CHAPTER 6
JUDICIAL ATTITUDE TOWARDS PUBLIC ACCOUNTABILITY
AND RULE OF LAW

6.1 Introduction

Jonathan Sacks observed that 896

True freedom requires the rule of law & justice, and a judicial system in which right of some are not secured by the denial of right to others. 897

In a democratic country like ours, governed by Rule of Law, the principle is “be thou so high the law is above you” 898

The principle of judicial review became an essential feature of written Constitutions of many countries. In Australia, judicial review is regulated by the Australian Administrative Procedures (Judicial Review) Act, 1977 899.

It is noted here that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia and India. And it may be added here that the principle of judicial review has been held to be a basic feature of our Constitution. It is incorporated in Articles 226 and 227 of the Constitution insofar as the High Courts are concerned 900.

In regard to the Supreme Court Articles 32 and 136 of the Constitution embody the principle of judicial review. Article 32 is included in Part III as a

897 Ibid
899 Ibid
900 Ibid.
fundamental right for enforcement of any of the fundamental rights conferred under Part III\textsuperscript{901}.

Judicial review of administrative action of the Union of India as well as the State Governments and authorities falling within the meaning of State\textsuperscript{902}. Accountability is an essential part of the rule of law. It is essential for another reason, as in the earlier editions of Dicey, of course modified in later editions that\textsuperscript{903}:

\begin{quote}
[C]onferment of any discretion tends to arbitrariness and therefore there is something inconsistent with the rule of law\textsuperscript{904}.
\end{quote}

But then, as time passed, it was realized that conferment of some discretion for the purpose of application to the facts of a given case is something you cannot do away with. The area of discretion should be the minimum possible, and set norms, standards or guidelines should regulate it, so that it does not tend to become arbitrary. Therefore, the rule of non-arbitrariness is something to be tested by the judiciary whenever the occasion arises\textsuperscript{905}.

The growth of \textit{judicial review} is the inevitable response of the judiciary to ensure proper check on the exercise of public power. Growing awareness of the rights in the people; the trend of judicial scrutiny of every significant governmental action and the readiness even of the executive to seek judicial determination of debatable or controversial issues, at times, may be, to avoid its accountability for the decision, have all resulted in the increasing significance of the role of the judiciary. There is a general perception that the judiciary in this

\begin{flushright}
901 \textit{Ibid.} \hfill 902 \textit{Ibid.} \\
905 \textit{Ibid.}
\end{flushright}
country has been active in expansion of the field of judicial review into non-traditional areas, which earlier were considered beyond judicial purview\textsuperscript{906}.

The Judges have a duty to perform, which is even more onerous to keep the judicial ship afloat on even keel. It must avoid making any ad hoc decision without the foundation of a juristic principle, particularly, when the decision appears to break new grounds. The judgments must be logical, precise, clear, and sober, rendered with restraint in speech avoiding saying more than that, which is necessary in the case\textsuperscript{907}.

Since the mid1990s the contraction of available resources and the spread of ‘new public management’ approaches have presented new challenges to European judicial systems, expecting them to improve simultaneously their efficiency quality of service delivery and accountability mechanisms, in line with the expectations on other branches of the public sectors\textsuperscript{908}.

In India, judiciary has been playing important role to innovate concept of personal responsibility. Here it is essential to quote Justice J.S Verma:

[T]o understand and appreciate fully the true constitutional obligations of the judiciary may I begin by mentioning the current perception in the society of the Judiciary It would be no exaggeration to say that our countryman have placed us on the highest pedestal and they have really put us at a dizzy height which goes to show the manner in which the people of our countrymen have placed us on the highest pedestal and they have really put us at a dizzy height which goes to show the manner in which the people of our country appreciate and praise what they considered to be good work done by anyone. I always say, why do we get so much acclaim, after all none of us is doing more than our duty, what else we are meant for? That is the beauty of this country, the people

\textsuperscript{906} Ibid.
\textsuperscript{907} Ibid.
praise you to dizzy heights merely for doing your duty. It should set up thinking and it requires very great reflection. Are we giving them back which is their due? Is the return to them commensurate with what they are giving us? 909

Ultimately each of us does that, which we assigned as our role under the constitution in the governance. In the discharge of this role, what is that, which must always be in front of us as the ideal to be achieved, as the target to be kept in view 910.

Cicero who said-

[T]he chief Law is Public Good”. These words summaries the entire reason for the entrustment of certain powers to each one of us in the three separate wings, so that in the discharge of our duty, we must always bear in mind that justice is to be administered according to law and the chief law is the public good. Therefore, for the purpose of proper implementation of the rule of law, the interpretation we make of the laws has to be keeping this uppermost in our minds as a basic postulate which must never be forgotten by the judiciary 911.

The constitutional theory of Judicial Review has long been dominated by the Doctrine of Ultra Vires, under which a decision of public authority can only be set aside if it exceeds the powers granted to it by the parliament. The role of judiciary was seen as enforcing the “will of Parliament” in accordance with the parliamentary sovereignty. 912

910 Ibid.
911 Id., at 3
In *Union of India v. Sankal chand Himmatlal Seth*\textsuperscript{913} in this case Untwalia J. Called the Judiciary as a :

[W]atching tower above all the big structures of other limbs of the state from which it keeps a watch like sentinel on the functions of other limbs\textsuperscript{914}

**6.2 The Independence of the judiciary must be required**

The rules concerning the independence of the judiciary includes the method of appointment of judges, there security tenure, the way of fixing their salary and other conditions of services are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law, they are therefore, essential for preservation of the Rule of Law\textsuperscript{915}. The concept of accountability is collateral to supremacy of the institution. The judicial independence cannot be viewed to have a separate existence because it is only in an accountable judiciary that the faith of the citizenry can be reposed. Quest of accountability, is the first step towards eradicating the existence of misfeasance as a dishonest judge should not be serving the bench\textsuperscript{916}.

As former CJI Hon’ble Justice J.S. Verma puts it-

[I] believe most of us prefer voluntary correct behavior instead of outside imposition. That in my humble view, is the dignified course for judges of the higher judiciary, which appears to have been the view also of the framer of the constitution\textsuperscript{917}.

The seeds of formal legislation on Right to Information were sown by the Supreme Court in the emphasizing on the importance of Right to Information with regards to the acts performed by the public authorities. It Supreme Court held that:

\textsuperscript{913} AIR 1997 SC 2328.
\textsuperscript{914} Ibid.
\textsuperscript{916} Ibid.
\textsuperscript{917} Ibid.
In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries….to cover with veil secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.\(^{918}\)

The above mentioned object of independent judiciary ensure that the authority does not abuse its power and the individual receives just and fair treatment and to ensure that the authority should not reaches a conclusion which is incorrect in the eye of Law.\(^{919}\)

In *Minerva Mills Ltd. v. UOI*\(^{920}\) Supreme court here observed that, the constitution has created an Independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and validity of legislation. It is the solemn duty of the judiciary under the constitution to keep different organs of the state within the limits of power conferred upon them by the constitution by exercising power of judicial review as sentinel on the qui vive, thus, judicial review aims to protect citizens from abuse of power by any branch of the state.\(^{921}\)

The principle of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. However in *State of Bihar v. Balmakund shah*\(^{922}\), independence of judiciary was elevated to the status of being a constituent of the basic structure of the constitution, the seeds

\(^{918}\) *Id.*, at 82.
\(^{919}\) *Ibid.*
\(^{920}\) AIR 1980 SC 1789.
\(^{921}\) *Ibid.*
\(^{922}\) AIR 2000 SC 1296.
of which were borne in the *locus classicus, keshavananda Bharti v. State of Kerala*923

6.3 Application of theory of check and balance in relation to the Judiciary

6.3.1 Judiciary and their Accountability under Rule of Law

There is every chance that judiciary like any other branch of the government can go wrong. They too are human and can be occasionally motivated by considerations other than law and justice. They can be motivated by consideration of their own personal ideology, biases and corruption. Here it is necessary to quote wordings of S.H Kapadia, C.J.924-

[J]udiciary usually comments on ethics among politicians, doctors, engineers, executive and students. Even for the judges ethics+ are most necessity. We are telling everybody what to do but who will tell us. In enforcing the law we are not exonerated from rule of law. Judges too should follow the code of conduct925.

