CHAPTER – IV

CONSTITUTIONAL REVIEW
OF THE ACTS OF
LEGISLATURE IN INDIA
CHAPTER IV
CONSTITUTIONAL REVIEW OF THE ACTS OF LEGISLATURE IN INDIA

Introduction
Part One: Historical Background of Judicial Review in India
1. Origins of Judicial Review
2. Independence of India and Establishment of Judicial Review System

Part Two: Generalities of the Indian Constitutional Courts
1. Structure of the Indian Constitutional Courts and its Relevant Issues
   1.1. Hierarchy of the Courts in India
   1.2. Composition of the Indian Constitutional Courts
2. Legal Position of the Indian Constitutional Courts
   2.1. Position of the High Courts
   2.2. Position of the Supreme Court
3. Independence of the Courts
   3.1. Qualifications of the Judges
   3.2. Appointment of the Judges
   3.3. Tenure of the Judges
   3.4. Removal of the Judges
   3.5. Transfer of the Judges
   3.6. Other Provisions on Judicial Independence
   3.7. Serious Dangers on Judicial Independence in India

Part Three: Scope and Limitations of Judicial Review in India
1. Scope of Judicial Review
   1.1. Fundamental Rights; Judicial Review of the Ordinary Laws
   1.2. Basic Structure; Judicial Review of the Constitutional Amendments
2. Limitations of Judicial Review
   2.1. Detention without Charge or Trial and Procedure Established by Law
   2.2. Declaration of Emergency
   2.3. Power of Parliament to Amend the Constitution
2.4. Martial Law
2.5. Laws under Articles 31(A) and 31(B)
2.6. Directive Principles
2.7. *A Posteriori* Review

**Part Four: Constitutional Adjudication Procedure and Decisions of the Courts**

1. *Locus Standi*
   1.1. Traditional Rule
   1.2. Public Interest Litigation (PIL)

2. Procedure of Appeal in Constitutional Matters
3. Decisions of the Supreme Court

**Part Five: A Glance at the Role and Performance of the Indian Constitutional Courts**

1. Pre-Emergency Period
   1.1. Right to Property
   1.2. Interrelationship of Fundamental Rights

2. Emergency Period
   2.1. Emergency, Constitutional Amendments, and Judicial Review
   2.2. Consequences of the Amendment Acts

3. Post-Emergency Period
   3.1. Heart of the Changes: Rejection of *Gopalan* Approach
   3.2. Religion and Secularism
   3.3. Protective Discrimination; Job Reservation
   3.4. Controversies over Judicial Activism

**Conclusion**
Introduction
In the Constitution of India, adopted in 1950, there is no express provision declaring that the Constitution to be the supreme law of the land. It seems that such a declaration was deemed superfluous by the Indian Constitution makers. The Constitution provides for distribution of powers between the Union and the States. As well, the functions of the three branches of the government (i.e. the Legislature, the Executive, and the Judiciary) have been sufficiently differentiated and it is expected that none of them can take over the functions of the other branches. If any branch of the government is allowed to go behind the Constitution, the distribution of the functions will be of no importance. Accordingly, the supremacy of the Constitution has been held to be a part of the basic structure of the Indian Constitution, and therefore it cannot be abrogated or destroyed even by the Constitutional Amendments.388

Moreover, the Indian Constitution guarantees certain fundamental human rights and freedoms for the people. These rights, in substance, constitute inhibitions on the Legislative and the Executive branches. No law or executive action infringing a fundamental right can be regarded valid.

Unlike the American Constitution, the Indian Constitution in Article 13 expressly provides for the judicial review to maintain the fundamental rights. As well, Articles 32 and 226 provides for the enforcement of these rights. The only branch of the government that can enforce the supremacy of the Constitution and maintain the fundamental rights is the judiciary through the means of judicial review. In fact, the Indian judiciary, besides its ordinary judicial functions, plays the significant role of the constitutional court as well.

This Chapter, in five parts, deals with the various aspects of judicial review of the Acts of Legislature in India.

Part One

Historical Background of Judicial Review in India

1. Origins of Judicial Review

During the British period, despite the presence of Indians in government, Indians had not been responsible for the laws that governed them. Indians had neither law nor courts of their own, and both the Courts and the law had been designed to meet the needs of the colonial power.\(^{389}\) In pre-independence India, only three High Courts at the presidency towns of Calcutta, Madras, and Bombay had the power to issue the prerogative writs. As the successors of the Supreme Courts, the three High Courts established in those presidency towns by the Charter Act of 1861, inherited the power to issue the prerogative writs within their respective territorial limits.\(^{390}\)

In England, since there is no written Constitution and Parliament is supreme, there is no judicial review of legislation enacted by Parliament.\(^{391}\) Nevertheless, it should be said that judicial review, in fact, originated in England, where the courts supervised the executive actions to ensure that they did not transgress the limits defined by the parliamentary Acts.\(^{392}\) Furthermore, judicial review of the Acts of legislature was always in vogue in the colonies. Unlike the British Parliament, the colonial legislatures were not supreme and their powers were circumscribed by the provisions of the Constituent Acts enacted by the British Parliament.\(^{393}\) Britain extended the practice of judicial review of legislation to its colonies such as India. Therefore, the courts in India began exercising the judicial review power even since the first Act of British Parliament enacted in 1858. In \textit{Empress v. Burah and Book Singh}, the Calcutta High Court proclaimed the principle of judicial review.\(^{394}\)


\(^{392}\) Ibid., p. 29.

\(^{393}\) Ibid.

However, since there was no bill of rights in the Constituent Acts, the scope of judicial review was limited. Moreover, the courts in India followed the policy of maximum judicial restraint in dealing with the Acts of the legislatures. The Indian judges were brought up in the British tradition of parliamentary supremacy and therefore rarely questioned the validity of the legislative action except on the ground of its being *ultra vires*. Therefore, very few statutes were struck down by the courts during the colonial period.

One of the main demands of Indian national movement for independence was a constitutional bill of rights that could act as a bulwark against any type of authoritarianism. The Nehru committee reporting on the fundamental rights in 1928 strongly recommended that the Indian Constitution in future should include a bill of rights. However, the British government rejected this demand and did not include the bill in the Government of India Act in 1935. The Joint Committee on Indian Constitutional Reform while rejecting the demand observed,

> We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective.

The Committee also added,

> Either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the power of the Legislature and to create a grave risk that a

---

397 Before the advent of the new Constitution, India was governed under the Government of India Act, 1935, which became effective in 1937. India was then a part of the British Empire: sovereignty that the British Parliament had enacted the Act of 1935. See Jain, M.P. *Indian Constitutional Law*. 5th ed. New Delhi: Wadiwa and Company Nagpur, 2007, p. 8.
large number of laws may be declared invalid by the courts because of the inconsistency with one or other of the rights so declared.\textsuperscript{399}

2. Independence of India and Establishment of Judicial Review System

India was among the first of Europe’s colonies to gain independence, which it obtained in 1947. Upon independence, it was widely thought that the writing of the new Constitution would be the first step in ending millennia of inequality. During the Constituent Assembly Debates, Jawaharlal Nehru, India’s first Prime Minister stated that “[T]he first task of this 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 capacity.”\textsuperscript{400} Accordingly, the leaders of independent India devoted their attention first to the drafting of a Constitution, which they accomplished after wide-ranging debates in the Constituent Assembly over the course of almost a year.

