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Unveiling Judicial Review: Origins & Impact on Administrative and Legislative Actions

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ABSTRACT

The expression 'judicial review' can be used both in narrow sense as well as in wide sense. In narrow sense Judicial Review is essentially collateral. It does not go into the merits of the impugned decision but on the contrary examines only the constitutionality or the basic legality of it. The attack is collateral.

Here 'The contention is not that on merits the impugned decision was wrong. On the other hand, the contention is that the decision was given either without jurisdiction or that it was contrary to the constitution or that it was contrary to the fundamental provision of a statute under which the administrative authority was acting.

In its wider sense, Judicial Review would include even Appeals on the merits of the decision which may be of administrative authority or even civil court. All the questions of Facts of law that is the merits of the whole case would be open to review. Since this is reconsideration by a higher court which have been already considered and decided by a court or tribunal which, in hierarchy of judicial authority is directly subordinate to the reviewing court, the earmark of such a wide review, is that it is usually vertical review. This would usually mean an Appeal from a lower to a higher court or tribunal on all questions of fact and law or on the question of law or on substantial question of law . The review in the wider sense may be of dispute between private parties or between private parties and the state or a public authority and therefore is mostly a question of private law. But the narrower view is essentially a question of public law. It is directed against administrative or legislative action as being without jurisdiction or unconstitutional.

For all practical purposes judicial review has acquired narrow usage to signify 'The power of the courts to pass upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce such as they find to be unconstitutional and hence void.

Keywords: *Judicial review, legislative action, executive action.*

I. INTRODUCTION

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For all practical purposes judicial review has acquired narrow usage to signify 'The power of the courts to pass upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce such as they find to be unconstitutional and hence void[4] .

II. ORIGIN OF JUDICIAL REVIEW AGAINST ADMINISTRATIVE ACTION AND LEGISLATIVE ACTION

(A) England

Basically, judicial review is the assertion of rule of law as controlling state action. It is generally asserted that the institution of judicial review originated in U.S.A, but a deeper analysis reveals the fact that this is true only in a very limited sense because historically, the origin of this institution can be traced to the English legal history. When the major portion of law in England consisted of common law, the judges asserted that the State's action including the exercise of

[2] Deshpande V.S- Judicial review of legislation, Eastern Book Co. Ltd. 1977, p.14
[3] ***M.V. Vasuraj V. DDA***., ILR (1971) II Delhi-21
[4] Corwin, E.S- Encyclopedia of Social Sciences Vol. 8, P. 457.

royal prerogative must confirm to the common law. On the morning of Sunday, November 10, 1607, a remarkable interview took place between **Sir Edward Coke**, Chief Justice of the common Pleas and King James I. this is what the Coke says happened:

"Then the King said that he thought that the law was founded upon reason and that he and others had reason as well as the judges; to which it was answered by me, that true it was that God had endowed His Majesty with excellent science and great endowment of nature , but His Majesty was not learned in the in the laws of the realm of England, and causes which concern the life, or inheritance of goods or fortune of his subjects, are not to be decided by natural reason but by artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it; and that the law was the golden scale to try the subjects; and which protected His Majesty in safety and peace"[5].

The supremacy of common law was sufficient to ensure the rule of law as against administrative action. For, it was for judges to say what the common law was. But when the law started becoming increasingly statute made and parliament asserted legislative sovereignty, the question which became important was whether there could be any control against legislative action. An Act of parliament confessing the character of Royal College of physicians gave the incorporated society of Physicians power to impose fine upon members offending against its rulers. Half of such Fine was to go to the Crown and Half to the Society. A Physician, Dr. Bonham was imprisoned for non payments of funds. He brought an action for false imprisonment. The same chief justice of England- Sir Edward Coke, held in 1610 that the Act was void in as much as it had made the society the prosecutor and judge at the same time which was against common law and reason. Coke thus asserted the power of judicial review even against legislation[6].

Sir Edward Coke in this famous Bonham's case said that *'it appears in our books that in a many cases the common law will control the Acts of parliament; and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason and repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void'*[7]. This shows how deeply the American plan of judicial review was rooted in English legal tradition[8].

The doctrine of judicial review however did not take root in England and the credit for its

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[5] Heustson RFV, Essays in Constitutional Law 2nd Ed. 'The Case of Prohibitions' (1607) p. 32-33.
[6]Plucknett, TFT, Selected essays on Constitutional Law, published under the auspices of the American law schools, Vol. I, P. 67
[7] Supra note 2, P. 16
[8] Sabine, G.H- History of political theory, 1957, P. 384.

development goes to United States of America. In England this doctrine could not develop because of two reasons. Firstly, the sovereignty of the parliament did not brook any rival. Henceforth the English judges were guided by the *Blackstonian principal* that 'the power of parliament is absolute and without control. Secondly, the spirit of moderation of British people ensured the 'Rule of Law' without the need of judicial review of legislation.

Some Englishmen who settled in America took with them the belief that the Court's were defenders of people's right and the common law was supreme. Somehow the English Parliament had not used it's power over colonist in America wisely and therefore subsequent bitter experiences of repressive and tyrannical British laws dictated to the needs for keeping check over the arbitrary powers of legislature and executive. This need was supported by the impact of Montesquieu's theory of separation of powers and checks and balances.

(B) America

After independence therefore the first concern of the Americans was to provide for a "Higher law" as the background of judicial review. This was why "the Supremacy clause" of the U.S constitution, namely Art VI clause 2 explicitly stated:

"The constitution and the laws of U.S.A which shall be made in pursuance thereof…….shall be the supreme law of the land."

The theory that there ought to be a natural law or a higher law to which the legislature ought to conform had found was given firm foundation in American constitution. Judicial control of legislative action was for the first time asserted by Chief Justice Marshall in ***Marbury V. Madison*** (1803). *Marbury* v. *Madison* stands as the classic expression of judicial review in American constitutional law. The framers of the federal constitution divided the United States government into three branches: the legislative, the executive, and the judiciary. The latter two were not in the Articles of Confederation. The Federal Constitution enabled Congress to establish certain rules and procedures in the operation of the federal courts. In 1789, Congress established a three-tiered system of federal courts--the District, Circuit, and Supreme Courts. At the bottom of this hierarchy were district courts, each with a single district judge covering every state, with the exception of Virginia and Massachusetts, which had two each. In the middle of this hierarchy were three circuit courts covering the southern, eastern, and middle states. Finally, at the top was the Supreme Court, which was staffed by five associate justices and one chief justice.[9]

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[9] Wythe Holt, "Judiciary Act of 1789," *The Oxford Companion to the Supreme Court of the United States*, Kermit L. Hall, et al., eds. (New York: Oxford University Press, 1992), 472-474; see also Kathryn Preyer, "Judiciary Acts

A part of the Judiciary Act of 1789, which caused great concern among many Americans, was Section 25. This section of the Judiciary Act stated that whenever the highest state court rendered a decision against a person who claimed rights under the Federal Constitution, laws, or treaties, the judgment could be reviewed and possibly reversed by the Supreme Court.

Eleven years before Chief Justice Marshall's decision in *Marbury* v. *Madison*, the Supreme Court clarified that it possessed the right of judicial review. In 1792, Congress enacted legislation directing the Circuit Judges, including the Supreme Court Justices then sitting on the Circuit Courts, to act as pension commissioners. When this legislation was brought before the Circuit Court in New York, with Chief Justice John Jay presiding, Jay rejected the Congressional act, stating that "... neither the Legislative nor the Executive can constitutionally assign to the Judicial any duties but as such are properly judicial and to be performed in a judicial manner."[10] However, before the issue had a chance to reach the Supreme Court for decision, Congress had changed the procedure for the pension claims. The case was not brought before the Supreme Court, and the Supreme Court did not have the opportunity to rule the act of Congress invalid. Thus, Judicial review was strong at the state level while it was only developing at the federal level.

In 1799, the Federalist Party began efforts to expand the organization and jurisdiction of the federal courts created in the Judiciary Act of 1789. Before Thomas Jefferson took office following his electoral triumph in 1800, the lame-duck Federalist-dominated Congress passed the Judiciary Act of 1801.[11] This act abolished the existing Circuit Courts, freeing Supreme Court justices from their duties as circuit judges. In addition, the number of Supreme Court justices was reduced from six to five, and six new circuits were created. Thus, outgoing President John Adams was able to appoint sixteen circuit judges, who came, among others at even lower levels, to be called the "midnight judges" because their commissions were signed in the closing days of the Adams' administration.[12]

Just before President John Adams' term expired, in addition to creating the sixteen new judgeships, he also created various other offices for attorneys, marshals, and clerks. Knowing that the Constitution assured federal judges life tenure and protected them from arbitrary dismissal, Adams rushed to fill the Supreme Court bench with strict Federalists.[13] The

of 1801 and 1802," ibid., 474-475.

[10] Leonard Baker, *John Marshall, A Life in Law* (New York: Macmillan Publishing Company, 1974), 374.

[11] Robert Lowry Clinton, "Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of *Marbury* v. *Madison*," *American Journal of Political Science* 38 (May 1994): 285-302.

[12] Robert H. Wiebe, *The Opening of American Society: From the Adoption of the Constitution to the Eve of Disunion* (New York: Alfred A. Knopf, 1984), 223.