However, there was misuse of power as in 1973 Justice A.N Ray superseded 3 senior most judges, Justice Hedge, Justice Shelat & Justice Grover as Chief Justice of India. Justice Ray transferred judges from one high court to another high court, not on the basis of their work but because of they decided important cases which politically had adverse effect on the Centre & state government in violation of judicial ethics. Recently, few cases underline the need for transparency in the functioning of judiciary926.

Judiciary faces yet another challenge within its framework with respect to removal of judges Article 124(4) vests the power to remove judges of Supreme Court& High Court on grounds of proved misbehavior, incapacity through

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923 AIR 1973 SC 1461(Sikhi C.J. had mentioned the separation of powers between the legislature, executive and the judiciary to be one of the components of the basic and foundation structure of the constitution).
924 Ibid.
925 Supra note 920.
926 Ibid.
impeachment. Application must be moved by 100 members of Lok Sabha & 50 members of Rajya Sabha MP’s. There are 2 conditions who must be fulfilled\(^{927}\):

1. There should be documentary evidence for misconduct against such judge\(^{928}\).
2. That evidence & charges must have been publicized\(^{929}\).

If we analyses this Article 124(4), then we will find that this procedure itself immunes the judges as the constitution does not permit any other forum to investigate unless a prior permission of the chief justice of India is taken. There are few cases in relation to this –

In *Sub-Committee on Judicial Accountability v. Union of India & Ors.*,\(^ {930}\) Writ petition is by a body of advocates styled "Sub-Committee on Judicial Accountability" and raises certain questions as to the validity and implementation of the action of the Speaker of the Lok Sabha admitting a notice of motion moved by 108 Members of Parliament under Article 124(5) read with the Judges (Inquiry) Act, 1968 and constituting an Inquiry Committee consisting of a Judge of the Supreme Court, Chief Justice of a High Court and a jurist to investigate into the allegations of misconduct made against a sitting Judge of the Supreme Court pertaining to his conduct as the erstwhile Chief Justice of the Punjab and Haryana High Court\(^ {931}\).

In *J.K Veera swami v. union of India*\(^ {932}\) Justice was charged for criminal misconduct as he was caught red handed while he was the chief justice of Madras High Court in 1974, but Supreme Court declared:

> [N]o judge of High Court or Supreme Court could be subjected to investigation in any criminal offence of corruption or otherwise unless a prior written consent of the chief justice of India is obtained.

\(^{927}\) *Ibid.*

\(^{928}\) *Ibid.*

\(^{929}\) *Ibid.*

\(^{930}\) AIR 1991 SC 1598.

\(^{931}\) *Ibid.*

A complaint against the appellant, a former Chief Justice of a High Court, was made to the CBI on which a case Under section 5(2) read with s. 5(1)(e) of the Prevention of Corruption Act, 1947 was registered on in the court of Special Judge. The appellant proceeded on leave from 9.3.1976 and retire on 8.4.1976 on attaining the age of superannuation. The investigation culminated in the filing of charge-sheet/final report under s. 173(2), Cr. P.C. against the appellant on 15.12.1977 before the Special Judge. The Charge-sheet stated that the appellant after assuming office of the Chief Justice on 1.5.1969 gradually commenced accumulation of assets and was in possession of pecuniary resources and property, in his name and in the names of his wife and two sons, disproportionate to his known sources of income for the period between the date of his appointment as Chief Justice and the date of registration of the case, and thereby justice veera swami committed the offence of criminal misconduct under s. 5(1)(e)\(^{933}\), punishable under section 5(2) of the Prevention of Corruption Act, 1947. The Special Judge issued process for appearance of the appellant. Meanwhile, the appellant moved the High Court under section 482, Cr.P.C. to quash the said criminal proceedings. The matter was heard by a Full Bench of the High Court which dismissed the application by 2:1 majority; but granted a certificate under Articles 132(1) and 134(1)(c) of the Constitution in view of the important question of law involved\(^{934}\).

In appeal to this Court it was contended by the appellant that the provisions of the Prevention of Corruption Act, 1947 do not apply to a judge of a superior court as for such prosecution previous sanction of an authority competent to remove a public servant as provided under s. 6 of the Prevention of Corruption Act, 1947 is imperative and power to remove a Judge is not vested in any single individual authority but is vested in the two Houses of Parliament and the President under Article 124(4) of the Constitution; that the Parliament cannot be

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\(^{933}\) Section 5(1)(e) criminal misconduct in discharge of official duty, if he, or any person on his behalf is in possession of or has, at any time during the period of his office, been in possession, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

\(^{934}\) Ibid.
the sanctioning authority for the purpose of s. 6 and if the President is regarded as the authority, he cannot act independently as he exercises his powers by and with the advice of his Council of Ministers and the Executive may 'misuse the power by interfering with the judiciary; that s. 6 applies only in cases where there is master and servant relationship between the public servant and the authority competent to remove him, and where there is vertical hierarchy of public offices and the sanctioning authority is vertically superior in the hierarchy in which office of the public servant against whom sanction is sought exists; that no prosecution can be launched against a Judge of a superior Court under the provisions of the Prevention of Corruption Act except in the mode envisaged by Article 124(4) of the Constitution; that no law prohibits a public servant having in his possession assets disproportionate to his known sources of income and such possession becomes an offence only when the public servant is unable to account for it; and that the public servant is entitled to an opportunity by the investigating officer to explain disproportionality between the assets and the known sources of income and the charge sheet must contain such an averment, and failure to mention that requirement would vitiate the charge-sheet and render it invalid and, no offence under s. 5(1)(e) of the Act could be made out.\footnote{935}{Ibid.}

In this case following questions were raised-

1. Whether a Judge of a High Court or of the Supreme Court is a 'public servant' within the meaning of section 2 of the Prevention of Corruption Act, 1947\footnote{936}{Ibid.};

2. Whether a Judge of the High Court including the Chief Justice, or a Judge of the Supreme Court can be prosecuted for an offence under the Prevention of Corruption Act, 1947;

3. Who is the competent authority to remove a Judge either of the Supreme Court or of the High Court from his office in order to enable

\footnote{935}{Ibid.}
\footnote{936}{Ibid.}
that authority to grant sanction for prosecution of the Judge under the provisions of s.6 of the Prevention of Corruption Act, 1947\textsuperscript{937}

After Dismissing the appeal, Supreme Court held:

1. A Judge of a High Court or of the Supreme Court is a 'Public servant' within the meaning of s. 2 of the Prevention of Corruption Act, 1947\textsuperscript{938}.