At the time of framing the Constitution, the framers had to ask themselves which of the provisions should be retained, and, if retained, how they should be modified and how the jurisdiction and powers of the courts should be widened to meet the needs of an independent State.\textsuperscript{401} Fear of large-scale invalidation of the laws seems to have been shared by the framers of the Indian Constitution. Although the Constituent Assembly unanimously agreed to incorporate the fundamental rights into the Constitution, and expressly provided that a law inconsistent with any of those fundamental rights would be void,\textsuperscript{402} maximum care was taken to avoid making judicial review censorial of legislative policy.\textsuperscript{403}

During the debates on massive program of land reform and change in property relations, the framers of the Constitution spelt out what model of judicial review they wanted for India. The framers were apprehensive of the

\textsuperscript{399} Ibid.
\textsuperscript{402} The Constitution of India, 1950, and its subsequent Amendments, Arts. 13 (1) & (2).
\textsuperscript{403} Sathe, \textit{supra} note 391, p. 36.
negative judicial attitude that might prevent legitimate socioeconomic reforms. Therefore, every attempt was made to make the Constitution specific and detailed, so that the courts could not impose further restrictions on the legislature. Speaking on the right to property, Nehru said,

Within limits no judge and no Supreme Court can make itself a third chamber [of the legislature]. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point it out but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is creature of Parliament.\(^{404}\)

The dilemma of the Constitutional framers was, “Is it advisable to confer the power of supervising the constitutionality of laws on a few judges or not?” Expressing this dilemma, Dr. B. R. Ambedkar, the Chairman of the drafting committee, said,

We are … placed in two difficult positions. One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself I cannot altogether omit the possibility of a Legislature packed by party men making laws, which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias

\(^{404}\) Constitutional Assembly Debates, vol. 9, p. 1195.
or their prejudices be trusted to determine which law is good and which law is bad.405

Although Dr. Ambedkar’s speech reflects the dilemma of the constitutional framers regarding the scope of judicial review, the opinion seems to have been equally divided between those who preferred supremacy of Parliament and those who wanted Parliamentary Acts to be subject to judicial review. It is interesting that while Nehru opted for a restricted scope for judicial review, Ambedkar doubted about the wisdom of giving to Parliament freedom to lay down any procedure and any law restricting liberty. Nehru’s fight was against the British Rule. He hoped that eliminating the Rule would automatically secure freedom of the individual. Therefore, he felt secure with a sovereign Parliament. On the contrary, Ambedkar’s fight was not only against British Rule but also against the tyranny of the religious and political majority and social injustice that the pre-British indigenous regimes had perpetrated. Therefore, he was bound to be skeptical of legislative supremacy and wanted a counter-majoritarian safeguard such as judicial review.406

As regards the establishment of the Supreme Court was concerned, an ad hoc Committee of five members undertook the work. The first recommendation of the Committee’s report bestowed the power of judicial review upon the Court. The report suggested that a Supreme Court with jurisdiction to decide upon the constitutional validity of laws could be regarded as a necessary implication of any federal scheme. Regarding the importance of giving the Supreme Court, the power of judicial review, Munshi, one of the members of the Committee, pointed out that this power was essentially necessary for safeguarding of fundamental rights and for ensuring the observance of due process.407

The resulting Constitution includes both continuities with the British legacy and clear departures from it. Among the more important continuities with

405 Ibid., vol. 7, p. 1000.
406 Sathe, supra note 391, p. 39.
British rule were a parliamentary system, with the national executive and the ruling party closely connected, and the broad powers of the central government, among them the power to take control of state governments under specified conditions. The Constitution, however, also included a number of new elements that constituted rejections of British rule, based on the drafters’ consideration of the American legal system. One important element undoubtedly was the provisions called ‘Fundamental Rights’. Another one was the creation of a strong Judiciary one of whose powers was ‘Judicial Review of the Legislative Acts’. According to G.B. Reddy, the reason why the American system of judiciary was preferred to the one prevailing in the U.K. appears to be the fact that the Indian Constitution has adopted a federal system of government. A weak system of Judiciary like the one prevailing in the U.K. could not uphold the federal principle and the supremacy of the Constitution. Moreover, India like the United States has guaranteed in a separate part of the Constitution certain fundamental rights, while the U.K. has no chapter in this regard. Thus, the judiciary in India can be effective only if it is on the lines of its counterpart in the United States that has the power of judicial review though inferred.

In contrast to the American Constitution, which did not explicitly grant to the Supreme Court the power of judicial review, and in contrast to the American Court’s controversial creation of that power, the Indian Constitution granted its Supreme Court the power of judicial review. Austin observes that the Indian judiciary, from the earliest days of independence, was regarded as “an arm of the social revolution” and that members of the Constituent Assembly believed judicial review to be an “essential power” of the new country’s courts. Article 13 of the Constitution declares that any law that encroaches on any of the fundamental rights shall be void, although it does not declare who has the authority to make such a determination. Additionally, the earliest proposals on fundamental rights emphasized that they must be

---

408 The Constitution of India, Arts. 12-35.
409 Reddy, supra note 401, p. 78.
410 Austin, supra note 389, pp. 164-65.
justiciable, and the resulting Constitution included among the fundamental rights the right to petition the Supreme Court directly in matters relating to the fundamental rights. Speaking of this right to petition the Supreme Court directly on fundamental rights, Dr. B.R. Ambedkar declared,

If I was asked to name any particular Article of the Constitution as the most important—an Article without which this Constitution would be a nullity—I could not refer to any other Article except this one ... It is the very soul of the Constitution and the very heart of it.  

Part Two

Generalities of the Indian Constitutional Courts

1. Structure of the Indian Constitutional Courts and its Relevant Issues
Since the body to control the constitutionality of laws in India is the judiciary system of that country, to explain the position and structure of its constitutional review body, inevitably the very judiciary system must be investigated.

1.1. Hierarchy of the Courts in India
Though India is a federal republic, which would normally require all branches of government to be represented equally at both the Center and State levels, it makes an exception for the judiciary. There is just one judicial branch, which then administers both State and National laws. The system of judiciary in India is vastly complex; however, seen in its most simple form, it is organized as a single, integrated hierarchy of courts with the Supreme Court at its apex. Directly below the Supreme Court are High Courts for each state, below which are several other court divisions referred to in the Constitution as “subordinate

411 Ibid., p. 169.
413 The present Chapter uses the terms “Constitutional Courts” and “Judiciary” interchangeably.
Among these courts, only the Supreme Court and the High Courts of the States have the power of judicial review.

1.2. Composition of the Indian Constitutional Courts

1.2.1. Composition of the High Courts

Before independence of India, the Provision of the Act of 1911 had fixed the maximum number of judges of High Courts as twenty, but the provision was dropped and the Act of 1935 empowered the king-in-council to fix number of judges from time to time for each High Court. After the independence, the Constitution of India has not fixed any maximum number of judges of High Courts. Article 216 of the Constitution says that every High Court consists of a Chief Justice and such other judges as the President may, from time to time, deem it necessary to appoint. “In this way, flexibility is maintained with respect to the number of judges in a High Court which can be settled by the central Executive keeping in view the quantum of work before the Court.”

1.2.2. Composition of the Supreme Court

According to Article 124 (1) of the Constitution of India, the Supreme Court of India consists of a Chief Justice and not more than seven other Judges until Parliament by law prescribes a large number. As the Court’s workload skyrocketed, the number of justices has been gradually increased. In 1956, eleven justices were allowed. Then in 1960, it was fourteen; in 1977, eighteen were allowed, and finally in 1986, the maximum number of justices became twenty-six including the Chief Justice.

---

2. Legal Position of the Indian Constitutional Courts

Legal position of the Supreme Court and the High Courts of India can be identified with reference to their powers and authorities.

2.1. Position of the High Courts

Almost every State in territory of India has High Court. Some of the very small States or Union Territories share High Courts with other States. Now, there are 21 High Courts throughout India. The High Courts stand at the head of a State’s judicial administration. Article 227 of the Constitution of India provides that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This power has been conferred on the High Courts to enable them to keep the courts and tribunals within the bound of their authority and jurisdiction.

Article 228 of the Constitution empowers the High Courts to withdraw from a court subordinate to them a case that involves a substantial question of law as to the interpretation of the Constitution. The High Courts can exercise this power if they are satisfied that the determination of the question is necessary for the disposal of the case.

Article 226 empowers the High Courts to issue writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto*, and *certiorari* for the enforcement of the fundamental rights.

The High Courts also have been given the power to hear appeals in civil and criminal cases under the provisions of the Civil and Criminal Procedure Codes.