[13] Elizabeth McCaughey, "*Marbury* v. *Madison*: Have We Missed the Real Meaning?" *Presidential Studies*

nominations were then confirmed by the Federalist Senate and the required commissions were signed and sealed, but some of them remained on the desk of President John Adams and were not delivered by then Secretary of State John Marshall. When Jefferson was inaugurated, he directed James Madison as the new Secretary of State to deliver twenty-five of the commissions appointed by Adams but to withhold seventeen other commissions.[14]

Four men applied to the Supreme Court for a writ of mandamus, an order issued by a court of superior jurisdiction and directed to a public official instructing the latter to fulfill an obligation imposed by law, in an attempt to force Secretary Madison into delivering the commissions.[15]

Marshall faced a serious decision, not only for himself, but for the future of the Supreme Court. If Marshall overstepped his power, he could face impeachment. If he backed down, the little prestige the Supreme Court possessed would be reduced to nothing. As he considered *Marbury* v. *Madison* after the close of the hearings, he must have realized that he was in a predicament.[16] At that time, Jefferson was at the height of his popularity. To issue a writ would be an act of defiance which could possibly trigger impeachment proceedings against Marshall.[17]

Marshall viewed the issue as a conflict between the Court and the President. The problem was how to check the President without exposing the Court to his might.[18] By rearranging the main issues of the case, Marshall declared that the President had no right to hold the commissions. He also asserted that Section 13 of the Judiciary Act of 1789, under which Marbury had brought suit, was unconstitutional; therefore, the Court was powerless to help him. By Marshall's authority, he extended his powers, because no act of Congress had ever been declared unconstitutional.[19] Marshall delivered a stern warning to the Jeffersonians, whose entire administration was to be subjected to judicial review by none other than its most powerful enemy, the Supreme Court.[20] At the very end of the decision, Marshall stated:

"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 a law repugnant to the Constitution is void and that courts, as well as other departments, are bound

Quarterly 19 (1989): 491-528.

[14] Andrew David, ed., *Famous Supreme Court Cases* (Minneapolis: Lerner Publication Company, 1980), 9.

[15] Henry Campbell Black, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th ed. (St. Paul, Minnesota: West Publishing Company, 1990), 61.

[16] Philip Kurland, *Politics, the Constitution and the Warren Court* (Chicago: The University of Chicago Press, 1970), 90.

[17] Garraty, *Quarrels*, 10.

[18] Ibid.

[19] D. Grier Stephenson, Jr., "John Marshall and the Evolution of Judicial Review," *USA Today*, Teacher Supplement, July 1987, 38, Section 1274.

[20] Baker, *John Marshall*, 408-409.

by that instrument."[21]

In reaching the decision, Marshall used an unorthodox approach. He was an ardent advocate of the rhetorical question and was able to consider the case by posing three such questions. First, has the applicant a right to the commission he demands? Second, if he has a right and that right has been violated, do the laws of his country afford him a remedy? Third, if they do afford him a remedy, is it a mandamus issuing from this Court?[22]

Marshall held that Marbury was entitled to a writ of mandamus and it was unconstitutional to issue the writ of mandamus. The Judiciary Act of 1789, Section 13, stated that the judicial courts of the United States authorized the Supreme Court, "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States."[23]Marshall's decision stated,

"The Secretary of State being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority, and assigning the duties with its words purport to confer and assign"[24].

(C) India

The development of the doctrine in United States had worldwide influence. It was also adopted in the Indian Constitution for the same reasons. The basic Rights such as Freedom of speech and of press had been denied to the Indian people during the British rule. For, the demands for Independence and civic Rights asserted by the leaders of the people of India ran counter to the policy of British India Government and of the Home Government in England to prolong the British rule in India as long as possible. One of the first things, therefore, which the constitution of India provided was that the legislative power was not to be exercised contrary to the Fundamental Rights. The constitution was itself framed by the constituent Assembly which was summoned by a cabinet mission plan but had converted itself in to a sovereign body. It did not seek to derive power from any other authority or from previous statute. The Act of making of the constitution was thus a political act. It was not Justiciable. The validity and supremacy of

[21] John Marshall, "*Marbury* v. *Madison*," *Domestic Expansion and Foreign Entanglement*, vol. 4, 1797-1820, The Annals of America Series (Chicago: Encyclopedia Britannica, Inc., 1968), 170.
[22] Edward S. Corwin, *The Doctrine of Judicial Review* (Princeton, New Jersey: Princeton University Press, 1963), 26.
[23] Jonathan Birnbaum and Bertell Ollman, eds., *The United States Constitution: 200 Years of Anti-Muckraking, Progressive, Feminist, Especially Socialist Criticism* (New York: New York University Press, 1990), 173.
[24] *Marbury* v. *Madison*, document no. 005-0137 (U.S. Supreme Court, 1803), reproduced in Howe Electronic Data Supreme Court Reports CD-ROM (Portland, Oregon, 1995).

the constitution was placed above ordinary law. The basic distinction between the constitution, namely, the Fundamental law on the one hand and the other laws made by the parliament on the other hand was thus established. The foundation for the exercise of judicial review of legislation was laid[25].

III. Difference between two kinds of review

Both the kinds of judicial review i.e. judicial review of administrative action and judicial review of legislation have much in common regarding their origin and rationale but their development has been on different lines. The basic difference between 'rule of law' and the 'limited government' is that the former works under parliamentary sovereignty but the latter postulates constitutional limitations on the legislative power. The former review is purely judicial while the latter is semi-political as it has to test the validity of the legislative policy on the anvil of the constitution. The former is directed against executive action while the latter is aimed at legislation. The former is used very widely because the administrative action touches the individuals at many more points than the validity of legislation touches them. The judicial review of administrative action is an essential part of rule of law. The area of its exercise is therefore expanding to meet the felt necessities of the times. The more the administrative action of the welfare state expands, the more the judicial review of administrative action also expands. On the other hand, judicial review of legislation may or may not be an essential part of rule of law depending upon the conditions obtaining in a particular country or society[26].

Thus the collateral Judicial Review itself may be of two kinds depending on the nature of the state action against which it is directed. If it is against administrative action, then it is directed against the executive department of the state or administrative authorities of the State. It seeks to review administrative action and is therefore called judicial review of administrative action. If on the other hand if it is directed against a statute of a legislature or a subordinate legislature made under a statute by an administrative authority in nature of rules, regulations, bye-laws etc. then it is directed not against the executive department but against the law making action of the legislature or the executive, since it seeks to determine the validity of legislation it is called Judicial Review of legislation.

In England the population is homogenous and the traditions of people are firmly established. In fact the whole system in England depends on conventions to a large extent. In such a system there was no danger of parliamentary legislation going against the interest of the people. The

[25] Basu D.D- Commentary of the Constitution of India Vol. I 1955, P. 151
[26] Supra note 2, P. 43.

judicial review of legislation therefore did not take roots in England.

On the other hand judicial review of legislation became an essential part of the constitution systems like India an U.S.A because the Federal system which is based on the distribution of powers between states and centre cannot function effectively without the judicial review of legislation.

Besides this, in India, the regional and linguistic diversities made it desirable that an independent and impartial Judiciary should be established by the constitution so that the Fundamental Rights of the individuals and the minorities are protected from any possibility of exercise of arbitrary power by legislature and executive.

IV. JUDICIAL REVIEW AS A COROLLORY TO CONSTITUTIONAL SUPREMACY

The necessity of ensuring a 'government of laws and not of men' led to the establishment of written constitutions as fundamental law. This law is above the ordinary law and the latter is 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. "once the constitution is regarded as the supreme law of the land and the powers of all the other organs of the government are considered as limited by its provisions, it follows that not only legislature, but also the executive, and all administrative authorities, are equally limited by the provisions, so that any executive or administrative Act which contravenes the provisions of the constitution must, similarly, be void and the courts must invalidate them"[27]. Depending on a system of checks and balances involving either a formal separation of powers or at least some division of governmental powers between the judiciary and the legislative-executive authority, the instrument of judicial review seems to be the most effective instrument in determining the validity of ordinary legislation, and therefore is an essential condition for democratic government.

(A) Role of judicial review

The existence of judicial review is considered to be vital in Federal system. It preserves the constitutional balance of authority between the central and state governments in a Federal system.

Indian society has a plural composition involving a number of linguistic, religious and ethnic groups. Like any other society, with rich variety of cultural complexities, Indian society also often presents problems of Human Rights, Cultural Integrity, Socio-Economic Development.

[27] Basu D.D- Commentary of the Constitution of India Vol. I 1955, P. 151.

These problems, in our country practicing democratic politics and constitutional government under Rule of Law, 'generate a variety of institutional arrangements and policies often supported by constitutional and legal gaurantees'[28].

'In the process of accommodation and adjustment among different ethnic groups in plural socities, the judiciary plays a key role often decisive of the direction and pace of accommodation of conflicting interests. If majority rule is characteristic of democratic government, judicial review based on guaranteed rights of minority is the essence of constitutional government and rule of law. Judiciary is thus guardian of the constitution'.[29]

In a Federal system where the spheres of the legislative powers are distributed between the central legislature and state legislatures, there has to be provided a machinery to decide in cases of a dispute as to whether a law made by the state legislatures encroaches upon the field earmarked by the central legislature as also a dispute whether the law made by the central legislature deals with a subject which can be exclusively dealt with by the state legislature. The machinery for resolving such is furnished by the courts and they are vested with the powers of judicial review to determine the validity of Acts passed by the legislations'.[30]

Independent judiciary has, therefore, very important role in the Federal system because it has to perform the basic function of interpreting the constitution impartially to adjudicate upon any disputes of the nature described above, and thus maintain equilibrium between the contracting parties.