2. Prosecution of a Judge of a High Court, including the Chief Justice, or a Judge of the Supreme Court can be launched after obtaining sanction of the competent authority as envisaged by s. 6 of the Prevention of Corruption Act\textsuperscript{939}.

Justice Verma, J. while delivering dissenting opinion held:

1. A Judge or Chief Justice of a High Court is a Constitutional functionary, even though he holds a public office and in that sense he may be included in the wide definition of a public servant. But a public servant. Whose category for the grant of sanction for prosecution is not envisaged by section 6 of prevention corruption Act is outside the purview of the Act, not intended to be covered by the Act\textsuperscript{940}.

2. The Prevention of Corruption Act, 1947, as amended by the 1964 amendment is inapplicable to Judges of the High Courts and the Supreme Court. For the purpose of s. 6(1)(c) of the Prevention of Corruption Act, 1947, the President of India is the authority competent to give previous sanction for prosecution of a Judge of a superior Court. No criminal case shall be registered under section 154, Cr. P.C. against a Judge of the High Court, Chief Justice of the High Court or a Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter\textsuperscript{941}.

He further observed:

[I]f the Chief Justice of India himself is the person against whom the allegations of criminal misconduct are received, the Government shall consult any other judge or Judges of the Supreme Court. There shall be

\textsuperscript{937} Ibid.
\textsuperscript{938} Ibid
\textsuperscript{939} Ibid
\textsuperscript{940} ibid
\textsuperscript{941} Ibid
similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and appropriate that the question of sanction be guided by and in accordance with the advice of the Chief Justice of India.\footnote{Ibid.}

As to who is precisely the authority for granting previous sanction for prosecution of a Judge is a matter which did not arise in the instant case and will have to be finally decided when it directly arises. However, the issues of removal under Art. 124(4) of the Constitution and sanction under s. 6 of the Act can be combined for getting clearance from the Parliament. Section 6 of the Act is inapplicable to Judges of High Courts or of the Supreme Court and such Constitutional functionaries do not fall within the purview of the Prevention of Corruption Act, 1947.\footnote{Ibid.}

According to justice B.C. Ray:\footnote{Ibid.}

1. A Judge of the High Court or of the Supreme Court comes within the definition of public servant under s. 2 of the Prevention of corruption Act, 1947 and he is liable to be prosecuted under the provisions of the Act.\footnote{Ibid.}

2. A Judge will be liable for committing criminal misconduct within the meaning of s. 5(1)(e) of the Act, if he has in his possession pecuniary resources or property disproportionate to his known sources of income for which he cannot satisfactorily account.\footnote{Ibid.}

3. Judge of a superior Court will not be immune from prosecution for criminal offences committed during the tenure of his office under the provisions of the Act.\footnote{Ibid.}

4. In order to launch a prosecution against a Judge of a superior Court for criminal misconduct failing under section 5(1)(e) of the Act, previous
sanction of the authority Competent to remove a Judge, including Chief Justice of a High Court, from his office is imperative.

5. The President of India has the power to appoint as well as to remove a Judge from his office on the ground of proved misbehavior or incapacity as provided in Article 124 of the Constitution and, therefore he, being the authority competent to appoint and to remove a Judge.

Accordance with the procedure envisaged in clauses (4) and (5) of article 124 may be deemed to be the authority to grant sanction for prosecution of a Judge under the provisions of s. 6(1) (c) in respect of the offences provided in s. 5(1) (e) of the Act.

It is also stated in case:

[T]he purpose of grant of previous sanction before prosecuting a public servant including a Judge of the High Court or of the Supreme Court is to protect the Judge from unnecessary harassment and frivolous prosecution more particularly to save the Judge from the biased prosecution for giving judgment in a case which goes against the Government or its officers though based on good reasons and rule of law.

In J. Rama swami v. Union of India the petitioner is the wife of Mr. Justice V. Ramaswami, a sitting Judge of the Supreme Court of India. In this writ petition under Article 32 of the Constitution of India, certain constitutional issues have been raised which are to be decided on the construction of Article 124 of the Constitution of India and the Judges (Inquiry) Act, 1968 read with the Judges (Inquiry) Rules, 1969 framed thereunder, in the background of the law declared in Judicial Accountability v. Union of India. In essence, this petition is a sequel to that earlier decision rendered in the context of the proceedings for removal of

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948 Ibid
949 Ibid
950 Ibid.
951 AIR 1992 SC 2219
952 (1991) 4 SCC 699
Mr. Justice V. Rama swami from the office of a Judge of the Supreme Court of India. There has been demanding the creation of an independent institution capable of handling a growing number of complaints of misconduct, investigate them and also take action against errant judges who now shelter behind a wall of protective mechanisms.

What also helped turn the tide was the public perception of rampant corruption in India’s higher judiciary. A survey conducted by Transparency International in 2007 suggested that 77 percent of Indians thought that the judiciary was corrupt.

Former Supreme Court chief justice S. P. Bharucha declared at a public function in 2002 that one in every five judges of the higher judiciary was corrupt. Bhushan said the figure is conservative and could be as high as 50 percent. It has not helped that despite the allegations of corruption and impeachment proceedings brought against several judges, the judiciary has, through various rulings, managed to continually enhance its already enormous powers. For example, in 1992, the Supreme Court ruled that the police could not accept or investigate a case against a sitting judge of any high court even if there was good evidence of wrongdoing without the permission of the Chief Justice of India, or the highest judge in the Supreme Court.

To impeach an erring judge is nearly impossible even if provisions exist. To move an impeachment motion, at least 100 legislators must sign up and political interference can take care of the rest. There is another very famous case, J. Soumitra Sen, Justice of Calcutta High Court. In this case, Justice Soumitra Sen faced the impeachment proceeding with Rajya Sabha passing the resolution by 2/3 majority despite his refusal that he did any act as a judge. Whatever

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953 Ibid.
955 Ibid.
956 Ibid.
957 Ibid.
allegations were labeled. When he functioned as an administrative capacity. It seems that he can be the first judge to be impeached but in the meantime he forwarded his resignation before the procedure initiated against him in Lok Sabha\(^ {958} \).

Another famous case related to Involvement of Judiciary in Corruption, J. A.M Bhattacharya, chief Justice of Bombay High Court, there were allegation on him that he received Rs 70 Lakhs advance from a Publishing firm having links with underworld. He was forced to resign\(^ {959} \).

6.4 Judicial attitude towards Discretionary and Arbitrary actions of administrative authority

6.4.1. Judicial activism

From a positivistic point of view, equality is antithetic to arbitrariness\(^ {960} \). In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violate of Article 14\(^ {961} \) and if it

\(^{958}\) Ibid

\(^{959}\) Ibid.