2.2. Position of the Supreme Court

The Supreme Court was inaugurated in January of 1950 as the replacement for the colonial Federal Court of India. The Indian Constitution gives a place of

---

419 For a thorough look at the list of the present High Courts, see Kulshreshtha, *supra* note 417, pp. 178-79.
pride and honor to the Supreme Court. The Court is a significant constitutional court and exerts a potent influence on the shaping of the Constitutional jurisprudence in India.\textsuperscript{423} The Court, according to scholars, is “the most powerful court in the world.”\textsuperscript{424} Such sweeping claims are not entirely unjustified, as the Court’s jurisdiction and powers are said to be wider in nature and extent than those of the highest court in any other country.\textsuperscript{425} According to the Law Commission of India, the Supreme Court “is a federal court, in the sense that it is the exclusive arbiter of disputes between the Union and the States or between one state and another. It is the highest constitutional court of the country, not only in its capacity as the protector of fundamental rights ..., but also in its capacity as the final court of appeal in matters involving substantial questions of law as to the interpretation of the Constitution.”\textsuperscript{426}

Position of the Supreme Court can be explained as follows:

Article 131 of the Constitution of India vests the Supreme Court with original and exclusive jurisdiction to determine disputes between the Government of India and one or more States; or between the Government of India and any State or States on one side and one or more other States on the other; or between two or more States.

The Supreme Court has also original (though not exclusive) jurisdiction to enforce the fundamental rights guaranteed by the Constitution of India. Articles 32 to 35 of the Constitution make the Supreme Court the protector of the fundamental rights. Many scholars claim that this particular openness is what makes the Indian Supreme Court probably the most accessible in the world.\textsuperscript{427}

The Constitution of India has imposed certain limitations upon the powers of the Legislatures in the form of fundamental rights conferred by Part III, the


\textsuperscript{425} Basu, supra note 414, p. 281.


Legislative competence,\(^{428}\) and territorial limitation in the case of State Legislature.\(^{429}\) Therefore, the Supreme Court has the power to pronounce upon the validity of laws on any of the above grounds. The Court even has the power to determine whether Constitutional Amendments are invalid as violations of the Constitution’s basic structure.\(^{430}\)

The Supreme Court is the final appellate tribunal of the land. Articles 132 to 136 of the Indian Constitution deal with the appellate jurisdiction of the Court. The Court exercises its appellate jurisdiction in civil, criminal, and constitutional matters. Under Article 136 of the Constitution, the Supreme Court also has a special leave jurisdiction that grants it discretion to hear appeals involving “any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India” except for matters relating to the Armed Forces.

The Supreme Court, though not officially a legislative body, does effectively create law and national policy. The Court does this in two ways. First, it interprets the Constitution, and in so doing, sets policy. Second, its rulings set binding precedents for all other courts in the nation. Article 141 of the Constitution reads, “The law declared by the Supreme Court shall be binding on all courts within the territory on India.”

The Supreme Court has also been designated as an advisory body to the President of India under Article 143 of the Constitution. Although it is still not clear whether the advisory opinion of the Supreme Court given under Article 143 is law declared by the Court under Article 141, the judicial bodies subordinate to the Court have freely relied on such opinions. Even the Supreme Court itself has followed its advisory opinion almost as a precedent.\(^{431}\)

\(^{428}\) The Constitution of India, Art. 246 & VII Schedule.

\(^{429}\) Ibid., Art. 245.


3. Independence of the Courts

The independence and impartiality of the Judiciary is one of the hallmarks of the democratic set up of government. An independent and impartial Judiciary is said to be the first condition of liberty.\(^{432}\) The judiciary is the protector of the Constitution and as such, it may have to strike down Executive and Legislative acts of the center and the states,\(^{433}\) so it should be free from all kinds of political pressures. As the Supreme Court of India has observed in *A.C. Thalwal v. High Court of Himachal Pradesh*,\(^{434}\) “The constitutional scheme aims at securing an independent judiciary which is the bulwark of democracy.”

The Constitution of India has made several provisions to ensure independence of judiciary, so that it can be said that the fundamental concepts of ‘separation of the three branches of powers’ and ‘independence of Judiciary’ have now been “elevated to the level of the basic structure of the Constitution and are the very heart of constitutional scheme.”\(^{435}\) These provisions can be discussed under the following headings:

3.1. Qualifications of the Judges

According to Article 124 (3) of the Constitution of India, only a citizen of India will be eligible for appointment of judge of the Supreme Court. In addition, either he should have been a High Court judge for five years, or an advocate of a High Court for ten years or he is, in the opinion of the President, a ‘distinguished jurist.’

The way to the Court opens mainly through High Courts. “An outsider has no chance of lateral entry in the Supreme Court despite provision of jurist being eligible for appointment in the Court.”\(^{436}\) However, by virtue of the last provision of Article 124 (3), an eminent non-practicing academic lawyer can

---

find a place on the Supreme Court\textsuperscript{437} although until now, no non-practicing lawyer has been appointed as a judge of the Supreme Court\textsuperscript{438}.

According to Article 217 (2) of the Constitution, a person is qualified for appointment as a judge of the High Court if he is a citizen of India, and has held a judicial office in the territory of India, or has been an advocate of a High Court for at least ten years. Unlike the Supreme Court, the Constitution makes no provision for appointment of a jurist as a High Court judge.

In a historic judgment in \textit{Shri Kumar Padma Prasad v. Union of India},\textsuperscript{439} the Supreme Court, for the first time, quashed the appointment of Shri K.N. Srivastava, Secretary (Law and Justice), Mizoram government, as judge of the Gauhati High Court. A practicing advocate through a writ petition challenged the validity of his appointment on the ground that he was not qualified for the post. The Court held that the independence, efficiency, and integrity of the judiciary can only be maintained by selecting the best persons in accordance with the procedure provided under the Constitution. These objectives enshrined under the Constitution cannot be achieved unless the functionaries accountable for making appointment act with meticulous care and utmost responsibility. Referring to Article 217 (2) (a), the Court ruled that the office of Legal Remembrancer-\textit{cum}-Secretary (Law and Judicial) of the State Government held by Shri Srivastava was a non-judicial office under the control of the Executive. All the other offices held by him were neither judicial nor part of any judicial service. He also did not complete a period of ten years as a member of the State judicial service.

\textbf{3.2. Appointment of the Judges}

According to Article 124 (2) of the Constitution of India, “Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the states as the President may deem necessary for the

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{437} Like the United States. See Jain, \textit{supra} note 415, p. 323; also see Kulshreshtha, \textit{supra} note 417, p. 203.
\item\textsuperscript{438} Pandey, \textit{supra} note 416, p. 450; Jain, \textit{supra} note 397, p. 197.
\item\textsuperscript{439} AIR 1992 SC 1213: (1992) 2 SCC 428.
\end{itemize}
\end{footnotesize}
purpose … provided that in the case of appointment of a judge other than the
Chief Justice, the Chief Justice of India shall always be consulted …” Thus,
under this Article, the President in appointing other judges of the Supreme
Court has to consult the Chief Justice of India. However, in appointing the
Chief Justice he does not have to consult anyone.