"A Federal court is an essential element in a Federal constitution. It is at once the interpreter and the guardian of the constitution and a tribunal for the determination of disputes between the constituent units of the Federation".[31]

K.C. Wheare has rightly pointed out that "the courts exercise this function, because it is the duty of the courts, from the nature of their functions to determine the limits within which the institutions are to move."[32] It thus helps to maintain the balance between the idea of state autonomy and principal of national supremacy.

Second important function of judicial review is 'as the guardian' of Fundamental Human Freedom. Rights are considered as indispensable condition for human progress. It is an essential condition of a modern democratic constitutional government that the Freedoms and Liberties

[28] Menon M.- 'Hindustan Times'- 'Judiciary in Plural society', 8.9.1983.
[29] ibid
[30] Khanna H.R- Judicial review or Confrontation, the MacMillan Co. of India Ltd, 1977, P.56.
[31] Report of the joint Parliamentary committee on Judicial Reforms Vol. I, Part I.
[32] Wheare K.C- Fedreal Govt. 2nd Ed. 1957, P. 65.

must be so embedded in the positive law of the country as superior to the powers of any government that they become effective guarantees against the action of the state. It is now becoming increasingly felt that in order to make rights secure and inviolable, adequate legal remedy should be provided in the constitutional document of the country. Judicial review provides the protection of Fundamental Rights against the abuse of the government. Judicial review of legislative Act is thought to be necessary requirement in order to preserve individual liberties against the rule of the majority and to protect the individuals and groups against invidious attacks by the public officers and departments of the government.[33]

In U.K there is no list of Fundamental Rights nor is there any judicial review of legislative enactments transgressing these rights; but as in the U.S.A, civil liberties have been preserved by the reason of (a) an independent judiciary and (b) the prerogative writs of Habeous corpus, Mandamus, prohibition, certiorari, and quo-Warrants. In the U.K, the prerogative writs have become part of the positive law to such an extent that the parliament would never dream of overriding or abrogating them. In the U.S.A, though there is no specific mention of the courts as the protector of the Fundamental human freedoms, the 5th & the 14th Amendments adopting the "due process clause" opened the way to the exercise of judicial review by the Supreme Court of the U.S.A, for safeguarding the Bill of Rights, and the Chief Justice Marshall's famous judgment in ***Marbury V. Madison*** established the firm basis for future discharge of this role as an integral part of American constitutional structure.

Justice Jackson in ***Board of Education V. Barnett*** [34] said "The very purpose of bill of rights was to withdraw certain subjects from vicissitudes of political controversy, to place them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, and a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depended on the outcome of no elections."

American experience was a source of inspiration for India and therefore we have a list of Fundamental Rights which are protected by the courts. As long as some of the Fundamental Rights exist and are 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. Art 32 of our constitution empowers Supreme Court to issue writs of Habeous Corpus, Mandamus, prohibition, certiorari and quo-Warrant for the proper and effective enforcement of Fundamental Rights. Therefore in our constitution the remedial right provided in Art 32 is itself

[33] Lauterpacht- An International Bill of Rights of Man, P. 186.
[34] (1943) 319 US 624 at 638.

a Fundamental Right and the court, as the protector of Fundamental Rights, cannot, refuse to entertain applications seeking protection against infringement of these Rights.[35] Dealing with the draft of Art 32 in the constituent assembly, **Dr. Ambedkar** observed on December, 9, 1948:

"If I was asked to name any particular Article in this constitution as the most important an Article without which 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 relevant heart of it and I am glad that the House has realized its importance."[36]

Judicial review has thus become an integral part of our constitutional system and the power has been vested to the High Courts and Supreme Court to decide about the constitutional validity of the statutes.

Besides these two functions, judicial review maintains and preserves the balance between executive power and the legislative power on the same governmental level.

Thus the judiciary has a very delicate and difficult task of ensuring to the citizens the enjoyment of their guaranteed rights consistent with the rights of the society and the state and thus acting as a 'great sentinel' it preserves the cherished values of life, and to act as a guardian of the constitution.

When it is said that the judiciary is the guardian of the constitution, it is not implied that the legislature and the executive are not to guard the constitution.

The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and executive on the one hand and judiciary on the other hand provides the means by which the mistakes committed by one are corrected by other and vice-versa. Therefore on the one hand there are representatives of the people i.e. the legislature which through its majority makes laws and on the other hand there is judiciary which decides in a litigation before it, whether a particular law is in accordance with the constitution or not?[37]

(B) Whether judicial review is democratic

Here sometimes a question is poised – how is it that a democratic constitution which is based on the principle of majority rule has also given the power to non-elected judiciary to review the legislation made by the parliament? In this context Justice Frankfurter once remarked, "Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional

[35] ***Romesh Thapper V. State of Madras***, AIR 1950 SC. 124 (1950) SCR 594.
[36] Constitutional Assembly Debates, Vol. VII, P. 953.
[37] Supra note 2, P. 265-266.

scheme."[38]

First of all it may be said that judicial review is not anti-democratic because it has been incorporated in the constitution. It is as much a part of our constitution as democracy is. Besides this, judiciary is necessary to protect the people against themselves or against their representatives, namely against the tyranny of the majority. This is not an oversimplification of the true position. It is not as if the majority of the representatives willfully and deliberately make always laws which could be harmful to the society at large or to minorities. 'By and large the good faith of the parliamentary majority is presumed and is not capable of being rebutted. The function of judiciary is not opposed to the policy and politics of majority rule. On the contrary the duty of the majority is simply to give effect to the legislative policy of a statute in the light of the policy of the constitution. The judiciary acknowledges that the only control over the legislature by parliament is that of the constitution. The duty of the judiciary is simply to consider and decide whether the particular statute accords or conflicts with the constitution and make a declaration accordingly.[39]

Another question related to earlier one is that why it was necessary that even when the executive and parliament had considered the constitutionality of a legislative proposal, the judiciary should again consider the constitutionality of a statute? The executive functions under the cabinet responsible to parliament. The aspirations of the people conveyed through their elected representatives are absorbed by the cabinet who wish to put them in action. A person who is imbibed with an ideal and who is enthusiastic to put in to action is inevitably prejudiced in favour of such action. Unless he hears full argument from people who would be opposed to such action, it would be difficult for him to visualize all the pros and cons of the proposal, including whatever may be said against the constitutionality of the proposal. The executive being necessarily partisan is not in a position to be objective and impartial to decide upon the legality of its own proposals—with the best of intentions the government and the parliament may not be able to detect a constitutional flaw which may thus be detected by a court of law.[40]

Of course, it is for the people, in each country according to the special conditions and problems of their life to choose either a system of full parliamentary sovereignty or a system of limiting the powers of parliament by the judicial review of legislation.

[38] ***Minersville School District V. Gobitis*** (1940 310 US- 586).
[39] Supra note 2, P. 273.
[40] Ibid, P. 275.

(C) Role of judicial review in India

India is a large country with a plural society. The diversity in population has resulted from vertical divisions such as wealth and caste and horizontal ones caused by language, religion and regions. It was for this reason that both in the Government of India Act, 1935 and in the constitution of India, a federal system of government was preferred to a unitary one. The legislative and executive powers of the nation had to be divided between parliament and central government on the one hand and the state government and the state legislature on the other hand because of the Federal nature of the constitution, and as pointed earliar, judiciary was to act as an arbitrator in case of disputes.

However the justification of judicial review of legislation in India cannot be limited to the existence of federalism or just as were check on the executive and parliament but it owes its existence, also to perform wider and positive functions- i.e., to promote social justice in society. Basis of judicial justice is laid down in our constitution which says that it will secure to all citizens- **Justice:** social economical and political; **liberty**- of thought, expression, belief, faith and worship; **equality**- of status and opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation. Thus, the judicial review in India has to perform a very unique task of promoting social justice.

On this basis, it can be said that judicial review in India is different from judicial review in United States. Whereas our preamble talks of Justice, Liberty, Equality and Fraternity, American declaration of Independence 1776 stated: 'We hold these truths to be self evident, that all men are created equal, that they are endowed by their creater with certain inalienable rights, that among these life, liberty and the pursuit of the happiness. That to secure these Rights, governments are instituted among men'[41]. American constitution is based on these ideals.

The difference in the outlook is reflected in the provisions of the two constitutions. The Bill of Rights and 'due process' clause in the U.S constitution give an equal place to the right to property along with the life and liberty of the people. On the other hand, the protection of the right to property in Articles 19 (1) (f) and 31 of our constitution was more limited and has been progressively diminished by a series of amendments to the constitution. Further, the role of the states in U.S.A is forbidden to encroach upon the Rights of the people, whereas in India, the Directive Principles in Part IV call upon the state to enact legislation to bring about a new social order in which justice , social, economic and political shall inform all the institutions of national life. The Fundamental Rights in Part III of the constitution are sandwiched between preamble

[41] Ibid, P. 286.

on the one side and Directive Principles on the other side. While the primary role of judiciary in United States as in India, is to uphold the Rights of the individual, the approach to the discharge of functions id different in the two constitutions.

