judicial review of the Court? The order of reference was made by a Constitution Bench of Five Judges is reported in *I.R.*

*Cohelo (Dead) by LRs v. State of Tamil Nadu*¹⁸. The Gudalur

Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
(1999) 7 SCC 580.

Yossarin, Asian News, Ninth Schedule of India Constitution now open to judicial review- Why did it take this long?,www.bloggernews.net/13766.

I. R. Cohelo (Dead) LRs v. State of T. N., AIR 2007 SC 861.
Supra note 17.

Janman Estates (Abolition and Conversion into Ryotwari), Act, 1969 (the Janman Act), in so far as it vested forest lands in the Janman estates in the State of Tamil Nadu, was struck down by this Court in *Balmadies Plantations Ltd. v. State of*

Tamil Nadu¹⁹ because this was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution. Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgment by the State of West Bengal was dismissed. By the Constitution (Thirty-Fourth Amendment) Act, the Janman Act, in its entirety was inserted in the Ninth Schedule. By the Constitution (Sixty - Sixth Amendment) Act, the West Bengal Land Holding Revenue, Act. 1979, in its entirety, was inserted in the Ninth Schedule. These insertions were the subject matter of challenge before a Five Judges Bench. It rests on two counts (1) Judicial review is a basic feature of the Constitution; to insert in the Ninth Schedule an Act which, or part of which, has been struck down as unconstitutional in exercise of the power of judicial review, is to destroy or damage the basic structure of the Constitution. (2) To insert in the Ninth Schedule after 24.4.1973, an Act which, or part of which, has been struck down as being violative of the fundamental rights conferred by Part III of the Constitution is to destroy or damage its basic structure. These insertions were the subject matter of challenge before a Five Judge Bench. The contention urged before the Constitution Bench was that the statutes, inclusive of the portions thereof which had been struck down, could not have been validly inserted in the Ninth Schedule. The five-Judge Constitution

Bench observed that, according to *Waman Rao v. Union of India*²⁰ amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the Constituent Power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. The decision in

*Minerva Mills*²¹ and *Maharao Sahib Shri Bhim Singhji*²² were also noted and it was observed that the judgment in *Waman Rao*²³ needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which or a part of which, is or has been found by Supreme Court to be violative of one or more of the fundamental rights conferred by Articles 14, 19 and 31 can be included in the Ninth Schedule or whether it is only

AIR 1972 SC 2240.

Supra note 12.

Supra note 10.

Supra note 13.

Supra note 12.

constitutional amendment amending the Ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of nine judges. This is how the matters have been placed before Supreme Court's nine judge bench.

The main thrust of the argument of the petitioners is that post-1973, it is impermissible to immunize Ninth Schedule laws from judicial review by making Part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Article 368, is the thrust of the contention. The contention proceeds that since fundamental rights form a part of basic structure and thus laws inserted into Ninth Schedule when tested on the ground of basic structures shall have to be examined on the fundamental rights test.²⁴

The key question however is whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights. According to the petitioners, the consequence of the evolution of the principles of basic structure is that, Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Article 31B. Assuming that such immunity can be conferred, its constitutional validity would have to be adjudged by applying the direct impact and effect test which means the form of an amendment is not relevant, its consequence would be determinative factor.²⁵

On the other hand, the contention urged on behalf of the respondents is that the validity of Ninth Schedule legislations can only be tested on the touch-stone of basic structure doctrine as decided by majority in Kesavananda Bharti's case which also upheld the Constitution 29th Amendment unconditionally and thus there can be no question of judicial review of such legislations on the ground of violation of fundamental rights chapter. The fundamental rights chapter, it is contended, stands excluded as a result of protective umbrella provided by Article 31B, and, therefore, the challenge can only be based on the ground of basic structure doctrine.²⁶ Legislation can further be tested for (i) lack of legislative competence and (ii) violation of other constitutional provisions. This would also show, that there is no exclusion of judicial review and consequently, there is no violation of the basic structure doctrine. The contention is that there is no judicial review in absolute terms and Article 31B only restricts that judicial review power. It is contended that after the doctrine of basic structure which came to be

Supra note 18 at 877.

Ibid.

Ibid.

established in Kesavananda Bharti's case, it is only that kind of judicial review whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. Giving immunity of Part III to the Ninth Schedule laws from judicial review, does not abrogate judicial review from the Constitution. Judicial review remains with the court but with its exclusion over Ninth Schedule laws to which Part III ceases to apply. The contention is that the majority in Kesavananda Bharti's case held that there is no embargo with regard to amending any of the fundamental rights in Part III subject to basic structure theory and therefore the petitioners are not right in the contention that in the said case the majority held that the fundamental rights form part of the basic structure and cannot be amended. The further contention is that if Fundamental Rights can be amended, which is the effect of Kesvananda Bharti's case overruling Golak Nath's case, then fundamentals rights cannot be said to be the part of the basic structure, unless the nature of the amendment is such which destroys the nature and character of the Constitution. It is contended that the test for judicially reviewing the Ninth Schedule Laws cannot be on the basis of mere infringement of the rights guaranteed under Part III of the Constitution. The correct test is whether such laws damage or destroy that part of fundamental rights which form part of the basic structure. Thus, it is contended that judicial review of Ninth Schedule laws is not completely barred. The only area where such laws get immunity is from the infraction of rights guaranteed under Part III of the Constitution.