According to Article 217(1) of the Constitution, “Every judge of a High
Court shall be appointed by the President by warrant under his hand, and seal
after consultation with the Chief Justice of India, the Governor of the State,
and, in the case of appointment of a judge other than the Chief Justice, the
Chief Justice of that High Court …”

However, it should be mentioned that the power of the President to appoint
judges is purely formal because in this matter he acts on the advice of the
Council of Ministers. This, in turn, makes a doubt that executive may bring
politics in the appointment of judges.\footnote{Ibid., pp. 444-45.} If the final power in this respect is left
with the executive then it is possible for the executive to subvert the
independence of the judiciary by appointing pliable judges. The Constitution of
India does not expressly lay down definitive procedure for the purpose as it
merely says that the President is to appoint Supreme Court judges in
consultation with the Chief Justice and “such” other judges of the Supreme
Court and of the High Court, as “the President may deem necessary.”\footnote{The Constitution of India, Art. 124 (2).}

It was not clear from this provision as to whose opinion was finally to prevail in case
of difference of opinion among the concerned persons.\footnote{Jain, supra note 397, p. 193.}

For long, the practice in India had been to raise the senior most judge of the
Supreme Court to the office of the Chief Justice of India whenever a vacancy
occurred in that office. In 1956 the Law Commission of India criticized this
practice on the ground that a Chief Justice should not only be an able and
experienced judge but also a competent administrator and, therefore,
succession to the office should not be regulated by mere seniority.\footnote{Law Commission of India. 14th Report. Ministry of Law, Government of India, 1958, cited in Jain, supra note 397, p. 192.}
Executive, whoever, did not act upon this recommendation and continued to appoint the senior most judge as the Chief Justice of India as it was afraid that it might be accused of tampering with judicial independence. On April 25, 1973, this 22-year-old practice was suddenly broken by the Indian government within few hours of the delivery of the judgment in the *Fundamental Right Case*. The government appointed Justice A.N. Ray who was fourth in the order of seniority as Chief Justice of India. Thus, three senior judges resigned from the Supreme Court in protest. The action of the government raised a great controversy in the country and the government was accused of tampering with the independence and impartiality of the judiciary. Although the government invoked the Law Commission’s recommendation, no one believed that the seniority rule had been jettisoned because of what the Law Commission had said, because the report of the Law Commission were published in 1956 but it were not implemented for about 17 years. According to J.N. Pandey, the three senior and eminent judges were superseded not because they did not possess the qualifications recommended by the Law Commission but because they had decided cases against the Government. Again, in 1976, the government appointed Justice BEG as the Chief Justice bypassing Justice Khanna who was senior to him at the time. Consequently, Justice Khanna resigned in protest. In 1977 general elections, the Congress Party was defeated and the Janata Party won with huge majority and formed the government at the Center. The Janata Party was opposed to the policy of the supersession of the judges of the Supreme Court. Consequently, they again revived the old practice of appointing the Chief Justice of the Supreme Court on the basis of seniority. This rule, though a mechanical one, can ensure independence of judiciary.444

Giving to the Executive an unfettered discretion to decide the philosophy of the judges is to make the Judiciary subordinate to the Executive, because every judge who desires to be elevated to the highest post of the Chief Justice of India will try his best to become a ‘forward looking judges’ in the eye of the government. This significant issue has been considered by the Supreme Court

---

in several cases. In 1991, in *Subhash Sharma v. Union of Inida*,\(^{445}\) regarding the word ‘Consultation’ in Article 124 (2), a three judge Bench of the Supreme Court said, “The constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognized and adumbrated and the cherished values of judicial independence.” The Bench emphasized,

An independent non-political judiciary is crucial to the sustenance of our chosen political system. The vitality of the democratic process, the ideals of social and economic egalitarianism, the imperatives of a socio-economic transformation envisioned by the Constitution as well as the Rule of law and great values of liberty and equality are all dependent on the tone of the judiciary. The quality of the judiciary cannot remain unaffected, in turn, by the process of selection of judges.\(^{446}\)

Subsequent to the abovementioned case, the question of the process of the Supreme Court judges came to be considered by a 7-2 majority of nine-judge Bench of the Supreme Court in *S.C. Advocates on Record Association v. Union of India*.\(^{447}\) In this case, the Supreme Court has delivered a historic and important judgment for the maintenance of judicial independence in India. The Court overruled its earlier judgment in *S.P. Gupta v. Union of India*\(^{448}\) under which the ultimate power to appoint judges of the Supreme Court had been ‘exclusively’ vested in the Central Government.

In *S.C. Advocates on Record Association v. Union of India*,\(^{449}\) the Supreme Court emphasized that the question has to be considered in the context of achieving “the constitutional purpose of selecting the best” suitable for composition of the Supreme Court “so essential to ensure the independence of the judiciary, and, thereby to preserve democracy.”

\(^{446}\) Ibid., p. 640.
Referring to the ‘consultative’ process envisaged in Article 124(2) for appointment of the Supreme Court judges, the Court emphasized that this procedure indicates that the government does not enjoy ‘primacy’ or “absolute discretion” in the matter of appointment of the Supreme Court judges.  

The Court has further clarified that the “opinion of the Chief Justice” is “reflective of the opinion of the judiciary” which means, “It must necessarily have the element of plurality in its formation.” In fact, the final opinion expressed by the Chief Justice is not merely his individual opinion but “the collective opinion formed after taking into account the views of some other judges who are traditionally associated with this function.”

The Court has observed that, “The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight, the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word ‘consultation’ instead of ‘concurrence’ was used but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual, much less to the executive.”

The Court also laid down the guidelines in relation to the appointment of the Supreme Court judges among which the most important ones are as follows:

1. Initiation of the proposal for appointment of a Supreme Court judge must be by the Chief Justice of India, but he must consult his two colleagues.

2. No appointment of any judge to the Supreme Court can be made by the President without consulting the Chief Justice.

450 Ibid., p. 429.
451 Ibid., p. 434.
452 Ibid., p. 430.
(3) Appointment to the office of Chief Justice of India ought to be of the senior-most judge of the Supreme Court considered fit to hold the office.

(4) *Inter se* seniority among judges in their High Court and their combined seniority on all India basis should be kept in view and given due weight while making appointments from amongst High Court judges to the Supreme Court. Unless there be any strong cogent reason to justify departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court.453

In *Re. Presidential Reference*,454 a nine-judge Bench of the Supreme Court held that in making his recommendation for appointment to the Supreme Court, the Chief Justice of India ought to consult four senior-most puisne judges of the Supreme Court. Thus, the collegium to make recommendation for appointment should consist of the Chief Justice and four senior-most puisne judges. If the majority of the collegium is against the appointment of a particular person, that person shall not be appointed. As well, when the Chief Justice of India is in a minority and the majority of the collegium disfavors the appointment of a particular person that person shall not be appointed. The Supreme Court has observed that in case of non-appointment of a person recommended by the Chief Justice of India on the ground of unsuitability, the Chief Justice has to reconsider the recommendation.

As a result of the judicial pronouncements in the two Supreme Court decisions that is, *Supreme Court Advocates on Record Association v. Union of India* and *Re. Presidential Reference*, the Executive interference in the matter of appointment of the Supreme Court and High Court judges has now been limited. Judges in the Supreme Court are gentlemen selected from judges of different High Courts (most of these Chief Justices of High Courts). The selection is by a collegium of Chief Justice and four senior judges and the appointment is by President of India. The selection is on non-academic, non-

453 See Pandey, *supra* note 416, p. 448; also see Jain, *supra* note 397, p. 196.
454 AIR 1999 SC 1.
performance or any pre-decided, pre-made known objective criterion. It is now based on seniority. If somebody has joined the queue or line at an early age as judge in any High Court, he stands a good chance of reaching the Supreme Court. According to M.P. Jain, the present arrangement to appoint the judges has been free from political considerations and pressures. Therefore, judicial independence has been guaranteed.455

Arguably, the tradition of choosing justices from the pool of High Court Chief Justices creates one of the Court’s more troubling issues. After all, the way in which the Indian judicial hierarchy works, by the time judges can actually get to a High Court, become Chief there, and then earn a position on the Supreme Court, they are usually already in their sixties. As a result, a person must have been appointed to a High Court relatively early in life to have any chance of reaching the Supreme Court prior to mandatory retirement, and must be elevated to the Supreme Court at a sufficiently young age to reach the position of Chief Justice before retirement. Thus, most judges of the Supreme Court can serve only a few years before mandatory retirement. The tenure of Supreme Court Chief Justice is usually extremely short due to the traditional process of selection by seniority. Quite often, they are able to serve just a few months as Chief before retirement. Nevertheless, deviations from that tradition have produced extremely sharp objections from the bench and bar.456

3.3. Tenure of the Judges

A judge of the Supreme Court shall hold his office until he attains the age of sixty-five years,457 however, a judge of a High Court shall hold his office until he attains the age of sixty-two years.458

According to M.P. Jain, the advantage of the above provision fixing a retiring age of the judges is that “it ensures infusion of new talent from time to time and thus protects the Court from falling into a groove or getting out of

455 Jain, supra note 397, p. 197.
456 Gadbois, supra note 423.
457 The Constitution of India, Art. 124 (2).
458 The Constitution of India, Art. 217 (1).
tune with the contemporary social and economic philosophy.”  However, the disadvantage of the provision is that at times it may remove some judges from the Court untimely “just when they may be beginning to find their feet as constitutional judges and approaching the period of their greater intellectual usefulness.”