Our courts have to bear in mind the interests of the society set out in the preamble and the Directive Principles as context in which the Rights of the individual in Part III of the constitution has to be construed.

Judicial review has to play a unique role in the Indian Democracy which, as has been made clear in the preamble, is decided to promote social welfare. Democracy is a multidimensional concept talking about what exactly Democracy is, **Edward Bernstein** says "The answer to this is very simple. At first one would think it settled by a definition-Government by the people". But even little consideration tells us by that only quite a superficial, purely formal definition is given, whilst nearly to the concept if we express ourselves negatively and define democracy as an absence of class government, as an indication of social condition where political privilege belongs to one class as opposed to the whole community. By that explanation is already given as to why a monopolist corporation is anti-democratic. This negative definition has, besides, the advantage that it gives less room than the phrase 'Government by the people'. To the idea of oppression of the individual by the majority which is absolutely repugnant to the modern mind. Today we find oppression of the "minority" by the majority as undemocratic.

Although it was held to be quite consistent with government by the people, the idea of Democracy includes, in the conception of present day, a notion of justice- an equality of rights for all members of the community, and in that principal the rule of the majority, to which every concrete case the rule of the people extends, finds its limits. The more it is adopted and governs the general consciousness the more will democracy in meaning refer to the highest possible degree of freedom for all"[42].

Nehru highlighting this aspect of democracy, after gaining independence said:

"*The service of India means the service of millions who suffer. It means ending of poverty and ignorance, and disease and inequality of opportunity. The ambition of the greatest man of our generation has been 'To wipe every tear from every eye'. That may be beyond us but so long as there are tears and sufferings so long our work will not be over"*[43]*. The first task of the Assembly is to free India, through a new constitution, to feed the starving people and to clothe the naked masses and to give every Indian the fullest opportunity to develop himself according to his*

[42] Salvadori M – Modern Socialism, P. 268.
[43] Iyer V.R.K – Law V. Justice, Eastern Book Publications, 1982, P. 160.

capacity."[44]

Thus the greatest task of democracy today is to promote social justice. This concept of Democracy also changes with changing conditions and environment.

The famous four Freedoms spelt out by Roosevelt include Freedom from want. Indeed the massive privation of the masses made our leaders like Vivekananda, Gandhiji, Nehru and Rajen Babu put the problems of poverty and material suffering of the millions in the forefront of freedom struggle and eventually, in pledging through the constitution, the establishment of social order animated by social and economic justice. This is not socialism but humanism without which the freedom is phoney.

Franklin Roosevelt, who was not a communist, also emphasized on economic freedom. Presenting a case for economic democracy he said :

"concentration of wealth and power has been built upon other people's money, other people's business and other people's labour. Under this concentration. Independent business was allowed, to exist only on sufferance. It has been a menace to American democracy. I see an America where the workers are really free and through their great unions not dominated by any outside force or any dictator within, can take their proper place in the council tables with the owners and the managers of business, where the dignity and security of the working men and women are guaranteed by their strength and fortified by the safeguard of law."[45]

In the same strain **Stalin** spoke, *"we have not built this society in order to cramp human freedom, freedom without question marks. What shall be the 'personal freedom', of an unemployed person who goes hungry and finds no use for his toil? Only when exploitation is anhilated, where there is no oppression of some by others, no unemployment, where the is no beggary no trembling for fear that a man may tomorrow loose his work, his habitation and his bread-----only there is true freedom found."*[46]

Liberty, Equality and a just social and economic order are implicit in democracy and an integral attitude to these values is an essential of the Rule of Law.

The function of the legislature in a democratic system is to create and maintain those conditions which will uphold the dignity of an individual, besides the recognition of his civil rights which are essential to the development of his personality.

Law in such a society is to serve justice. It is an instrument of justice because justice is the goal

[44] Ibid.
[45] Ibid, P. 162.
[46] Ibid.

of any civil society. Court is one of the most important institutions to promote social justice because it has to inform all the institutions of national life to administer social justice at their levels. A heavy responsibility is upon the jurists. They have to interpret the laws, feeling the pulse of the masses and needs of the time and not just deliver cold legal interpretations. Power of judicial review has to be used very cautiously. 'Therefore, their search as jurists, contends **V.R.K Iyer** '*'should be Indian man or woman—those thinly fleshed skeletons, tined pavement progeny and below the poverty line 'masters' of national resources."*[47]Here a question may be posed that if our constitution makers were conscious of our prevailing socio-economic conditions of appalling poverty then why did they not introduce word 'Socialism' at that time. The reason was that most members believed that the type of 'Socialism' India could have was not for them to decide but it was clear to them that the utility of the state has to be judged from the effect of common man's welfare and that constitution must establish the state's obligations beyond doubt. This was the purpose of Directive Principles of the State Policy.[48] Thus judges have to keep in mind directive principles of state policy while interpreting laws. In a status oriented hierarchical society with egalitarian constitutional goals as that of India, judicial review has a very important role to play.

(D) Judicial review in India- evolution

The basic issue of judicial review in a modern democratic society inheres within itself the apparent possibility of an antithesis between rigid attitude in preserving the fundamental human liberties and the effective pursuit of a social welfare objective by the legislature in accordance with the dominant socio-economic and political factors[49].

Judicial review under the constitution of India stands as a class by itself. It represents a synthesis of ideas of several constitutions of the world, particularly U.K and U.S.A, processed and adjusted to meet the specific situations arising out of the previous socio-economic and political conditions of our country. Under the government of India Act, 1935, the absence of formal bill of rights in the constitutional document very effectively limited the scope of court's review power to an interpretation of the Act in light of the division between the center and state units[50]. Our judiciary was contemplated 'as an extension of the rights' and an arm of social revolution'[51] . Judicial review was therefore considered to be an essential condition for the successful implementation of fundamental rights and directive principles of state policy.

[47] Ibid, P. 14
[48] Austin G – The Indian Constitution- Cornerstone of a Nation, P. 60.
[49] Ray S.N.- Judicial Review and Fundamental Rights, Eastern Law House, 1974, p.1.
[50] Ibid.p.4
[51] Austin G- The Indian Constitution- Cornerstone of a Nation, O.U.P., P.164.

a. Position of judicial review in constituent assembly

Members of the constituent assembly agreed upon one fundamental point, that judicial review under the new constitution of India was to have a more direct basis than in the constitution of U.S.A[52], where the doctrine was more an 'inferred' than 'conferred' power, and more 'implicit' than 'expressed' through constitutional provisions. In the report of the Adhoc committee of the supreme court, it was recommended that" a supreme court, with jurisdiction to decide upon the constitutional validity of Acts and Laws can be regarded as necessary implication of any Federal scheme[53]. This was eventually extended to an interpretation of the laws of the executive orders on the touchstone of fundamental rights. In the draft constitution of India, this power of judicial review in relation to fundamental rights found formal expression in Art .5(2) and Art. 25(1) & (2) which, when adopted by the nation's representatives in the constituent assembly on Nov, 26, 1949 became new Articles 13 (2) & 32 (1) & (2), respectively under the constitution of India. However, there was a sharp controversy among the members of the constituent assembly over the perplexed question of reconciling the conflicting concepts of 'individuals' Fundamental and Basic Rights and socio-economic needs of the nation. A compromise had to be struck between the to extreme view -points of the proponents of the two schools, individualism and socialism, and judicial review, which was recognized as the basic and indispensible precondition for safeguarding the rights and liberties of the individuals, was sought to be tampered by the urge for building up a new society based on the concept socio-economic welfare.

In the constituent assembly there were long discussions on the acceptance or rejection of clause "due process of law". The differences of opinion were manifest at least between two leading figures, namely, **Shri. K. M. Munshi**, who wanted its adoption and **MR. Alladi Krishnaswamy Ayyar**, who opposed that move. Thus, this clause i.e. " Due process of Law" became "first casualty". In Article 21 of the new constitution of India (Art. 15 of the draft constitution), it was replaced by "except according to procedure established by law". In a note to Art.15 of the draft constitution, the drafting committee justified and referred to Art XXXI of the Japanese constitution of 1946. **Dr. Ambedkar** explained the stand of the framers. He felt that expression raised the question of relationship between the legislature and the judiciary, and that it would give the judiciary an additional power to question the law made by the legislature on the ground whether the law was in the keeping with certain fundamental principles relating

[52] Munshi Papers & Ayyar Papers
[53] Reports Ist series P.63.

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to the rights of an individual, and whether the law was a good law[54]. While admitting that the legislature "could be packed by the party men making laws which may abrogate or violate ……..certain fundamental principles affecting the life or liberty of an individual[55]", he could not see how "five or six gentlemen in the Federal or Supreme Court examining the laws made by the legislature can by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad"[56]. It was, he pointed out, "rather a case where a man has to sail between charybdis & Scylla"[57].

One reason, for limiting the role of judicial review could be that the framers of the constitution may have feared that the unbridled power of judicial policy making could usher in series of 'judicial vagries' and prevent the national leadership to achieve its socio-economic goals in pursuance of a welfare state. As Granville Austin puts it "the assembly had created an idol and that fettered at least one of its arms…the limitations on the courts review power…..however were drafted in the name of social revolution"[58].