To answer this question the court first examined the judgement in Keavananda Bharati, particularly with reference to 29th Amendment. Khanna, J. was of the view that 29th Amendment Act did not suffer from any infirmity and as such was valid. Thus, while upholding the 29th Amendment Act, there was no mention of the test that is to be applied to the legislations inserted in the Ninth Schedule. The implications that the respondents seek to draw from the above was that this amounts to an unconditional upholding of the legislations in the Ninth Schedule. However, Khanna, J. in Indira Nehru Gandhi made it clear that he never opined Kesavananda Bharati that the fundamental rights were outside the purview of the basic structure According to him, what has been laid down in that judgment is that no article of the Constitution is immune in from amendmentary process because of the fact that it relates to a fundamental right and is contained in the Part III of the Constitution. Thus, after this clarification, it is not possible to read the decision of Khanna, J. in Kesavananda Bharati so as to exclude fundamental rights from the purview of the basic structure, the inevitable consequence is that the 29th Amendment even if treated as unconditionally valid is of no consequence on the point in issue before the court. The problem was solved in Minerva Mills by the Supreme Court by holding that Acts inserted in the Ninth Schedule were not unconditionally valid but would have to stand the test of fundamental rights.

The Court in I.R. Coelho, after discussing the above cases, was of the opinion that rights and freedom created by the fundamental rights chapter could be taken away or destroyed by amendment of relevant article, but subject to limitation of basic structure doctrine. It may reduce the efficacy of Article 31B but that is inevitable in view of the progress the laws have made post - Kesavananda Bharati, which has limited the power of Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure. Part III is amendable subject to basic structure doctrine. It is permissible for the legislature to, amend the Ninth Schedule and grant a law the protection in terms of Article 31B but subject to the right of citizen to assail it on the concept of enlarged judicial review. The legislature cannot grant fictional immunities and exclude the examination of Ninth Schedule law by the Court after the enunciation of the basic structure doctrine. The constitutional amendments are subject to limitations and if the question of limitations is to be decided by Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitation cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary. The doctrine of basic structure as a principle has now become an axiom. The power to amend the Constitution is subject to the aforesaid axiom.

After the judgment of Supreme Court in this case it is now well settled principle that any law placed under Ninth Schedule after April 24, 1973, are subject to scrutiny of Court's if they violated fundamental rights and thus put the check on the misuse of the provision of the Ninth Schedule by the legislative.

CONCLUSION

The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principle of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers.²⁷

The original purpose of the Ninth Schedule read with Article 31B of the Constitution was to shield the land reform laws from judicial scrutiny in earlier year of independence to promote social change. Whereas scope of Article 31A is limited to property related laws only, the scope and ambit of Article 31B is not clearly defined thereby giving wide discretion to Parliament

27. Supra note 18 at para 44.

to include any law in the Ninth Schedule as it considers fit and proper. Therefore Article 31B has a far greater possibility of its misuse. The rationale for Article 31-B and the Ninth Schedule was to protect legislation dealing with property rights and not any other type of legislation. But, in practice, Article 31-B has been used to invoke protection for many laws not concerned with property rights in anyway. Article 31-B is thus being used beyond the socio-economic purpose for which it was enacted.

Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and the extent of infraction of a Fundamental Right by a statute, sought to be Constitutional protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the 'rights test' and the 'essence of the right' test. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

From 1970 onwards, the courts realized the scope of the misuse of power of amendment by Parliament and thus evolved the 'basic structure' doctrine in *Kesavananda Bharati*, which put irrevocable limits on the powers of the legislature. The object behind Article 31B is to remove difficulties and not to obliterate Part III in its entirety or to exclude judicial review. The doctrine of basic structure is propounded to save basic features.

Our Constitution meticulously defines the functions of various organs and that they have to function within their demarcated spheres. No organ can usurp the functions assigned to another. Legislature and executive, the two facets of people's will, have all the powers of formulation of policies as well as implementing them. Judiciary has power to ensure that the two organs of the state function within the constitutional limits. Judicial review, thus, is a powerful weapon to restrain unconstitutional exercise of power by the legislature and the executive. The Ninth Schedule acts as a striking counterpart to the theory of separation of powers intended to act as a system of checks and balances between the three organs of the state.

In *I.R. Coelho*, the Supreme Court once again discussed the scope of the immunity provided by the Ninth Schedule and held that any amendment which is relatable to Article 31B, i.e., any amendment to the Ninth Schedule, must not violate the basic structure. To examine whether the basic structure has been violated or not can be examined, only by exercising the power of judicial review. Therefore, the power of judicial review cannot be avoided. When elections are near, efforts are generally made by the politicians to woo the electorate by whatever means possible including frequent use of the Ninth Schedule to drop all trained laws in it. That is why judicial scrutiny is necessary for the sake of transparency and extensive circumspection of the law makers' motive behind putting certain enactments under this privileged constitutional clause.

In sum, all laws included in the Ninth Schedule are now open to judicial review of the courts on the ground of violation of basic structure of the Constitution and the erstwhile protection provided by the Ninth Schedule is no longer available. Moreover, after 44th amendment act right to property ceased to be fundamental right and it became only legal right. Thus the purpose for which the Ninth Schedule was enacted has more or less been met today. In such a situation the judgment of Supreme Court in I.R. Coelho case is laudable and such an interpretation will give a strong basis to the power of judicial review of the apex courts as a basic structure of the Constitution and thereby provide an effective means to prevent the misuse of the Ninth Schedule.

Urkund Analysis Result

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