3.4. Removal of the Judges

Removal of a judge of Supreme Court or High Court before the age of retirement has a significant bearing on their independence and impartiality. If a judge is removed without much formality, it is clear that the Court will lose its independence. Accordingly, the Constitution of India has prescribed a difficult procedure for the removal of a judge of the Courts. According to Article 124 (4), a judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each Houses of Parliament supported by a majority of the total members of that House and by a majority of not less than two-thirds of the members of the House present. Voting is presented to the President in the same session for such removal on the ground of proved misbehaviors or incapacity. The same procedure has been prescribed for the removal of a judge of a High Court.

In 1968, Parliament has enacted the Judges (Inquiry) Act to regulate the procedure for investigation and proof of misbehavior or incapability of a Supreme Court or a High Court judge for presenting an address by Parliament to the President for his removal. The procedure for the purpose is as follows: A notice of a motion for presenting such an address may be given by 100 members of the Lok Sabha, or 50 members of the Rajya Sabha. The Speaker or the Chairman may either admit or refuse to admit the motion. If it is admitted, then the Speaker/Chairman is to constitute a committee consisting of a Supreme Court judge, a Chief Justice of a High Court and a distinguished jurist. The committee is to frame definite charges against the judge on the basis

---

459 Jain, supra note 397, pp. 198-99
460 Ibid.
461 The Constitution of India, Art. 217 (1).
of which the investigation is proposed to be held and given him a reasonable opportunity of being heard including cross-examination of witnesses. If the charge is that of physical or mental incapacity, the committee may arrange for the medical examination of the judge by a medical board appointed by the Speaker/Chairman or both as the case may be. The report of the committee is to be laid before the House or Houses concerned. If the committee finds the judge to be guilty of misbehavior or suffering from incapacity, the House can take up consideration of the motion. On the motion being adopted by both Houses according to the relevant constitutional provisions, an address maybe presented to the President for removal of the judge. Rules under the Act are to be made by a committee consisting of 10 members from the Lok Sabha and 5 members from the Rajya Sabha.

3.5. Transfer of the Judges

Article 222 (1) of the Constitution of India empowers the President after consultation with the Chief Justice to transfer a judge from one High Court to any other High Court.

The issue of transfer of a judge from one High Court to another in territory of India has raised controversies from time to time. During the Emergency period of 1975, 16 judges were transferred. “It was widely believed that the government did so as a punitive measure to punish those judges who had dared to give judgments against it.”

In Union of India v. Sankalchand Himatal Sheth, the constitutionality of a notification issued by the President through which justice Sankalchand of the Gujarat High Court was transferred to the High Court of Andhra Pradesh was challenged on the ground that the order was passed without the consent of the Chief Justice of India. The Supreme Court held that Article 222 does not require consent of a judge to his removal.

462 The Constitution of India, Arts. 124 (4) & 217 (1).
463 See Jain, supra note 397, pp. 199-200 & 387-88.
464 Jain, supra note 397, p. 380.
transfer from one to another High Court. However, as a safeguard against misuse of power by the Executive, the majority ruled that the consultation with Chief Justice of India must be full and effective one and not a mere formality. It means that while consulting the Chief Justice the President must make the relevant data available to him. The majority also emphasized that the proposal to transfer a judge should be initiated only by the Chief Justice and that transfer could be resorted to only as an exceptional measure and only in public interest, not for providing the Executive with a weapon to punish a judge who does not touch its line.

In *S.P. Gupta v. Union of India*, popularly known as *Judge Transfer Case* the Court held that consent is not necessary element of Article 222. The only requirement is that there must be ‘consultation’ with the Chief Justice of India, which must be effective. Power of transfer of judges must be exercised in public interest. However, transfers cannot be done by way of ‘punishment.’

In the historic judgment in *S.C. Advocates on Record Association v. Union of India* the Supreme Court has reiterate the proposition that there is no requirement of prior consent of the judge before his transfer under Article 222. The power of transfer can be exercised only in “public interest.” The Court further held that the proposal for the transfer of a judge/Chief Justice should initiated by the Chief Justice of India alone. However, before sending his recommendation for transfer of a judge from one High Court to another, the Chief Justice of India has to consult two senior most judges of the Supreme Court. The Court also emphasized that “any transfer in accordance with the recommendation of the Chief Justice of India cannot be treated as punitive or an erosion in the independence of judiciary.”

In *Dalpatrary Bhandari v. Union of India*, the Supreme Court rejecting a writ petition challenging the transfer of a judge held that no one other than the transferred judge himself can question the validity of a transfer.

---

467 AIR 1994 SC 425: (1993)4 SCC 441
468 Ibid., p. 435.
In *Re. Presidential Reference*,\(^{470}\) a nine-judge Bench of the Supreme Court has unanimously held that in case of transfer of High Court judges, the Chief Justice of India must consult a collegium of four senior most judges of the Supreme Court. Moreover, he is required to consult the Chief Justice of the High Court from which the judge is to be transferred and the Chief Justice of the High Court to which the transfer is to be affected. The collegium should make the decision in consensus.

### 3.6. Other Provisions on Judicial Independence

Several other provisions of the Constitution of India have been made to ensure the judicial independence:

- According to Article 124 (b) every judge of the Supreme Court shall, before he enters upon his office, make and subscribe an oath or affirmation in the form prescribed before the President or some person appointed by him for the purpose. Similarly, according to Article 219 every judge of a High Court has the same duty before the Governor of the State or some person appointed by him for the purpose.

- The salaries and allowances of the judges of the Supreme Court and the High Courts have been fixed by the Constitution of India under the provisions of Articles 125 and 128. The judges are entitled to be paid such salaries as determined by Parliament. They cannot be varied by the legislature expect during the period of financial emergency. Once appointed, their privileges, rights and allowances cannot be altered to their disadvantage.\(^{471}\) The expenditure in respect of the salaries and other allowances of the judges of the high judiciary are drawn from the consolidated fund of India and they are not subject to any vote in any legislature.\(^{472}\)

\(^{470}\) AIR 1999 SC 1.  
\(^{471}\) *The Constitution of India*, Arts. 125, 221 & 360.  
\(^{472}\) Ibid., Arts. 146 & 229.
According to Articles 121 and 211 of the Indian Constitution, no discussion shall take place in the legislature of a state or in the Parliament with respect to the conduct of any judges of the Supreme Court or of a High Court in the discharge of his duties. The only exception appears to be in the case of impeachment proceedings. According to Articles 129 and 215 of the Constitution, the Supreme Court and High Courts have been designated as a court of record and vested with the power punish for contempt of itself.

The Supreme Court and the High Courts enjoy administrative autonomy. They have been given authority to recruit their non-judicial staff and frame rules regarding conditions of service.473

3.7. Serious Dangers on Judicial Independence in India

The foregoing discussions make it clear that the framers of the Indian Constitution have provided enough safeguards to enable the Indian constitutional courts to work in an impartial and independent atmosphere. However, there are some disturbing trends, which may threaten the independence and impartiality of the courts.