Simultaneously a cluster of provisions were incorporated in to the constituent document so as to restrict the rights envisaged in articles 19, 21, and 31 to reduce the supreme court's power of judicial review to 'formal view'. Besides this a comparatively flexible amending procedure was adopted to improve the ultimate will of the popular representative in the matter of removing constitutional limitations. ***Thus to all intents and purposes the seed of discord between the legislature and the judges in India was unconsciously sown by the fathers of the constitution.*** D.D. Basu rightly points out "the factors which fostered the growth of judicial supremacy in the U.S are either absent or are not so much prominent in our constitutional system"[59].

Though it is true that a new republic committed to achieve socio-economic goals could not permit overzealous indulgence in "judicial activism" because it could be harmful and self-defeating, but nevertheless the compromise solution, ultimately arrived at, was not very effective.

b. Judicial review in Indian Constitution

The word judicial review is no where expressly given in constitution of India even then the power given to supreme court of India under various provisions of the constitution evidently give proof of its existence. Firstly article 13 of constitution of India which state that state and

[54]Supra note, 1, Page .70.
[55] Ibid.
[56] CAD Dec. 13, 1948, P.1000.
[57] Ibid.
[58] Supra note, 3, p. 174.
[59] Basu D.D.- Commentary on the Constitution of India, 5th, edition, Vol. I, p. 160.

local governmental and legislatures will not make laws which take away or abridges fundamental rights. If at all they do so such orders or laws will become void. And secondly article 32 and 226 which talk about the protection of fundamental rights through writs issued by the courts and confer upon the Supreme Court the sacred duty of upholding the constitution. The powers of judicial review of legislation have been specifically recognized in articles 13, 32, 131, 136, 216 and 137 of our Indian constitution. The courts can strike down a law passed by parliament or state legislature if;

(1) It is beyond its legislative competence as provided in Articles 245, 246, 248 another provisions of the constitution or

(2) If it violates any of the fundamental rights conferred by part- III provided in Art. 13 or

(3) If it transgresses specific provisions of the constitution imposing limitations upon legislatures, such as Art. 254.

Supreme Court of India is playing a very active role in describing the scope of judicial review in India. This power is not achieved by the court in a night rather a series of actions and cases are there in which Supreme Court is trying to filter this power to reach at its optimal stage.

One role played by the supreme court of India in giving the true meaning to its power of judicial review and second is the role played by Supreme Court of India in establishing a social welfare structure while exercising the power of judicial review.

c. Working of judicial review in Indian political system

Gopalan's Case initiated the era of strict and literal judicial interpretation in India and provided a firm base for judicial self-restraint as the guiding line for future Indian Judges.

'Judicial activism' and 'judicial-self restraint' represent two competing philosophies of judicial decision making, which has characterized the working of Indian Supreme Court. The interpretation of nature and scope of judicial review in India began with *Gopalan case* (***A.K. Gopalan v. State of Madras***)[60]**(1950)**. The court adopted a policy of 'restraint'. The Gopalan decision while pursuing a course of liberal interpretation of individual's right to freedom and personal liberty, paved the way for the realization of social objectives by its clear anunciation of the principle of 'judicial subordination' to legislative wisdom. The decision in Gopalan's case scrupulously avoided the notions of 'natural justice' and 'due process' and construed the law in favour of legislature. The position of judiciary was thus explained by Justice Das in this case as :

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[60] AIR 1950 SC 27, 1950 SCR 88 AT 286-287, 288-90.

"in India the position of judiciary is somewhere in between the courts in England and U.S.A while in main leaving our parliament and state legislature supreme in their respective legislative fields, our constitution has, by some of its articles, put upon the legislatures certain specific limitations……In so far as there is any limitation on the legislative power, the court must, on a complaint being made to it , scrutinize and ascertain whether such limitation has been transgressed and if there has been any transgression the court will, courageously declare the law unconstitutional, for the court is bound by its oath to uphold the constitution. But outside the limitations imposed on the legislative powers our parliament and state legislatures are supreme in their respective legislative fields and the court has no authority to question the wisdom or policy of law duly made by appropriate legislature. Our constitution unlike the English Constitution recognizes the court's supremacy over legislative authority, but such supremacy is a very limited one, for it is confined to the field where the legislative power is circumscribed by limitations put upon it by the constitution itself. Within this restricted field, the court may, on a scrutiny of the law made by the legislature, declare it void if it is found to have transgressed the constitutional limitations. But, our constitution, unlike the American constitution does not recognize the absolute supremacy of the court over the legislative authority in all respects, for outside the restricted field of constitutional limitations, our parliament and state legislatures are supreme in their respective legislative fields and in that wider field there is no scope for the court in India to play the role of supreme court of the United States[61]".

In connection with the question of validity or applicability of 'due process clause' in working of Indian Judiciary, the learned Judge observed that the 'due process' doctrine can only thrive and work where the legislature is subordinate to the judiciary in the sense that latter can act in judgment over, and review all acts of the legislature. Such a doctrine can have no application to a field where legislature is supreme. Since the Indian constitution has, in the main, and subject to limitations, preferred the supremacy of the legislature to that of the judiciary, "to try to bring in the American doctrine, inspite of this fact, will to stulify the intention of the constitution as expressed in article 21[62]". Further "the constitution is supreme. The court must take constitution as it finds it even if it does not accord with its preconceived notions of what an ideal constitution should be. Our protection against legislative tyranny, if any, lies in the ultimate analysis in a free and intelligent public opinion which must eventually assert itself"[63].

[61] Ibid.
[62]Ibid, P. 315, 316.
[63] Ibid.

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Thus in the ***Gopalan's Case***, the supreme court laid down the limitations of Indian Judiciary and made it very clear that the functioning of Judicial review in India would be different from that of U.S.A. As **Kaina C.J** puts it:

"it is difficult upon any general principle to limit the omnipotence of sovereign legislative powers by judicial interposition, except so far as the express words of a written constitution give that authority. It is only in express constitutional provisions limiting legislative powers and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of judiciary powers too great and too indefinite either for its own security or for the protection of private rights"[64].

S.R. Das Justice went a step further, and declared that,

"it is not for the court to insist on more elaborate procedure according to its notion or to question the wisdom of the legislative authority in enacting the particular law, however harsh, unreasonable, archaic or odious the provisions of that law may be"[65]*. Further, "the court may construe and interpret the constitution and ascertain its true meaning but once that is done the court cannot question its wisdom or policy. The constitution is supreme. The court must take the constitution as it finds it, even if it does not accord with the preconceived notions of what an ideal constitution should be…"*[66].

The court was of the opinion that there were important differences between the Indian and U.S constitutions, and that the American Supreme Court's unlimited power of review could not be a model for its Indian counterpart. On the basis of this presumption, the court established that in using the words "according to procedure established by law" in Article 21, instead of words "due process of law", the Indian constitution had deliberately abstained from adopting the "due process" clause of the 5th and 14th amendment to U.S constitution.

Regarding the meaning of 'Law in Article 13, the majority decision of the court in this case was that "Law" referred to state made law and not law of natural justice. It was only **Fazal Ali, Justice**, who advocated the necessity of looking to the spirit and purpose of the fundamental rights and other provisions rather than to the letter of the constitution. The guidance set by the 'Gopalan' case was scrupulously followed by supreme court in ***Romesh Thapar V. State of***

64 (1950) SCR 88 at 120-121 AIR 1950 SC 27.
65 Ibid at 316, 322-23.
66 Ibid.

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***Madras*[67]*(1950)*.**

The supreme court's judgment in ***Champakam Dorairajan*** case also reflected the dominant role of self-restraint. The supreme court in his case observed that "directive principles of state policy have to confirm and run subsidiary to chapter on Fundamental Rights" and that, since they are expressly made "unenforceable" by the court, they "cannot override the provisions found in part III" which are not only expressly made enforceable by appropriate writs under Article 32, but are "sacrosanct". In other words, Directive principles of state policy cannot be given effect to if they come in conflict with the operation of any other provision of the constitution. Thus, *here Supreme Court's opinion reflected narrow legalism and legal technicalities*. "However, it would be wrong to lay the blame squarely on the south court alone, for in the first place it had been incapacitated by vague "non enforcement" clause of Article 37, and in the second place it had no precedent to fall back upon in harmoniously construing such a clause in conformity with the spirit of the constitution"[68].

Supreme Court's interpretation was in fact responsible for controversy and tussel between fundamental rights and directive principles and it led to a series of constitutional amendments. Immediately, first and fourth amendments to the constitution in 1951 and 1955 respectively were added. This decision of Supreme Court held field for some time and became a guide line for different High courts judgments in subsequent cases.

In ***Jugwant Kaur V. State of Bombay***[69]***(1952)*** case, chief Justice while quoting ***Champakam Dorairajan*** case said, "Art.15 or indeed any Article conferring Fundamental Rights cannot be whittled down or qualified by anything that is contained in part IV of the constitution. Whereas Fundamaental rights are justiciable, the Directive Principles enumerated in part IV are non-justiciable and provisions of part IV must be read as subsidiary to fundamental rights contained in part III."

S. Somasundram J. in his *dissenting view* in ***Champakam Dorairajan*** case observed:

"it is , therefore, the duty of the state to respect and to give effect to the principles in article 46.....the use of the word 'Fundamental' is significant in view of the use of the same word in part III of the constitution. The principles in this chapter are, therefore, as fundamental as those in part III".