\(^{960}\) See, E.P Royappa v. state of Tamil Nadu , AIR 1974 SC 555

\(^{961}\) Article 14 of the constitution of India provides for equality before the law or of the equal protection of the laws. According to Article 14, the state shall not deny to any person equality before the law or equal protection of the laws within the territory of India. ‘Equality before law’ implies absence of any special privilege in favour of any individual. It ensures that all are equal before the law. Equal protection of law implies equal protection of all alike in the same situation and under like circumstances. The aim of both the concepts is equal justice. Article 14 forbids class legislation but it does not forbid classification which rests upon reasonable grounds of distinction. The importance of the doctrine of reasonable classification should be examined in the light of the doctrine of arbitrariness evolved by the Supreme Court. Article 14 strikes at arbitrariness in state action because an arbitrary action will involve negation of equality. The state action is arbitrary or irrational; it would be treated as being against article 14. An arbitrary act cannot be valid on the ground of reasonable action and doctrine of reasonable classification has been evolved only as a subsidiary rule for testing whether a particular action is arbitrary or not. Right to equality affords protection not only against discriminatory laws passed by the legislature but also prevent arbitrary discretion being vested in the executive. Often administrative authorities are given wide discretionary powers. In such conditions, the statute which confers such discretion is vested in the executive. Often administrative authorities are given wide discretionary powers. In such conditions, the statute which confers such discretion is vested in the executive. Often administrative authorities are given wide discretionary powers. In such conditions, the statute which confers such discretion is vested in the executive. Often administrative authorities are given wide discriminatory and, therefore against article 14
affects any matter relating to public employment, it is also violate of Article 16. Article 14 and 16 strikes at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide experience of power and that is hit by Articles 14 and 16. Mala fide answer to the charge of infringement of Articles 14 and 16 to say that the petitioner had no right to the post of Chief Secretary but was merely officiating in that post. That might have some relevance to Article 311 but not Articles 14 and 16. 

In 1975 the Supreme Court said State of Uttar Pradesh v. Raj Narain, 

[W]hile there are overwhelming arguments for giving to the executive the power to determine what matters may prejudice public security, those arguments give no sanction to giving the executive exclusive power to determine what matters may prejudice the public interest. Once considerations of national security are left out there are few matters of public interest which cannot be safely discussed in public.

Justice K.K. Mathew further Stated: 

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets.
The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.\(^{966}\)

Before reaching its decision there are observations of Lord Scarman in *Burma Oil v. Bank of England*\(^ {967}\)

[I]t is settled law, and it was so clearly recognized in Raj Narain's\(^ {968}\) case that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognizes that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognized by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level interdepartmental communications and dispatches from


\(^{967}\) (1970) 3 All ER 700 at 732

\(^{968}\) *Supra* note 966.
ambassadors abroad. Class immunity is not absolute or inviolable in all circumstances. It is not a rule of law to be applied mechanically in all cases. The principle upon which class immunity is founded is that it would be contrary to public interest to disclose documents belonging to that class, because such disclosure would impair the proper functioning of the public service and this aspect of public interest which requires that justice shall not be denied to any one by withholding relevant evidence. This is a balancing task which has to be performed by the Court in all cases.\(^{969}\)

In the same case\(^ {970}\) the court cited the observation in Halsbury's Laws of England:

\[\text{[A] discretionary power is typically conferred by words and phrases such as "may", "it shall be lawful", "if it thinks fit" or "as it thinks fit". A statutory discretion is not, however, necessarily or, indeed, usually absolute: it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken whether to act and how to act. Moreover, there may be a discretion whether to exercise a power, but no discretion as to the mode of its exercise; or a duty to act when certain conditions are present, but a discretion how to act. Discretion may thus be coupled with duties. On the other hand, duty unaccompanied by any discretion requires action in a prescribed manner and form to be taken when the conditions precedent exist; performance of such a duty is a mere ministerial act.}\(^{971}\)

Supreme Court observed that\(^ {972}\)-

\[\text{[O]n a government of responsibility like our, where all the public must be responsible for their conduct, there can be but few secret. The people of this country have a right to know every public act, everything that is}\]

\(^{969}\) Ibid
\(^{970}\) State of Uttar Pradesh v. Raj Narain , AIR 1975 SC 865
\(^{971}\) Ibid.
\(^{972}\) Ibid
done in a public way by their functionaries. They are entitled to know the particular of every public transaction in all its bearing.\footnote{Ibid.}

In \textit{The Manager Govt. Branch Press and Anr. v. D.B. Belliappa}\footnote{AIR 1979 SC 429}, a three judges bench of the Supreme Court held that protection of Articles 14 and 16(1) is available even to a temporary government servant and if the action of the employer is found to be arbitrary or discriminatory, it is liable to be invalidated. While repelling the argument advanced on behalf of the appellant that Articles 14 and 16 do not have any relevance in the matters involving termination of services of temporary employees, their Lordships held as under:\footnote{Ibid.}

[M]r. Veerappa's first contention is that Articles 14 and 16(1) of the Constitution have no application, whateof a temporary employee whose service is terminated in accordance with the terms and conditions of his services because the tenure or the duration of the employment of such an employee.\footnote{Ibid.}

In \textit{S.P Gupta v. UOI}\footnote{AIR 1982 149.}, decided by seven-judge bench, added a fresh, liberal dimension to the need for disclosure in matters relating to public affairs. In the instant case it was held that in regard to the functioning of Government, disclosure of information must be the ordinary rule while secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest. It was further held that the disclosure of documents relating to the affairs of the State involves two competing dimensions of public interest, namely, the right of the citizen to obtain disclosure of information, which competes with the right of the state of protecting the information relating to its crucial affairs\footnote{Supra note 966.}.\footnote{Ibid.}

Supreme Court further observed here that:\footnote{Ibid.}
It is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy. The citizens' right, to know the facts, the true facts, about, the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world.

In *Krishan yadav v. state of Haryana*[^981], Supreme Court observed that:

[T]he conclusion of case is irresistible that fraud has reached its crescendo. It is to be noted that all was motivated by extraneous consideration. Selection was made without any verification about their antecedents or medical tests. Entire selection based on arbitrary exercise of power. Arbitrary action by public authority results cleansing public administration. It is highly regrettable that the holders of public offices both big and small have forgotten that the offices entrusted to them are sacred trusts. Such offices are meant for use and not abuse[^982].

To put it in other words, the entire selection is arbitrary. It is that which is faulted and not the individual candidates. Accordingly court hereby set aside the selection of Taxation Inspectors[^983].

In *Shiv sagar tiwari v. union of India*[^984], Supreme Court observed that,

[^980]: Ibid.
[^981]: AIR 1994 SC 2166.
[^982]: Ibid.
[^983]: Ibid.
[^984]: AIR1997 SC 2725
These high principles of administrative law have been placed at the forefront because, as would appear from what is being stated later, in the present case there was gross misuse of discretionary power relating to allotment of accommodation to government employees. As against the discretionary quota of 10 per cent, it shot up to 70 per cent; and on top of that 8,768 houses were allotted by stating that the same was being done on "Special Compassionate Ground". This naturally led to uproar and serious objection from those who were denied accommodation as per rules 985.

Hansaria, J. observed that 986:

Law has reached its finest moments, when it has freed man from unlimited discretion of some ruler, some...official, some bureaucrat.... Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other invention 987.

### 6.4.2 Meaning of Discretionary power

In the modern administrative state, discretionary power is omnipresent. It is wielded by government officials at local and national level, by representative government agencies and other public bodies. Simply meaning of discretionary power refers to the authority of an official or agency to make decisions within given parameters 988.

Article 14 of the Constitution of India which is genus of the doctrine of equality declares that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. In the last 55 years, the Courts have given different dimensions to the doctrine of equality so as to bring every arbitrary action of the State and its functionaries within the ambit of the Court's power of judicial review 989.

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985 Ibid.
986 Ibid.
987 Ibid.
The ever expanding horizon of the equality clause has also encouraged filing of large number of petitions in which the petitioners seek relief solely on the premise that in the case of some other person the public authority has given relief. Till recently, the Courts had enforced equality clause and entertained the claim of such petitioners without going into the question whether the action taken by the State and/or public authority in the other case or order passed in favour of some 990.