Firstly, the incidents of indiscipline and corruption charges levelled against certain judges of various High Courts damage the independence and the legitimacy of judiciary. For example, resort arrest of the Delhi High Court judge for his links with land mafia is one of the numerous events, which show that the higher judiciary is suffering from malice that is in dire need of cleaning.474

Secondly, the non-effectiveness of the impeachment proceeding under Article 124(4) and (5) of the Constitution based on political maneuvering also harms the independence of judiciary as the erring judge is not afraid of any action taken against him.475 Some questions that arise in this connection are, “Whom are the judges accountable to? What should be done to remove a

473 Ibid.
474 Pandey, supra note 416, p. 485.
475 Ibid., p. 483.
corrupt judge? If a judge is corrupt, should he continue? Would his continuance not adversely affect the legitimacy of the Court?"476 The failure of impeachment motion in the Ninth Lok Sabha against Justice V. Ramaswami of the Supreme Court is a glaring example to show that there is no mechanism in the Constitution to punish a guilty judge. In 1998 J.S. Verma, the former Chief Justice of India, said, “Today judges of the superior judiciary in India are not answerable to any one for their misconduct, as neither the impeachment procedure nor internal machinery is workable.”477

Thirdly, practice of appointing retired judges to the high offices is likely to affect the judicial independence adversely.478 Although Articles 124(7) and 220 of the Constitution of India bar a judge after retirement from practicing as a lawyer, retired judge can work as arbitrators. Moreover, judges are appointed to some National Commissions such as the National Human Rights Commission and various other administrative agencies and tribunals. Therefore, there is a possibility that a judge compromises his independence by looking forward to such post-retirement appointment by the government.479 The Law Commission has rightly pointed out the dangers of such undesirable practices. The government is one party in a large number of cases in the highest court, and because a judge might look forward to being employed after his retirement, he may not remain impartial and unbiased in cases that government is one party. This practice has a tendency to affect the independence of the judges.480

476 Sathe, supra note 391, p. 299.
477 See Pandey, supra note 416, p. 485.
478 Rai, supra note 421, p. 413.
479 Sathe, supra note 391, p. 299.
Part Three
Scope and Limitations of Judicial Review in India

1. Scope of Judicial Review
The power of judicial review of the Acts of Legislatures in India is exercised by the Supreme Court and the High Courts through relying on two different concepts. The first concept is “Fundamental Rights” which is invoked to examine the ordinary laws enacted by the Parliament and the State Legislatures, and the second one is “Basic Structure” which is utilized to control the Constitutional Amendments enacted by the Parliament.

1.1. Fundamental Rights; Judicial Review of the Ordinary Laws
1.1.1. Concept of Fundamental Rights and its Classification
India has been consistently concerned with the protection of human rights, and this has been reflected (for the most part) in the way in which it pursues socio-economic development. For purposes of the social revolution in India, the most important parts of the Constitution are parts III and IV, which hold the ‘Fundamental Rights’ and ‘Directive Principles of State Policy’. These Sections have often been called the “conscience of the Constitution.”481 India’s set of fundamental rights is, in effect, its counterpart to the American Bill of Rights (the first Ten Amendments of the American Constitution).482 Part III of the Constitution of India guarantees these rights because they enable a man to chalk out his own life in the manner he likes best.483 These rights are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.484 They are also limitations upon all powers of the government, Legislative as well as Executive.


\textbf{-Right to Equality} (Articles 14-18): this includes equality before the law and equal protection before the law; prohibition of discrimination on the grounds of religion, race, caste, sex, place of birth; equality of opportunity in employment; the abolition of untouchability; and the abolition of titles of nobility.

\textbf{-Right to Particular Freedom} (Articles 19-22): within this right fall freedom of speech and expression; assembly; association; movement; residence; settlement; profession; protection with respect to conviction for offenses; protection of life and personal liberty; and protection against arrest and detention in certain cases.

\textbf{-Right against Exploitation} (Articles 23-24): this right prohibits trafficking in human beings; forced labor; and the employment of children in hazardous situations.

\textbf{-Right to Freedom of Religion} (Articles 25-28): protected here are freedom of conscience and free profession (religious expression); freedom to manage religious affairs; freedom from payment of taxes for the promotion of any particular religion; and freedom to attend religious instruction in certain educational institutions.

\textbf{-Cultural and Educational Rights of Minorities} (Articles 29-30): this protects language, scripts and cultures of minority groups; and the right of minorities to establish and administer educational institutions.

\textbf{-Right to Constitutional Remedies} (Articles 32-35): this final fundamental right ensures remedies for enforcement of the fundamental rights conferred by the Part, including writs of \textit{habeas corpus, mandamus, prohibition, certiorari} and \textit{quo warranto}. 
It should be mentioned that the Constitution (44th Amendment) Act in 1978 has excluded the right to property guaranteed by Article 19(1) (f) and Article 13 of the Constitution from the list of fundamental rights, and hence Article 19(1) (f) and Article 31 has been omitted.

The fundamental rights included in Part III of the Constitution differ from ordinary rights in several respects. Ordinary rights are given by the ordinary law while the fundamental rights have been given by the Constitution. Ordinary rights may be taken away, curtailed, or abridged by ordinary law while the fundamental rights cannot be abridged, curtailed, or taken away except in so far as it is permitted by the Constitution itself or by Amendment of the Constitution. Fundamental rights form the basic structure of the Constitution and, therefore, they may be abridged by Constitutional Amendment but cannot be abrogated or destroyed.486 The person who is entitled to the ordinary rights can waive his right but the person who is entitled to the fundamental rights has no such right. In the case of infringement of the fundamental rights special remedy has been provided while in the case of infringement of the ordinary rights the remedy is to be sought under ordinary law.487

1.1.2. To Whom and against Whom Available?
The fundamental rights in Articles 15, 488 16, 489 19, 490 29, 491 and 30 492 are available only to citizens, while the rights granted by other Articles are available to the citizens and non-citizen alike.

Most of the fundamental rights in part III of the Constitution of India are available against the State 493 only, but some of them are also available against

487 Rai, supra note 421, p. 86.
488 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
489 Equality of opportunity in matters of public employment.
490 Protection of certain rights regarding freedom of speech, etc.
491 Protection of interests of minorities.
492 Right of minorities to establish and administer educational institution.
493 According to Article 12 of the Indian Constitution, the term “State” in Part III (Fundamental Rights), unless the context otherwise requires, includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.
the private individuals. For example, the rights guaranteed in Article 14,\(^{494}\) 15(1),\(^{495}\) 16,\(^{496}\) 18(1),\(^{497}\) 19,\(^{498}\) 20,\(^{499}\) 21,\(^{500}\) 22,\(^{501}\) 25,\(^{502}\) 26,\(^{503}\) 27,\(^{504}\) 28,\(^{505}\) 29,\(^{506}\) and 30\(^{507}\) are available against the State only, while the fundamental rights guaranteed in Article 15(2),\(^{508}\) 17,\(^{509}\) 23(1),\(^{510}\) and 24\(^{511}\) are available against the State as well as against the private individuals.

1.1.3. Waiver of Fundamental Rights

A significant question is as to whether a person can waive his fundamental right. In *Behram v. State of Bombay*,\(^{512}\) the Supreme Court held that the fundamental rights, though for the benefit of individual, have been put in the Constitution on the ground of public policy and therefore none of them can be waived by any person. For example, it is not open to an accused person to waive or give up his constitutional rights and get convicted.

The question of waiver directly arose in *Basheshar Nath v. Income Tax Commissioner*.\(^{513}\) In 1954, the petitioner whose case was referred to the Income-tax Investigation Commissioner under Section 5(1) of the concerned Act agreed at a settlement to pay Rs. 3 lakhs in monthly installments by way of arrears of tax and penalty. In 1955, the Supreme Court in *Muthiah v. I.T.*...
Commissioner\textsuperscript{514} held that Section 5(1) of the Taxation of Income (Investigation Commission) Act was \textit{ultra vires} of Article 14. The respondent contended that even if Section 5(1) was invalid, the petitioner by entering into an agreement to pay the tax had waived his fundamental rights guaranteed under Article 14. The majority of the Court held that the doctrine of waiver formulated by some American judges interpreting the Constitution of the United States cannot be applied in interpreting the Constitution of India. The Court further held that it is not open to a citizen to waive any of the fundamental rights conferred by Part III of the Constitution. It is an obligation imposed upon the State by the Constitution. No person can relieve the State of this obligation, because a large number of Indian people are economically poor, educationally backward, and politically not yet conscious of their rights. In such circumstances, it is the duty of this Court to protect their rights against themselves.