This issue, however, once again cropped up in ***Shankari Prasad V. Union of India***[70]***(1951)***.

[67] AIR 1950 SC 124, 1950 SCR 594.
[68] Supra note,1, p. 120.
[69] Jagwant Kaur V. State of Bombay, AIR 1952, Bombay 461.
[70] AIR 1951 SC 458: 1952 SCR 89.

Petitioners in this case felt that the first amendment Act, which purported to insert Articles 31A and 31B in the constitution of India was ultra vires and unconstitutional, since it fell within the prohibition of Art.13(2). It was contended though it may be open to parliament, the provisions in respect of Fundamental Rights contained in part III, the Amendment, if made in this behalf, would have to be tested in the light of provisions contained in Article 13(2) of the constitution. The 'State' it was contended includes Parliament (Art.12) and law must include a 'constitutional amendment'.

In rejecting a petition by unanimous verdict, the court made a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power, so that Art 13(2) does not affect Amendments made under Article 368. This the court did on basis of the ingenious rule of 'harmonious construction' came to finding that Fundamental Rights under Indian Constitution are not immune from constitutional Amendments. The result of this decision was that parliament could, by a majority of not less than 2/3rd of the members in that house, present and voting, could abridge or take away the fundamental rights.

Government felt that one of its earliar tasks after independence was to bring about agrarian reforms by abolishing Zamindaries and all intermediaries and also by imposing a ceiling on land holdings and distributing the surplus land among landless labourers. But soon government became alert of the beginning of 'Judicial Activism' when the *Bihar Zamindari Abolition Act* was struck down in **Kameshwar Singh's Case**[71]**(1952)**. It was after this case that the first amendment to the constitution was undertaken to avoid further litigation on the subject.

In order to put legislation relating to land reforms beyond judicial scrutiny, the constitution was further amended later by 17th, 29th and 34th amendments.

Another important programme of the government related to the management and acquisition of certain undertakings. But it was in twin cases of ***Dwarkadas***[72]***(*1954) and *Subodh Gopal***[73]***(1954)*** that clauses (1) and (2) of Article 31 must be read together and compensation has to be paid where there is any substantial deprivation of property. It was further held in case of ***Bela Banerjee***[74]***(1954)*** that compensation in Article 31(2) meant the just equivalent of the property taken.

These decisions made it impossible for the government to take over the management of a sick

[71] Kameshwar Singh V. State of Bihar-1952, SCR 859.
[72] Dwarkadas V. Sholapur Spinning and Weaving Company (1954) SCR.
[73] Subodh Gopal V. State of Bengal AIR 1954 SCR 72..
[74] State of West Bengal V. Bella Banerjee (1954) SCR 558.

company even temporarily, without payment of compensation or nationalizing big business or industry without payment of full compensation. It was in these circumstances that the 4th amendment was undertaken to override these decisions and to provide that (i) there should be no legal obligation to pay compensation for mere deprivation of property when it is not acquired by the state, (ii) the amount of compensation payable should be left to the judgment of parliament and its adequacy should not be questioned in a court of law.

Thus, the Supreme Court decisions till this period reflected mostly judicial restraint. The conflict between judiciary and legislature took shape of conflict between fundamental rights and directive principles.

Slight shift towards liberal attitude :-

The Supreme Court ultimately modified its original attitude adopted in ***Champakam case***. The decisive break came in 1968 when in **'*M.H. Qureshi V. State of Bihar'*[75]*(1958)*** , the court observed that:

"Article 13(2) expressly says that the state shall not take away or abridge the rights conferred by chapter III of our constitution which enshrines Fundamental Rights. The Directive principles of State Policy cannot override this category of restrictions imposed on the legislative powers of the state. A harmonious interpretation has to be placed upon the constitution and so interpreted means that the state should certainly implement the Directive Principles of State Policy but must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of chapter III will be mere rope of sand"

The supreme court in ***Kerala Education Bill case*[76]*(1958)*** observed:

"although certain legislation may have been undertaken by state in discharge of the obligation imposed on it by directive principles of state policy enshrined in part IV of the constitution, it must, nevertheless, subserve and not override the fundamental rights conferred by the provisions of Articles contained in Part IV of the constitution."

It was observed by the court that in determining the scope of fundamental rights the court may not entirely ignore these directive principles laid down in Part IV of the constitution but should adopt the principle of harmonious construction and should try to give effect to both as much as possible.

In ***Mohd Hanif Qureshi*** and ***Kerala Education Bill*** case the supreme court while upholding

[75] Mohd. Hanif Quereshi V. State of Bihar, AIR 1958, SC 731.
[76] Re Kerala Education Bill, AIR 1958, SC, 1956.

the legal and constitutional position of fundamental rights and directive principles of state policy made a significant departure in two respects- the court should take note of directive principles of state policy while determining amendment of fundamental rights and Secondly, by adopting the doctrine of harmonious construction the court should attempt to give effect to both fundamental rights and directive principles**.**

Another important case which came before the Supreme Court during this period was ***"M.S.M. Sharma V. Sri Krishna"***[77]***(1959)*** or popularly known as *search light case.* Verdict in this case ***again reflected principle of judicial restraint***. The Supreme Court in its majority judgment sought to reconcile fundamental rights of freedom of speech and expression with parliamentary privileges by subordinating the former to latter on the principle of harmonious construction.

The court, of course pointed out that *"though Article 194(3) is not in terms made subject to provisions contained in Part III, it would be subject to Article 19(1) (a), which are general, must yield to Article 194(1) and latter part of its clause (3) which are special."*

Subba rao.J, in his *dissenting judgment* however was not prepared to make the concession which the majority had made. In his opinion, there was no inherent inconsistency between Article 19 and Article 194 of the constitution, but when the privileges of a legislature was in conflict with Article 19, then privilege should yield to extend if it affected the fundamental rights. Majority judgment in this case held that since the privilege of the House of Commons has the force of a provision of the constitution, anything done in virtue of them would not be subject to review as violative of fundamental rights.

The entire question came up for a thorough reexamination by the Supreme Court in famous ***Keshav Singh v. State of U.P***[78]***(1965)****,* which caused a tremendous controversy in India and abroad, by its starling pronouncements. In this case, involving a conflict between legislature and judiciary in U.P, interesting questions were raised and sought to be resolved by the Supreme Court on a reference made by the president of India under Article 143 of the constitution of India. The state assembly had committed one Mr. Keshav Singh to prison for contempt of legislature and breach of privileges by issuing a general and unspeaking warrant. Keshav Singh, immediately appealed to the state High Court, arguing that the fundamental rights under Article 21 had been infringed. A notice was issued by two Judges of Lucknow High Court, N.V. Beg and G.D. Sehgal JJ to the speaker of the assembly, the chief minister of the state and the jailor, and Keshav Singh were set free on bail. The assembly then ordered that Keshav Singh, his

[77] AIR 1959, SC.395, (1959) SCR Supp 806.
[78] AIR 1965, SC 745 (1965).

lawyer and the two judges should be brought in custody before it for the contempt of the House. On an Appeal by the lawyer and the two Judges, the High Court, specially constituted and ordered the stay of the operation of the warrants of the speaker. The Assembly then withdrew, its order for the arrest of two Judges, but asked them to appear before its committee of privileges to explain their stand. The stage was thus all set for a tremendous battle between the two organs of the government, but in view of the seriousness of the conflict the President of India intervened and referred the case to the Supreme Court for its advisory opinion. The question that was formulated by the President and answered by the Supreme Court centered around such burning and ***controversial issues*** as the sovereignty of parliament, the status of judicial review, the scope and extent of parliamentary privileges, and the nature and extent of fundamental rights guaranteed in the constitution.

The lengthy judgment of the Supreme Court dwelt on different aspects of these questions. The Supreme Court was of the opinion that it would not be correct to say that the power conferred on the legislature by the first part of Art. 194 (3) is a constitutional power and is therefore outside the scope of Article 13.

Though the power to make such a law is conferred on the legislature by the Ist Part of Art.194 (3), yet, when the state legislature purport to exercise this power, they will undoubtedly be acting under Article 246 read with entry 36 of list II. In dealing with the effect of the provisions contained in clause (3) of Article 194, wherever it appears that there is a conflict between the said provisions and the provisions pertaining to fundamental rights, an attempt will be made to resolve the said conflict by adoption of principle of harmonious construction.

Gajendragadkar C.J. observed that, *"the impact of Fundamental constitutional right conferred on Indian citizens by Art 32 on the constitution of latter Part of Art 194 (3) is decisively against the view that a power or privilege can be claimed by the House though it may be inconsistent with Article 21*[79]*.*

The majority of Judges, thus held, in effect, that the power and privileges conferred on parliament and the state legislature by Art 105 (3) and 194 (3) of the constitution respectively are subject to Fundamental Rights and , that even if the British House of Commons had, at the commencement of constitution, the privilege or power to commit for its contempt by a general warrant, the Parliament and the state legislatures in India do not posses that power, and also the validity of the unspeaking warrant of arrest for the contempt of legislature can be questioned under Art 226.

[79] Ibid.