6.4.2.1 Discretionary Power and Judiciary

The principle of good administration that condition the exercise of many discretionary powers. In determining the scope of the principles of public law, should look to who hold the power, or to the nature of the power itself 991

The aim of conferring discretionary power to judiciary is 992:

1. Results the nature of right and the interest affected by this discretionary power.

2. It is judiciary to ensure that the government carries out its duty in accordance with the provision of the constitution.

6.4.3 Contribution of Indian Judiciary to widen the Scope of Public Accountability

*Common cause (A Registered society) v. UOI* 993 while examining executive actions of two union ministers in making illegal allotment to certain person Supreme court while taking view that:

[N]o public servant court arrogate himself the power to act in a manner which was plainly arbitrary.

Supreme Court observed that 994;

\[990\text{ Ibid.}\]
\[991\text{ Ibid.}\]
\[992\text{ Ibid.}\]
\[993\text{ AIR 1986 SC 3539}\]
[It is high time that the public servants should be held responsible for their mala-fide acts in discharge of their functions as public servants. With the change in socio-economic outlook, the public servants are being entrusted with more and more discretionary power even in the field of Destruction of government wealth in various forms, we take it to be perfectly clear, that if a public servant abuses his office either by an act of omission or commission, and the consequences of that is inquiry to an individual or loss of public property, an action may be maintained against public servant. No public servant can say “you may set aside an order on the ground of mala-fide but you can’t hold me personally liable”.

Supreme Court further observed:

[N]o public servant can arrogate to himself the power to act in manner which is arbitrary. The government today in a welfare state, provides a large number of benefit to the citizens, it distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licenses, and etc. government distributes largesse in various forms. A minister who is executive head of department concerned distributes these benefits and largesse. He is elected by the people and is elevated to the position where he holds a trust on behalf of the people. He can’t commit breach of trust reposed in him by the people… a transparent and objective procedure has to be evolved….”

In this case, while examining executive actions of two union ministers in making illegal allotment to certain person. Supreme Court observed that,

[N]o public servant court arrogates him-self the power to act in a manner which was plainly arbitrary. It is high time that the public servants

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994 Ibid.
995 Id., at 3550.
996 Id., at 3550.
997 Common cause (A Registered society) v. UOI, AIR 1986 SC 3539
should be held responsible for their *mala-fide* acts in discharge of their functions as public servants. With the change in socio-economic outlook, the public servants are being entrusted with more and more discretionary power even in the field of destruction of government wealth in various forms, court take it to be perfectly clear, that if a public servant abuses his office either by an act of omission or commission, and the consequences of that is inquiry to an individual or loss of public property, an action may be maintained against public servant. No public servant can say “you may set aside an order on the ground of *mala-fide* but you can’t hold me personally liable”\(^998\).

In *Nilabati Behera v. state of Orissa*\(^999\), the court held that a claim in public law for compensation for violation of human rights and abuse of power is an acknowledged remedy for the enforcement and protection of such rights. Thus every individual has an enforceable right to compensation when he is victim of violation of his fundamental rights and abuse of power. In such a situation, the court observed:

> [T]hat leaving the victim to the remedies available in civil law limits the role of constitutional courts as protectors and guarantors of fundamental rights of the citizens. Thus courts are under an obligation to make the state or its servants accountable to the people by compensating them for the violation of their fundamental rights\(^1000\).

In another case *R. Rajagopal v. State of Tamil nadu*,\(^1001\) in this case Supreme Court observed that:

> [L]aw with respect to exposition of unauthorized acts of public servants is clear that, in case of infringement of privacy of public officials, they

\(^998\) *Ibid.*

\(^999\) (1993)2 SCC 746.

\(^1000\) *Ibid.*

\(^1001\) (1994)6 SCC 632.
have no remedy or damage available if the act or conduct is associated with officer’s duty\textsuperscript{1002}.

In \textit{A.G. of India v. Amritlal prajivandas}\textsuperscript{1003}

The concept of constructive trust and equality to enforce public accountability as lay down in \textit{Reid case}\textsuperscript{1004} was followed by the Supreme Court of India in this case. In this case was dealing with the challenge to the validity of the ‘illegally – acquired properties’ in clause (c) of section 3(1) of the smugglers and foreign exchange manipulators (forfeiture of property) Act, 1976 (SAFEMA). The Act provided for the forfeiture of properties earned by smuggling or other illegal activities whether standing in the name of other parties. The court upheld the validity of the Act\textsuperscript{1005}.

Another case for strengthen the public accountability, \textit{State of Bihar v. Subhash Singh}\textsuperscript{1006} the court held that-

[T]he Head of Department is ultimately responsible and accountable unless there are special circumstances absolving him of the accountability. The Supreme Court observed that no matter if there is hierarchical responsibility for decision making yet the Head of the Department/designated officer is ultimately responsible and accountable for the result of the action done or decision taken. Despite this, if there is any special circumstance absolving him of the accountability or if someone else is responsible for the action, he needs to bring it to bring it to the notice of the court. The controlling officer holds each of them responsible at the pain of disciplinary action. The object is thereby is to ensure compliance with the rule of law\textsuperscript{1007}.

\textsuperscript{1002} \textit{Ibid.}
\textsuperscript{1003} (1994)5 SCC 622.
\textsuperscript{1004} (1993)3 WLR 1143.
\textsuperscript{1006} (1997) 4 SCC 430.
\textsuperscript{1007} \textit{Ibid.}
The concept of public accountability has been further strengthened by the court by strictly applying the contempt law. Recently many seniors public servants were sent to jail for deliberately violating court orders. The court has also imposed cost personally against the erring officer after due notice and hearing for delay in the discharge of duties. In the same manner where the public servant has caused a loss to the public exchequer the court has allowed the government to recover such loss personally from the erring officer.\textsuperscript{1008}

To define the role of public servant in society, we have to read this case \textit{Superintending Engineer, Public Health, Union Territory v. Kuldeep Singh}\textsuperscript{1009}, it was observed in this case:

Every public servant is a trustee of the society and in all facets of public administration; every public servant has to exhibit honestly, integrity, sincerity and faithfulness in the implementation of the political, social, economic and constitutional policies to integrate the nation, to achieve excellence and efficiency in public administration. A public servant entrusted with duty and power to implement constitutional policy…should exhibit transparency in implementation and should be accountable to due effectuation of constitutional goals\textsuperscript{1010}.

\textit{P.V Narasimha Rao v. State}\textsuperscript{1011}, in 1991 elections congress remained 14 members short of a clear majority. On July 28, 1993 government faced a no confidence motion which was defeated by 265 to 251. Thereafter, a first information report was filed with the central bureau of investigation alleging conspiracy of taking and receiving bribe by the members of Jharkhand mukt morcha and others for voting against the motion. It was for quashing the FIR that a petition was filed with the Delhi High Court which was heard by a constitutional bench. The constitution bench with a majority of 3 to 2 held that the Article 105 of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1008} \textit{Jatin Garg, The accountable citizen,} 79 (2012)
\item \textsuperscript{1009} \textit{(1997) 9 SCC 199}
\item \textsuperscript{1010} \textit{Ibid.}
\item \textsuperscript{1011} Famously know as \textit{Jharkhand mukt morcha Bribery} case, (1998) 4 SCC 626
\end{itemize}
\end{footnotesize}
constitution confers immunity on the members of parliament for freedom of speech and right to give vote in Parliament\textsuperscript{1012}

Therefore, those MPs who received bribes and voted in the parliament cannot be prosecuted. However, those MPs who gave bribes or did not vote can be subjected to criminal proceedings. The court further held that a Member of Parliament is a public servant and therefore, can be prosecuted under the Prevention of Corruption Act, 1998 and the Indian Penal Code. This decision generated a lot of controversy. It was argued that Article 105 of the constitution does not protect corruption. The court failed to follow its own wisdom reflected in its earlier decisions\textsuperscript{1013}, aimed at rooting corruption in high places. It is certain that the object of immunity is to ensure independence of a member of parliament for a healthy functioning and protecting him against crime will be repugnant to any healthy functioning. The object of Article 105 of the constitution is not to create a superman from a law of crimes\textsuperscript{1014}.