\textbf{1.1.4. Justiciability of Fundamental Rights}

Article 13 of the Indian Constitution makes the fundamental rights justiciable. This Article in fact provides for the ‘judicial review’ of all laws and regulations in territory of India, past as well as future. The Supreme Court and the High Courts has been given power to determine finally the constitutionality of laws and declare them unconstitutional if they are inconsistent with any provision of Part III of the Constitution.\textsuperscript{515} Article 13 as ‘laws inconsistent with or in derogation of the fundamental rights’ says,

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

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

\textsuperscript{514} AIR 1956 SC 269.
\textsuperscript{515} The Constitution of India, Arts. 32 & 226.
(3) In this Article, unless the context otherwise requires,—

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this Article shall apply to any Amendment of this Constitution made under Article 368.\(^{516}\)

As observed above, in the Indian Constitution there is an express provision for judicial review. However, as J.N. Pandey rightly points out, even in the absence of such a provision, the courts would have been able to invalidate a law that contravened any constitutional provision, for such power of judicial review follows from the very nature of the constitutional law.\(^{517}\) In A.K. Gopalan v. State of Madras,\(^{518}\) the first case in which the power of judicial review was used by the Supreme Court, Chief Justice Kania pointed out that it was only by way of abundant caution that the farmers of the Indian Constitution inserted the specific provisions in Article 13. He observed, “In India it is the Constitution that is supreme and that a statute law to be valid must be in all conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not.”

Some provisions of Article 13 will be explained under the following headings:

1.1.4.1. Prospective or Retrospective?

A significant question regarding the Article 13 is, “Does the Article have prospective effect or retrospective?” To answer this question two assumptions should be separated:

\(^{516}\) Clause (4) was inserted by the Constitution (24th Amendment) Act, 1971, Sec. 2 (w.e.f. 5-11-1971).

\(^{517}\) Pandey, supra note 416, pp. 65-6.

\(^{518}\) AIR 1950 SC 27.
- First Assumption: Pre-Constitution Laws
According to Clause (1) of Article 13, all pre-Constitution laws inconsistent with the provisions of Part III shall be void to the extent of such inconsistency. The analysis of this Clause makes it clear that it is prospective in nature. All pre-Constitution laws inconsistent with fundamental rights shall be void only after the commencement of the Constitution. They are not void ab initio. Such inconsistent law is not wiped out as far as the past Acts are concerned. However, a declaration of invalidity by the courts will be necessary to make the laws invalid.\footnote{Pandey, supra note 416, p. 66.} In \textit{Keshav Madhava Menon v. State of Bombay},\footnote{AIR 1951 SC 128; Rabindra Nath v. Union of India, AIR 1970 SC 470.} the petitioner was prosecuted in 1949 under the Indian press [Emergency Power] Act, 1931. During the pendency of the criminal proceeding, the Constitution of India came into force and the petitioner challenged the validity of the Act on the ground that it was inconsistent with the fundamental right under Article 19(1) (a) and pleaded that the proceedings commenced against him before the commencement of the Constitution could not be continued. The Supreme Court ruled that Article 13(1) could not apply to his case, as the offence was committed before the present Constitution came into force. The Supreme Court held that Clause 1 of Article 13 has no retrospective effect and therefore the proceedings under the impugned Act were not affected even if the Act was inconsistent with the fundamental right under Article 19(1) (a).

- Second Assumption: Post-Constitution Laws
According to Clause (2) of Article 13 the State shall not make any law (post-constitutional law) which takes away or abridges the rights conferred by part III of the Constitution and any law made in contravention of these rights shall be \textit{ultra vires} and void to the extent of the contravention. The analysis of Clause 2 makes it clear that post-Constitution laws inconsistent with fundamental rights are void from their very inception.\footnote{Deep Chand v. State of U.P., AIR 1959 SC 648; Mahendra Lal Jain v. State of U.P., AIR 1963 SC 1019.} However, declaration by the Court of their
invalidity will be necessary.\textsuperscript{522} Clause 2 makes the inconsistent laws void \textit{ab initio} and even conviction made under such constitutional laws shall have to set aside. In \textit{Deep Chand v. State of U.P.},\textsuperscript{523} the Supreme Court held that “anything done under such a law, whether closed, completed, or inchoate will be wholly illegal and person adversely affected by it will be entitled to relief.”

1.1.4.2. Doctrine of Eclipse

A law that is inconsistent with the fundamental rights is treated to be dormant not dead.\textsuperscript{524} In other words, it is not void \textit{ab initio} but becomes only unenforceable. Such a law is not wiped out entirely from the statute book.\textsuperscript{525} Therefore, if by the subsequent Amendment of the Constitution the inconsistency that has made it unconstitutional is removed, the law will become free from all blemish or infirmity and it will become enforceable.\textsuperscript{526} This is called the Doctrine of Eclipse. It is only as against the citizens that the inconsistent laws remain in a dormant or moribund condition but they remain in operation as against non citizens who are not entitled to fundamental rights.\textsuperscript{527}

The doctrine of eclipse, which is based on Article 13(1) of the Indian Constitution, has been enunciated by the Supreme Court in the \textit{Bhikaji v. State of M.P.} case.\textsuperscript{528} The provisions of C.P. and Berar Motor Vehicles (Amendment) Act, 1947 had authorized the State Government to make up the entire motor transport business in the Province to the exclusion of motor transport operations. This provision, though valid when enacted, became void when the Constitution of India came into force in 1950 as it violated Article 19(1) (g)\textsuperscript{529} of the Constitution. In 1951 Clause 6 of Article 19(1) (g) was amended by the Constitution (1st Amendment) Act so as to permit the State Government to monopolies any business. The Court held that by the said

\begin{itemize}
  \item \textsuperscript{522} \textit{M.D. Ishaq v. State}, AIR 1961 All 532.
  \item \textsuperscript{523} AIR 1959 SC 648.
  \item \textsuperscript{524} \textit{Bhikaji Narayan v. State of M.P.}, AIR 1955 SC 781.
  \item \textsuperscript{525} \textit{Keshav Madhava Menon v. State of Bombay}, AIR 1951 SC 128, pp. 599-600.
  \item \textsuperscript{526} \textit{Bhikaji Narayan v. State of M.P.}, AIR 1955 SC 781.
  \item \textsuperscript{527} \textit{State of Gujarat v. Sri Ambica Mills}, AIR 1974 SC 1300.
  \item \textsuperscript{528} AIR 1955 SC 781.
  \item \textsuperscript{529} Right to practice any profession, or to carry on any occupation, trade or business.
\end{itemize}
Amendment of the Constitution, the inconsistency was removed and the impugned Act was revived. This Act was merely eclipsed for the time being by the fundamental rights. As soon as the eclipse is removed, the law begins to operate from the date of such removal.

For the applicability of the doctrine of eclipse, the law must be valid at its inception. Thus, this doctrine can be applied only in the case of pre-Constitution laws under Article 13(1). It cannot be applied in the case of post-Constitution laws because they would be void from their very inception under Article 13(2) and, therefore, cannot be validated and revived by the subsequent Amendment of the Constitution. If the Parliament desires to make a post-Constitution Act invalidated under Article 13(2) valid, the whole Act should be re-enacted in the modified form removing the inconsistency. However, in exceptional cases the doctrine of eclipse may be applied to post-Constitution laws. In *State of Gujarat v. Ambica Mills*, the Supreme Court held that a post-Constitution law that is inconsistent with fundamental rights is not nullity or non-existent in all cases and for all purposes. For example, a post-Constitution law that takes away or abridges the right conferred by Article 19 will be operative as regards to non-citizens because fundamental rights are not available to non-citizens. Such a law will become void or non-existent only against citizens because fundamental rights are conferred on them. The voidness in Article 13(2) can only mean void as against persons whose fundamental rights are taken away or abridged by law. Non-citizens cannot take advantage of the voidness of the law. Accordingly, the Court held that the Bombay Labor Welfare Fund Act, 1953 was valid in respect to non-citizens.