"The decision in this case has been assailed in some quarters as working a deep erosion into the privileges of legislature. But it is to be remembered that far from belitting the august and important functions of the legislature and the powers needed by them for their discharge, the court fully conscious of its assigned responsibility recognized their importance[80]".

Advisory opinion of Supreme Court in this case inevitably paved the way for possibility of judicial intervention in the arena of parliamentary privileges and thist he legislators did not seem prepared to concede to.

This issue generated tremendous heat in the minds of legislators and the politicians, and an open confrontation between legislature and Judiciary was around the corner.

This case made the legislative privileges meaningless and intensified the conflict between the judiciary and the parliament.

The vital question of "Fundamental nature" of Fundamental Rights again cropped up in ***Sajjan Singh case[81](1965)*** the majority judgment in this case expressed full concurrence with the decision of ***Shankari Prasad case[82](1951)***. . 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 (1965), 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 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. Till Sajjan Singh case the same situation was maintained by courts. On the basis of a very detailed examination of the scope and effect of Art 368 and 13(2), the court concluded that the power to amend the constitution was conferred by Art 368 includes even power to take away Fundamental Rights under Part III. Court felt that Article 368 and Art 13 are too widely phrased and can serve as effective guide.

*In **Sajjan Singh's decision** tremendous amount of judicial discretion and sensibility was witnessed.* It was in fact the first effort to present the two sides of coin in the controversial issue

[80] The Bar Association of India- "The opinion of the Supreme Court in the President's reference no.1 of 1964- is a constitutional amendment necessary p.2.
[81] AIR 1965 SC 845 (1945) SCR 935.
[82] AIR 1951 SC.

of "Fundamentalness" of Fundamental Rights. While **Gjendragadkar, C.J.** representing the majority, refuted the arguments on behalf of 'transcandentalists' the two dissenting notes by **Hidayatullah and Mudholkar JJ** reflected the contrary view.

Thus the period of strict interpretation was ushered in by the "Gopalan's" case. This line followed in *Romesh Thapper V. State of Madras*, *State of Madras V. Champakam Dorairajan*, *Keshav V. Madhav Menon V. State of Bombay* and *Charanjit Lal V. Union of India* and *Shankri Prasad V. Union of India.*

The subsequent period of widening and expansion of power of judicial review was reflected in *Re-Delhi Laws Act,1912*, *Dwarka Prasad V. State of U.P.*, *State of West Bengal V. Subodh Gopal*, *Dwarka Prasad V. Sholapur Spinning and Weaning Co.*, *State of West Bengal V. Bella Banerjee*, *M.H. Quereshi V. State of Bihar.*

However, the Supreme Court's interpretation of Art.31 resulted in severe setback for legislative enactment in the field of agrarian reforms. The constitutional 4th Amendment Act, 1954, struck the sledge hammer on the possibility of judicial defiance of legislative policy leaving a bitter trial of frustration for the judiciary[83].

Next followed a long period of "alternative rays of hope and despair" between the years 1956-67 as reflected in various judgements notable among them being ***Basheshamath V. Commissioner of Service Tax***, ***M.S. Sharma V. Sri Krishna***, ***Kouchunni V. State of Madras***, ***Attiabri Tea Co. Ltd. And others V. State of Assam***, ***Nanavati V. State of Bombay***, ***Keshav Singh V. State of U.P***. and ***Sajjan Singh V. State of Rajasthan***. During this period increasing trend of judicial defiance towards legislative wisdom is discernible.

From 1950-67, even after seventeen years of its operation, judicial decisions reflected more of judicial restraint and less of judicial activism. 'judicial review during this period failed to strike a happy compromise between the two extremes of legislative penchant for social reform and judicial insistence on constitutional protection of individual liberties[84].

Thus this era was primarily an era of judicial restraint.

V. Position from 1967 onwards

Then came ***Golaknath & Ors. V. State of Punjab & Another[85](1967).*** In this case the Supreme Court overruled the ongoing situation since 1951. a Bench of 11 Judges considered the correctness of the view that had been taken in Sankari Prasad and Sajjan Singh. By majority of

[83] Supra note, 1 , page 70.
[84] Ibid.
[85] (1967) 2 SCR 762

six to five, these decisions were overruled. It was held that the constitutional amendment is "law" within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

It was declared that the Parliament will have no power from the date of the decision (27th February, 1967) to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

*Soon after Golak Nath's case, the Constitution (**24th** Amendment) Act, 1971, the Constitution (**25th** Amendment) Act, Act, 1971, the Constitution (**26th** Amendment) Act, 1971 and the Constitution (29th Amendment) Act, 1972 were passed.*

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." Article 368 was also amended and in Article 368(1) the words "in exercise of its constituent powers" were inserted.

The Constitution (**25th** Amendment) Act, 1971 amended the provision of Article 31 dealing with compensation for acquiring or acquisition of properties for public purposes so that only the amount fixed by law need to be given and this amount could not be challenged in court on the ground that it was not adequate or in cash. Further, after Article 31B of the Constitution, Article 31C was inserted, namely:

"**31C.** Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing 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 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." The Constitution (**26th** Amendment) Act, 1971 omitted from Constitution Articles 291 (Privy Purses) and Article 362 (rights and privileges of Rulers of Indian States) and inserted Article 363A after Article 363 providing that recognition granted to Rulers of Indian States shall cease and privy purses be abolished.

Then came the **(29th** Amendment) Act, 1972 which amended the Ninth Schedule to the

Constitution inserting therein two Kerala Amendment Acts in furtherance of land reforms after Entry 64, namely, Entry 65 Kerala Land Reforms Amendment Act, 1969 (Kerala Act 35 of 1969); and Entry 66 Kerala Land Reforms Amendment Act, 1971 (Kerala Act 35 of 1971).

All these Amendments were challenged in ***Keshavnanda Bharti V.Union of India[86](1973).*** These amendments were challenged in Kesavananda Bharati's case (AIR 1973 SC 1461). The decision in Kesavananda Bharati's case was rendered on 24th April, 1973 by a 13 Judges Bench and by majority of seven to six Golak Nath's case was overruled. The majority opinion held that Article 368 did not enable the Parliament to alter the basic structure or framework of the Constitution. The Constitution (24th Amendment) Act, 1971 was held to be valid. Further, the first part of Article 31C was also held to be valid. However, the second part of Article 31C that "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" was declared unconstitutional. The Constitution 29th Amendment was held valid.

The validity of the 26th Amendment was left to be determined by a Constitution Bench of five Judges.

The majority opinion did not accept the unlimited power of the Parliament to amend the Constitution and instead held that Article 368 has implied limitations. Article 368 does not enable the Parliament to alter the basic structure or framework of the Constitution.

Khanna, J observed:

"...The power of judicial review is, however, 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.... review 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 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."

[86] AIR 1973, SC 1461

Another important development took place in the case of ***Indira Gandhi V. Raj Narain***[87]***(1975).*** Allahabad High Court set aside the election of the then Prime Minister Mrs. Indira Gandhi to the fifth Lok Sabha on the ground of alleged corrupt practices. Pending appeal against the High Court judgment before the Supreme Court, the Constitution (**39th** Amendment) Act, 1975 was passed. Clause (4) of the amendment inserted Article 329A after Article 329. Sub-clauses (4) and (5) of **Article 329A** read as under:

"(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in Clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been 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 respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in Clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of Clause (4)."

Clause (5) of the Amendment Act inserted after Entry 86, Entries 87 to 124 in the Ninth Schedule. Many of the Entries inserted were unconnected with land reforms.

The court struck down the aforesaid clauses holding them to be violative of the basic structure of the constitution.

About two weeks before the Constitution Bench rendered decision in Indira Gandhi's case, **internal emergency** was proclaimed in the country. During the emergency from 26th June, 1975 to March, 1977, Article 19 of the Constitution stood suspended by virtue of Article 358 and Articles 14 and 21 by virtue of Article 359. During internal emergency, Parliament passed Constitution (**40th** Amendment) Act, 1976. The said Amendment inserted many entries in the Ninth Schedule of which many were unrelated to land reforms.

Article 368 was amended by the Constitution (**42nd** Amendment) Act, 1976. It, inter alia,

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[87] 1975, SCC 1 p1.

inserted by Section 55 of the Amendment Act, in Article 368, after clause (3), the following clauses (4) and (5) :

"368(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article." After the end of internal emergency, the Constitution (**44th** Amendment) Act, 1978 was passed. Section 2, inter alia, omitted sub-clauses (f) of Article 19 with the result the right to property ceased to be a fundamental right and it became only legal right by insertion of Article 300A in the Constitution. Articles 14, 19 and 21 became enforceable after the end of emergency."

The Constitution (**44th** Amendment) Act also amended **Article 359** of the Constitution to provide that even though other fundamental rights could be suspended during the emergency, rights conferred by Articles 20 and 21 could not be suspended. ***During emergency, the fundamental rights were read even more restrictively*** as interpreted by majority in ***Additional District Magistrate, Jabalpur v. Shivakant Shukla[88](1976).*** The decision in Additional District Magistrate, Jabalpur about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions.

The Fundamental Rights received enlarged judicial interpretation in the Post-Emergency period. In ***Maneka Gandhi V. Union of India[89](1978)*** it was held that A.K. Gopalan was no longer a good law and that the procedure prescribed in Art 21 to deprive a person of his right to life and personal liberty should be just, fair and reasonable and that it cannot be interpreted to mean state made law.