6.4.4 Concept of Rule of Law

Today’s Democratic Government is expanding its horizon from the 19\textsuperscript{th} Century Rule of Law given by the Dicey for performing its function. Now while performing their functions they seek support from due process clause for introducing reasonability in the actions so as to exclude arbitrariness. There may unforeseen cases or situations faced by public authorities for which they are not vested with discretionary power without sufficient guidelines so as to maintain sanctity of Rule of Law. After \textit{E.P Royappa v. State of Tamil Nadu}\textsuperscript{1015}, Article 14 has living a role of Rule of law. After \textit{E.P Royappa v. State of Tamil Nadu}, Article 14 has living a role of Rule of law. Now every action and decision which is arbitrary can be challenged as violation of article 14 of constitution. Main issue is consequence of control of arbitrary power, as to who can be made liable for arbitrary decision and what can be action taken to control it. This problem is to

\begin{itemize}
\item[Ibid, in 2000 CBI has awarded 3 years rigorous imprisonment to Narsimha Rao, former Prime Minister and Buta singh, former minister.]
\item[See also, \textit{Gill v. R.}, (1948) 75 IA 41, Privy Council held that if a judge accepts bribe, he is not acting in exercise of any public duty and hence, there is no immunity;]
\item[\textit{Supra} note 1008 at 81.]
\item[AIR 1974 SC 555]
\end{itemize}
reconcile the ideas of Democracy and the Rule of Law on the touchstone of right to equality of persons against arbitrary actions of public authorities and the need to make government genuinely accountable for their arbitrary actions. Here we are also discussing many instances under which judiciary plays an important role by using Article 14 and rule of law as a tool to gives protection against arbitrary actions by public servants and innovate a new concept of personal responsibility named as public accountability.\\n\\n6.4.4.1 Contribution of Indian Judiciary to widen the Scope of Rule of Law\\n\\nMore important, however, has been the judicial employment of Article 14 to develop a broad principle of reasonableness.\\n\\nIn, *E P Royappa v. State of Tamil Nadu*, Justice Bhagwati with Chandrachud and Krishna Iyer, JJ. Observed:\n
Equality is a dynamic concept with many aspects and dimensions and it cannot be “cribbed, cabined and confined” within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness.

Justice Bhagwati with Chandrachud and Krishna Iyer, JJ. Proceed to discuss further.

[A]rticle 16 embodies the fundamental guarantee that Arts. 14 as there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Art. 16 is only an

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1016 Ibid.\\n1017 AIR 1974 SC 555, See also Ameermisa Begum v Mehboob Begum AIR 1952 SC 91; Ram Prasad v State of Bihar AIR 1953 SC 215.\\n1018 Ibid.\\n1019 Ibid.
instance of the application of the concept of equality enshrined in Art. 14. In other words, Art. 14 is the genus while Art 16 is a species, Art. 16 gives effect to the doctrine of equality in all matters relating to public employment.\footnote{1020}

It was further observed:\footnote{1021}

\[T\]he basic principle which therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness.\footnote{1022}

In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violating of Art. 14, and if it affects any matter relating to public employment, it is also violate of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action an (ensure fairness and equality of treatment. They require that State action must be based on relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.\footnote{1023}

Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of Power and arbitrariness are different lethal radiations emanating from the same vice: in fact the matter comprehends the former. Both are inhibited by
Articles 14 and 16. It is also necessary to point out that the ambit and reach of Articles 14 and 16 are not limited to cases where the public servant affected has a right to a post. Even if a public servant is in an officiating position, he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine.\(^{1024}\)

It is, therefore, no answer to the charge of infringement of Articles 14 and 16 to say that the petitioner had no right to the post of Chief Secretary but was merely officiating in that post. That might have some relevance to Article 311, but not to Articles 14 and 16.\(^{1025}\)

It was held by court:

[T]he transfer of the petitioner from the post of Chief Secretary first to the post of Deputy Chairman and then to the post of Officer on Special Duty coupled with the promotion and confirmation of Sabanayagam in the post of Chief Secretary was, therefore, clearly arbitrary and violate of Articles 14 and 16. The transfer of the petitioner was, therefore, in mala fide exercise of power and accordingly invalid.\(^{1026}\)

It was for the first time in *E.P. Royappa v. State of Tamil Nadu*\(^{1027}\) that this Court laid bare a new dimension of Article 14 and pointed out that Article has highly activist magnitude and it embodies a guarantee against arbitrariness. This Court speaking through one of us (Bhagwati, J.) said:\(^{1028}\)

[T]he basic principle which therefore informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a

\(^{1024}\) *Ibid*  
\(^{1025}\) *Ibid*  
\(^{1026}\) *Ibid*  
\(^{1027}\) AIR 1974 SC 555  
\(^{1028}\) *Ibid*
narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbled, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.¹⁰²⁹

This vital and dynamic aspect which was till then lying latent and submerged in the few simple but pregnant words of Article 14 was explored and brought to light in Royappa's¹⁰³⁰ case and it was reaffirmed and elaborated by this Court in *Maneka Gandhi v. Union of India¹⁰³¹* where this Court again speaking through one of us (Bhagwati, J.) observed that¹⁰³²:

> [N]ow the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalizing principle enunciated is this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic

¹⁰³⁰ AIR 1974 SC 555.
¹⁰³¹ AIR 1978 SC 597.
concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment.\textsuperscript{1033}

This was again reiterated by this Court in \textit{International Airport Authority's case}\textsuperscript{1034}. It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not Paragraph of Article 14 nor is it the objective and end of that Article\textsuperscript{1035}.

It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached\textsuperscript{1036}.

Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution\textsuperscript{1037}.

In another case of \textit{Dr. Subramanian Swamy v Director, Cbi and Ors}\textsuperscript{1038}.

In this petitions challenge is to the constitutional validity of Section 6-A of the Delhi Special Police Establishment Act, 1946 (for short, 'the Act').

\textsuperscript{1033} \textit{Ibid.}
\textsuperscript{1034} \textit{Ramana Dayaram Shetty v. International Airport Authority's}, 1979 SCR (3)1014
\textsuperscript{1035} \textit{Ibid.}
\textsuperscript{1036} \textit{Ibid.}
\textsuperscript{1037} \textit{Maneka Gandhi v. union of India}, AIR 1978 SC 597
\textsuperscript{1038} (2005) 2 SCC 317.
Section was inserted in the Act w.e.f. 12th September, 2003. It, inter alia, provides for obtaining the previous approval of the Central Government for conduct of any inquiry or investigation for any offence alleged to have been committed under the Prevention of Corruption Act, 1988 where allegations relate to officers of the level of Joint Secretary and above. Before insertion of Section 6-A in the Act, the requirement to obtain prior approval of the Central Government was contained in a directive known as 'Single Directive' issued by the Government. The Single Directive was a consolidated set of instructions issued to Central Bureau of investigation (CBI) by various Ministries/Departments regarding modalities of initiating an inquiry.

The validity of Section 6-A has been questioned on the touchstone of Article 14 of the Constitution of India. Learned Amicus Curiae has contended that the impugned provision is wholly subversive of independent investigation of culpable bureaucrats and strikes at the core of rule of law as explained in Vineet Narain's case and principle of independent, unhampered, unbiased and efficient investigation. The contention is that Vineet Narain's decision frames structure by which honest officers could fearlessly enforce the criminal law and

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1039 Ibid.
1040 Ibid.
1041 The Judgment of the Court was delivered by Verma, C.J. - These writ petitions under Article 32 of the Constitution of India brought in public interest, to begin with, did not appear to have potential of escalating to the dimensions they reached or to give rise to several issues of considerable significance to the implementation of rule of law, which they have during their progress. They began as yet another complaint of inertia by the Central Bureau of Investigation (CBI) in matters where the accusation made was against high dignitaries. It was not the only matter of its kind during the recent past. The primary question was: Whether it is within the domain of judicial review and it could be an effective instrument for activating the investigative process which is under the control of the executive? The focus was on the question, whether any judicial remedy is available in such a situation? However, as the case progressed, it required innovation of a procedure within the constitutional scheme of judicial review to permit intervention by the court to find a solution to the problem. This case has helped to develop a procedure within the discipline of law for the conduct of such a proceeding in similar situations. It has also generated awareness of the need of probity in public life and provided a mode of enforcement of accountability in public life. Even though the matter was brought to the court by certain individuals claiming to represent public interest, the procedure devised was to appoint the petitioners’ counsel as the amicus curiae and to make such orders from time to time as were consistent with public interest. Intervention in the proceedings by everyone else was shut out but permission was granted to all, who so desired, to render such assistance As they could, and to provide the relevant material available with them to the amicus curiae for being placed before the court for its consideration. In short, the proceedings in this matter have had great educative value and it does appear that it has helped in future decision-making and functioning of the public authorities.

1042 1997 (4) SCC 778.
detect corruption uninfluenced by extraneous political, bureaucratic or other influences and the result of the impugned legislation is that the very group of persons, namely, high ranking bureaucrats whose misdeeds and illegalities may have to be inquired into, would decide whether the CBI should even start an inquiry or investigation against them or not.  

There will be no confidentiality and insulation of the investigating agency from political and bureaucratic control and influence because the approval is to be taken from the Central Government which would involve leaks and disclosures at every stage. The very nexus of the criminal-bureaucrat-politician which is subverting the whole polity would be involved in granting or refusing prior approval before an inquiry or investigation can take place. Pointing out that the essence of a police investigation is skillful inquiry and collection of material and evidence in a manner by which the potential culpable individuals are not forewarned, the submission made is that the prior sanction of same department would result in indirectly putting to notice the officers to be investigated before commencement of investigation. Learned senior counsel contends that it is wholly irrational and arbitrary to protect highly placed public servants from inquiry or investigation in the light of the conditions prevailing in the country and the corruption at high places as reflected in several judgments of this Court including that of Vineet Narain's. Section 6-A of the Act is wholly arbitrary and unreasonable and is liable to be struck down being violate of Article 14 of the Constitution of India is the submission of learned Amicus Curiae.

In support of the challenge to the constitutional validity of the impugned provision, besides observations made in the three-Judge Bench decision in Vineet Narain's case, reliance has also been placed on various decisions including

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1043 Supra note 1038.
1044 Vineet Narain & Others v Union of India, 1997 (4) SCC 778
1045 Supra note 1038.
In Kumari Shrilekha Vidyarthi and Ors. v State of UP, and Ors.\(^{1046}\) the court viewed:

[T]o emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based.

In support, reliance has been placed on observations made in a three Judge Bench decision in Khoday Distilleries Ltd. and Ors. v State of Karnataka and Ors.\(^{1047}\), that delegated legislation can be struck down only if there is manifest arbitrariness\(^{1048}\).

In State of A.P. and Ors. v McDowell & Co. and Ors.\(^{1049}\). That no enactment can be struck down by just saying that it is arbitrary or unreasonable and observations made

6.5 Judicial tool to maintain fairness in administrative actions.

6.5.1 Judicial Review.

A special system of administrative law can as well impose restriction on government as it can confer special privileges. However, now, the rudiments of a system of administrative law have been introduced in the form of a special procedure, where the application for Judicial Review designed for the purpose of challenging government decisions and is handled by a distinct but fluctuating group of Judges. In recent times, allegations, questioning the integrity of this great institution have been multiplied. Lack of accountability and the alleged widespread corruption have endangered the spirit of democracy, calling into question the integrity of the conscience keepers of the law, as a result, constant public debates and scrutiny have subjected the judiciary to stand the touchstone of

\(^{1046}\) AIR 1991 SC 557
\(^{1047}\) 1995 SCC (1) 574
\(^{1048}\) Ibid.
\(^{1049}\) 1996 SCC (3) 709
accountability to ensure an increased transparency in the judicial process and restore the lost public faith. Here it is necessary to maintain natural justice for the smooth functioning of the administrative work. Public confidence in judiciary is the core of concept of democracy. If this collapses, there would be total collapses of the very system itself Parts of Natural justice –

Rule of Law
Public accountability

6.5.1.1 Introduction

Exercise of legislative and administrative power by the devolved institution is subject to Judicial Review. The doctrine of judicial review has acquired different nuances during the course of its evolution in UK, USA, and India. Its origins can be traced to UK which has no written Constitution. It has become firmly established in USA with a written Constitution establishing a federal polity.

The very old case on judicial review in England in case Dr. Bonham’s Chief Justice Coke stated that:

When an Act of Parliament was against common right or reason, repugnant or impossible to perform, the Common Law would control it and adjudge such Act to be void.

In the Historic case Marbury v. Madison the Supreme Court of America made it clears that Court had the power of judicial review, Chief Justice George Marshall observed:

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\(^{1052}\) Ibid.
\(^{1054}\) Ibid.
\(^{1055}\) Ibid.
[C]ertainly all those who have framed the written Constitution contemplate them as forming the fundamental and paramount law of the nations and theory of every such government must be that the legislature, repugnant to the Constitution is void^{1056}.

6.5.1.2 Judicial review and its scope

 Judicial review defined as a:

[C]ourt’s power to review the actions of others branches of government, especially the Court’s power to invalidate legislative and executive actions as being unconstitutional^{1057}.

6.5.1.2.1 Judicial review in India deals with these aspects:

1. Judicial Review of Legislative Actions^{1058}
2. Judicial Review of Administrative Actions^{1059}
3. Judicial Review of Judicial Actions

 Here researcher dealing with second aspects only, namely Judicial Review of Administrative Actions. Law, it is rightly said, should be clear and precise. The same wholesome prescription applies to declaration of law by the highest court of the land particularly as we are informed by it that^{1060}:

[J]udges are presumed to know the tendency of parties concerned to interpret the language in the judgments differently to suit their purposes and the consequent importance that the words have to be chosen very carefully so as to give room for controversy^{1061}.