In ***Minerva Mills* vs. *UOI[90](1980)*** the court struck down clauses (4) and (5) and Article 368 finding that it violated the basic structure of the constitution and it was held by the Supreme Court that the clauses of Article 31-C as introduced by the Constitution (42nd Amendment) Act, 1976, which sought to take away the power of judicial review were unconstitutional. Reaffirming that the width of the constitutional amendment had to be looked at in order to

[88] (1976) 2 SCC 521
[89] (1978) 1 SCC 248
[90] (1980) 3 SCC 62

determine its validity, and accordingly finding that a large number of laws could be brought within the ambit of Article 31-C by invoking Part IV of the Constitution, it was held that those clauses seeking to take away judicial review must be struck down lest Article 13 become a dead letter law and large scale violations of fundamental rights take place. However, *judicial review per se was not held to be part of the basic structure of the Constitution by the majority in this decision, although* ***Bhagwati J.*** *in his* ***minority decision*** *traced the power of judicial review to Articles 32 and 226 and held it to be a part of the basic structure of the Constitution, and if taken away by a constitutional amendment would amount to "subversion of the Constitution".* However, he went on to add that it is not necessary to concentrate the power of judicial review in the constitutional courts; and if "effective alternate institutional mechanisms or arrangements" for judicial review were made by Parliament, then such amendment would be within its powers.

An authoritative pronouncement on this aspect was rendered by a decision of seven judges of the Supreme Court in ***L. Chandra Kumar*** **vs.** ***Union of India***[91]***(1997)***. **Chief Justice Ahmadi**, speaking for all seven members of the bench, went into an exhaustive review of all the developments in this regard, and held as under –

"It is emphatically the province and duty of the judicial department to say what the law is..... A law repugnant to the Constitution is void; ... courts as well as other departments are bound by that instrument."

He also referred to a very early judgment of Chief Justice **Patanjali Shastri** in ***State of Madras v. V. G. Row****,* where he held -

". . . Our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike 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 tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially 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."

Justice Ahmadi then went on to examine whether the power of judicial review vested in the

[91](1997) 3 SCC 261

High Courts and in the Supreme Court under articles 226/227 and 32 is part of the basic structure of the Constitution.,

"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 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…"

Responding to **Justice Bhagwathi's** argument in ***Minerva Mills*** that "effective alternate institutional mechanisms or arrangements" to exercise the power of judicial review could be created by Parliament; **Justice Ahmadi** put forth the following argument.

"…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 Courts 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 the High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded."

After ***Chandra Kumar****, it is clear that judicial review is an integral part of the Constitution*; and the position is that even though tribunals may be created to adjudicate on various matters, the jurisdiction of the High Courts under Articles 226 and 227 and that of the Supreme Court under Article 32, wherein lies their power to question executive and legislative judgment, and scrutinize executive and legislative action vis-à-vis the Constitution, cannot be excluded even by a constitutional amendment.

I R Coelho (Dead) by LRs Vs. State of Tamil Nadu and Others[92](2007)

In *I.R.Coelho V State of Tamil Nadu* , The Constitution bench of 5 judges referred the case to higher bench. The problem that drew attention before the nine judge bench was whether such evasion of judicial review, using the constitutional device of Article 31B, violates the basic structure, therefore making the exercise of Article 31B r/w Article 368 (post-1973), a violation of basic structure. The above judgments drew the attention of the nine judges.

[92] AIR 2007 SC 861

On January 11 2007 while delivering the judgment the 9 Judge Constitutional Bench of the Supreme Court held that All amendments to the Constitution made on or after 24th April 1973 by which the Ninth 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, Article 19, and the principle underlying them. To put it differently even though an Act is put in the Ninth Schedule by a Constitutional Amendment, its provision would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights is/are taken away or abrogated pertains to the basic structure. The Supreme Court further stated that if the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III of the Constitution is subsequently incorporated in the Ninth Schedule after 24th April 1973, such a violation / infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19, and the principles underlying there under.

Now after the landmark judgement of Supreme Court in ***I.R.Coelho*** which was delivered on January 11 2007 it is now well settled principle that any law placed under Ninth Schedule after April 23 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.

VI. Conclusion

Supreme Court operating under the aegis of the constitution, has by and large played a significant and even pivotal role in sustaining India’s liberal-democratic institutions and upholding the rule of law. Court has generally upheld basic freedoms associated with liberal democracy, albeit with some glaring exceptions when it shrank from its duty and chose to concur with the executive’s suspension of the writ of *Habeus corpus.*

While the social and economic rights that the constitution lists were not at first deemed justiciable, the supreme court has managed over the years to apply a more substantive conception of equality that justices have used to uphold rights to health, education, and shelter, among others. In PIL matters the court has expanded its own powers to the point that it sometimes takes control over the operations of executive agencies.

Court has helped to ensure the polity’s democratic character by safeguarding the integrity of the electoral process. The court has acted to curb the central governments tendency to misuse Article 356 as a pretext to sack elected state governments and install presidents’ rule instead.

Constitution allows the courts to intervene in the cause of what might be loosely termed “social reform”. Moreover, judges have widened the scope of rights held to be constitutionally “justiciable”. Hence the scope of judicial intervention can include everything from civil liberties to urban planning. The constitutional practice, which licensed the courts to intervene was bound to generate a promiscuity that would be the cause of some resentment.

In the ***early post-independence period*** years, the Supreme Court tried to block land reform legislation, virtually denied that the constitution requires substantive due process, and gave serious scrutiny to government regulation of publications. The government’s response was to seek a change in the letter of the constitution, which helps to explain why India’s basic law is so heavily amended.

During the late 1960’s and early 70’s, the judiciary struck down major planks of Indira Gandhi’s development agenda, including her scheme for nationalizing the banks. This era also saw the court making its first strong claim that parliament may not , even via amendment , override the fundamental rights enumerated in part III of the constitution. Later the court extended and revised this claim to argue that the legislature may not, through amendment, override the “basic structure” of the constitution- a structure of which judiciary has insinuated itself as the custodian.

Yet when Prime Minister Gandhi declared her state of emergency in 1975, suspended Article 21 of the constitution, and had hundreds of people detained by executive order, the Supreme Court overruled nine high courts and upheld her actions. The decision is now unanimously regarded as one of the worst in the Indian Judicial history[93].

Despite Indira Gandhi’s court packing schemes and other efforts to exert arbitrary executive influence over judicial appointments, the court’s emerged from her premiership stronger than ever. For during those years judges framed far reaching interpretations that would lay a constitutional basis for future judicial bids to curb the powers of the two other branches. The Supreme Court, moreover, managed to legitimize itself not only as the forum of last resort for questions of governmental accountability, but also as an institution of governance. The court’s PIL initiatives allowed judges to make policy and demand that executive officials carry it out by closing business on environmental grounds, building new housing for slum dwellers, and even maintaining particular college courses.

The ***second big moment for the judiciary*** was securing its own independence in the matters of filling the Supreme Court. The constitution’s Article 124 is ambiguous on judicial

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appointments, calling for consultation between the executive and the judiciary but leaving it unclear as to who has the final say. In a decision in the Third Judges' Case[94] (1993), the Supreme Court held that the power to name new judges to the highest bench rest's primarily with the chief justice and the next four senior most justices of the Supreme Court itself. Extensive consultations with the executive are required but in the end the court's highest ranking jurists have the lion's share of the appointment power. Here the court may have secured its autonomy at a cost to its transparency and perhaps its legitimacy as well.

While giving judgements, ***justices seem routinely to anticipate the effects of particular decisions on the courts popular authority.*** This makes the court's major decisions something other than purely straight forward applications of high constitutional principles and values. Most judgements, in fact, are the result of a delicate and political process of balancing competing values and political aspirations. Therefore, most Supreme Court judgements can be read as accommodations or balancing acts of this sort. In ***Keshavnanda case***, while making a statement whose strong drift was that parliament cannot amend the "basic structure" of the constitution, was nonetheless deliberately vague about exactly what counts as part of that "basic structure". The ***Mandals decision*** on affirmative action showed the court balancing different pressures rather than giving a principled argument. The justices enlarged the scope of affirmative action, but less than some states wanted. Court has also shown its aversion to religious matters capable of inciting large scale violence. Judges go to unusual lengths to show that, while they may recommend the reform of certain religious practices, they are not anti-religious. The courts have often shied away from taking firm stands on the hottest religious disputes. One such controversy, the ***Babri Masjid case***, has languished in various courts for fifty years. When the executive sought an advisory opinion from the Supreme Court, the justices took two years to rule that the matter belonged at the appeals-court level.

In India, parliament and the judiciary have been and are likely to remain competitors when it comes to interpreting the constitution. It is by no means settled who has the final word. Parliament can pass a law, the courts can strike it down, parliament can try to circumvent the court by amending the constitution, Court can pronounce that parliament's amendment power does not apply to the case, and so on. But it is possible that in the near future this kind of overturning of the judicial decisions through constitutional amendments will itself become subject to judicial scrutiny. In India, the supremacy of any branch of government is not simply a result of a one-time-only act of constitutional design, but must be secured through an ongoing

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struggle. Thus, in Democratic societies, it seems that the degree of independence which a judiciary asserts is itself a creation of judicial power.

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