6.5.1.2.2 Meaning of Administrative Actions

Administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid

^{1056} Ibid.
^{1057} Durga Das Basu, Administrative Law, 7 (2010).
^{1059} Ibid.
^{1060} Ibid.
^{1061} Ibid.
of generality. It has no procedural obligations of collecting evidence and weighing argument. In case *A.K. Kraipak v. Union of India*, the Court was of the view that¹⁰⁶²:

> [I]n order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred and the consequences¹⁰⁶³.

6.5.1.2.3 Grounds for Judicial Review of Administrative Actions

1. Illegality
2. Irrationality
3. Procedural impropriety
4. Proportionality

The decision in *S.R Bommai v. Union of India*¹⁰⁶⁴ marks the high water mark of judicial review. It is a very salutary development and will go a long way in minimizing centre’s frequent onslaught on the states who as rightly pointed out “are neither satellites nor agents of the centre” and “have an important a role to play in the political, social, educational or cultural life of the people as the union”¹⁰⁶⁵.

However there is genuine concern about misuse by the centre of Article 356 on the pretext that the state government is acting in defiance of the essential features of the constitution¹⁰⁶⁶

6.5.1.3 Limitation on the power of judicial review:

In India the Rule of Law was adopted, where general rules of accountability were assumed. However, there is still scope for abusing power. There is need to evolve specific and concrete mechanisms of accountability in addition to diffuse. It is

¹⁰⁶⁴ *Supra* note 1058, at 20.
¹⁰⁶⁶ *Id.*, at 31.
specific and concrete method of checking the excess of administrative bodies. It is true that Indian courts are under a constitutional duty to interpret the constitution and declare the law as unconstitutional if it’s found contrary to any constitutional provision. Judicial power in relation to judicial review has been limited scope with the help of various principles from common law\textsuperscript{1067}.

As we can say this limited review – merely to ensure conformity to the Rule of Law\textsuperscript{1068}.

The principle of judicial review would apply to the exercise of contractual powers by the government bodies in order to prevent arbitrariness or favoritism. However there are inherent limitations in exercise of that power of judicial review. Few of them are given below\textsuperscript{1069}:

1. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. The duty of the court is thus to confine itself to the question of legality. Its concern should be\textsuperscript{1070}:

   a) Whether a decision making authority exceeded its power?
   b) Committed an error of law
   c) Committed a breach of the rules of natural justice
   d) Reached a decision which on reasonable tribunal would have reached or,
   e) Abused its powers.

2. There is always chance that judiciary may trespass the power given to legislature and the executive\textsuperscript{1071}.

\textsuperscript{1067} Common law, such principle were added, subtracted or modified such principles as they think fit in the Indian context.
\textsuperscript{1068} Michael allen & brain Thompson et.al., Cases & Materials on Constitutional & Administrative Law, 465 (1995)
\textsuperscript{1069} Tata cellular v. union of India, (1994) 6 SCC 651.
\textsuperscript{1070} Ibid.
\textsuperscript{1071} Ibid.
3. Whenever courts comes to judicial review of administrative action\textsuperscript{1072}, judiciary cannot question legality of discretionary power, unless it is abuse of discretionary power\textsuperscript{1073}

4. Judiciary has some inherent limitation. It is suited more for adjudication of disputes than for performing administrative functions.

5. Sometimes a culture of arbitrariness can be gauged within the judicial circles while applying the principles of natural review especially in recent times. A decision is said to be arbitrary when it is depending on individual discretion, or determined by a judge rather than by fixed rules, procedures or law. Such arbitrariness takes myriad forms. It can be observed that judicial arbitrariness itself in four major forms\textsuperscript{1074}:

a) Courts substituting the decision it, with what it think fit.

b) Court misapplying the existing principles

c) Court ignoring the existing principles and interfering on its own considerations.

d) Courts not interfering when it is supposed to.

\textbf{6.6 Conclusion}

When researcher thinks about the most appropriate method of inquiring into the legal competence of a public authority then judicial review of administrative action is the answer. The aspect of an official decision or an administrative act that may be scrutinized by judicial process are competence of the public authority, the extent of a public authority’s legal powers, the adequacy and fairness of the procedure and the motives underlying it, and the nature and scope of the discretionary power. There is a question of responsibility for the damage caused by the public authority in the performance of its functions. It is of course impractical to subject every administrative act or decision to investigate, for this would entail unacceptable delay. The constitutional courts exercise power of judicial review with constraint to ensure that the authorities on whom such power

\textsuperscript{1072} Such situation arises, when the legislature expressly or directly gives matter to the direction of an administrative authority then court should adopted self-restraint theory.

\textsuperscript{1073} Supra note 1069.

\textsuperscript{1074} Ibid.
is entrusted under the rule of law exercise it honestly, objectively and for the purpose for which it is intended to be exercised\textsuperscript{1075}.

Today, we have a vibrant intelligentsia and society both willing and well equipped to participate in informed public. This is only deliberative model that public can be directly and effectively come to participation. This can be create a strong involvement of youth in the country democratic governance process. It is also true that great degree of public participation causes check on greater accountability. This underlines the need for a strong anti-corruption institution i.e, lokpal, Right to Information\textsuperscript{1076}.

There is no doubt that, Right to Information is also playing a very important role in Indian Democratic setup. It makes government responsible as well as create awareness among the general public. Somewhere Right to Information Act helps to disclose corruption in Public Offices and here for this purpose, role of judiciary is appreciable. Time to time judiciary points out many provisions, who required to be amended, one of them is section 24 of the Act, this Act is very wide in its scope by which there is every chance for the arbitrariness\textsuperscript{1077}.

By utilizing the analytical distinction between different aspects of doctrine of judicial review researchers find that the judicial output on the doctrine may be reorganized along with discrete themes. These thematic enquiries allow us to analyses the judicial output critically and to assess strength and weakness of parts of the doctrine as it presently stands and to respond to criticism of excessive and careless use\textsuperscript{1078}.

All actions of the state and its instrumentalities must be towards the objectives set out in the constitution. Indian democratic system based upon social, traditional and public welfare. To achieve this purpose public servants and

\textsuperscript{1076} Ibid.
\textsuperscript{1077} Ibid.
\textsuperscript{1078} Sudhir krishnaswamy, Democracy and Constitutionalism in India, 70(2010).
government agencies need set objectives and fundamental rules. But for this also need accountability *standard* for stating their intentions and results\textsuperscript{1079}.

If citizens are to hold their government accountable, they must be able to find out what it is doing. At the immediate neighborhood level, word of mouth is perhaps sufficient to transit such information, but at any higher level some formal redress procedures have been included as an accountable mechanism in some decentralization initiatives. Indian democracy based upon two pillars, one public accountability and other is public participation. Both pillars are required to have maintain rule of law in country. If we think about the most appropriate method of inquiring into the legal competence of a public authority then judicial review of administrative action is the answer. The aspect of an official decision or an administrative act that may be scrutinized by judicial process are competence of the public authority, the extent of a public authority’s legal powers, the adequacy and fairness of the procedure and the motives underlying it, and the nature and scope of the discretionary power. There is a question of responsibility for the damage caused by the public authority in the performance of its functions. It is of course impractical to subject every administrative act or decision to investigate, for this would entail unacceptable delay\textsuperscript{1080}.

\textsuperscript{1079} Ibid.  
\textsuperscript{1080} Ibid.