In *Dulare Lodh v. IIIrd Additional District Judge, Kanpur*, the Supreme Court applied the doctrine of eclipse to post-Constitution law even against citizens.

---

532 AIR 1974 SC 1300.
533 AIR 1984 SC 1260.
534 For a detailed look at this case, see Pandey, *supra* note 416, p. 70.
1.1.4.3. Doctrine of Severability

When some provisions of a statute offend against the constitutional provision and are declared unconstitutional, then a question arises whether the whole of the statute is to be declared void or only those provisions that are unconstitutional should be declared as such. The doctrine of severability, which has been devised by the Supreme Court, has answered this question. This doctrine means that if some of the provisions of a statute are found inconsistent with the rights guaranteed by part III of the Constitution and the rest are not inconsistent, then, only the provisions that are inconsistent shall be treated by courts as void and not the whole statute. Article 13 of the Indian Constitution provides that laws inconsistent with the fundamental rights shall be void to the extent of such inconsistency.

In *A.K. Gopalan v. State of Madras*, only Section 14 of the Preventive Detention Act, 1949 was declared *ultra vires* and void and the rest of the Act was allowed to continue. In this case, the Supreme Court observed, “The omission of the Section will not change the nature or the structure of the subject of the legislation. Therefore, the decision that Section 14 is *ultra vires* does not affect the validity of the rest of the Act.” Similarly, in *State of Bombay v. F.N. Balsara*, a case under Bombay Prohibition Act, 1949, the Court after declaring the inconsistent provisions null and void observed that there is no necessity for declaring the entire statute as invalid.

In *Minerva Mills v. Union of India*, Section 4 and 55 of the Constitution (42nd Amendment) Act, 1976 were served and declared void as being beyond the amending power of the Parliament but rest of the Act was held to be valid.

In *Kihoto Hollohon v. Zachilhu*, it has been held that Para 7 of the Tenth Schedule which excludes the jurisdiction of the Supreme Court and the High Courts under Articles 136 and 226 respectively is unconstitutional and severable from the main provision of the Tenth Schedule. The remaining

---

536 AIR 1950 SC 27.
537 AIR 1951 SC 318.
538 AIR 1980, SC 1789.
539 AIR 1993 SC 412.
provisions stand independent of Para 7 and are complete in themselves and workable.

However, there is one exception in applying the doctrine of severability. If the valid part of a statute is so closely mixed up with invalid part that they cannot be separated from one another, then, the Court will declare the entire Act null and void.\(^\text{540}\) In *R.M.D.C. v. Union of India*,\(^\text{541}\) Section 2(d) of the Prize Competition Act was involved. This Act was broad enough to include competitions of a gambling nature as well as competitions involving skill. The Supreme Court held that in determining whether the unconstitutional provisions of the statute can be separated from the constitutional ones, the intention of the Legislature should be taken into account. The test to be applied is whether the Legislature would have enacted the valid portion if it had known that the rest of the statute was invalid. If the valid and invalid portions are so inextricably mixed up that they cannot be separated from one another, then, the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.

1.1.4.4. Rule of Prematurity

The Supreme Court is technically supposed to be bound by the rule of prematurity. According to S.P. Sathe, the rule of prematurity states that a court must interpret a statute or discover a common law only if it is absolutely necessary for the disposal of a case. The Court is not actually supposed to deal with any abstract or hypothetical issues. Sathe argues however, that in developing countries the Court should have leeway to do just that. In a case that did not need to be decided based on the waiver of fundamental rights, *Basheshar Nath v. Income Tax Commissioner,*\(^\text{542}\) Sathe explains that the Court

---


\(^{541}\) AIR 1957 SC 628.

\(^{542}\) AIR 1959 SC 149.
did just that. He says, The Court, however, went into that question (of waiver of fundamental rights) because it wanted to protect people against themselves … In a society where rights had been given to people who for generations had been powerless and exploited, such waiver could be dangerous and could make the entire bill of rights meaningless.”

1.1.5. Remedies of Violation of Fundamental Rights: Writ Jurisdiction of the Courts

In the case of violation of the fundamental rights in Part III of the Indian Constitution special remedies have been provided. According to Article 32 (2) of the Constitution the Supreme Court has the power to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari*, which ever may be appropriate, for the enforcement of any of the fundamental right. As well, according to Article 226 every High Court shall have the similar jurisdiction for the enforcement of the fundamental rights and also for the enforcement of any other purpose throughout the territory in relating to which it exercises its jurisdiction.

There are two main differences between writ jurisdiction under Articles 32 and 226. Firstly, the right to move the Supreme Court under Article 32 is itself a fundamental right and thus, in such condition ordinarily the Supreme Court cannot refuse to grant this remedy. However, the right to move the High Court under Article 226 is not itself a fundamental right. The remedy provided in Article 226 is a discretionary remedy and cannot be claimed as a matter of right. Secondly, the remedy provided under Article 32 is available only for the enforcement of the fundamental right guaranteed by part III of the Constitution while the remedy provided under Article 226 is available for the enforcement of the fundamental rights and also for the enforcement of any other purpose. Thus, the writ jurisdiction of the High Court is wider than of the Supreme Court.

---

Court by Article 226 shall not be in derogation of the power conferred on the Supreme Court by Article 32 (2).  

In a landmark decision in *L. Chandra Kumar v. Union of India*, the Supreme Court held that the power of judiciary over legislative action vested in the High Courts under Article 226 of the Constitution is basic feature of the Constitution and therefore it cannot be ousted or excluded even by way of a Constitutional Amendment. Accordingly, the Supreme Court declared Clause (2)(d) of Article 323-A and Clause(3)(d) of Article 32 3-B as unconstitutional to the extent that they excluded the jurisdiction of the High Courts over the Service Tribunals established under the Administrative Tribunal Act, 1988. The Court made it clear that while the jurisdiction of the High Courts cannot be ousted these tribunals will continue to function and perform a supplemental role in discharging the powers conferred by Articles 226, 227 and 32 of the Constitution. The tribunals are competent to test the validity of statutory provisions and rules. The result of the decision is that now it will not be possible for a person to move the Supreme Court directly from a decision of a tribunal, without first going to the concerned High Court. In this respect, the aggrieved person has got another remedy by way of a writ-petition before the concerned High Court. Thus, what was earlier two-tier litigation has now become three-tier litigation.

The remedies of violation of fundamental rights should be sought within a reasonable time. Laches or unreasonable or unexplained delay in instituting writ petition entail refusal to issue a writ. Nevertheless, delay is no bar to writ of *quo warranto*. In *D.R.L.R.C. v. Dt. Board*, refusal for delay was described as a rule of practice. Writs in the Indian legal system are as follows:

---

546 For a thorough discussion of Article 32 and its constitutional remedies for the enforcement of fundamental rights, see Basu, supra note 414, pp. 121-24. Included is also the important distinction between High Court and Supreme Court jurisdictions.
547 AIR 1997 SC 1125.
548 Ins. By the Constitution (42nd Amendment Act), 1976, sec. 46 (w.e.f. 3-1-1977).
549 Pandey, supra note 416, p. 528.
552 (1992) 2 SCC 598.
1.1.5.1. **Habeas Corpus**

_Habeas Corpus_ is a prerogative writ by which a person, who is confined or detained by any authority or person, can apply to the Court and the Court may issue an order to produce the person, so confined and detained, before the Court. However, it is the duty of the Court to set free an individual when once the Court comes to the conclusion that there has been violation of the constitutional provisions.

In view of Article 21 of the Indian Constitution, the constitutionality of the very statute under which the person has been arrested or detained can be challenged in the proceedings of _habeas corpus_. Thus the question for a Court, deciding a _habeas corpus_ case, is whether the person is lawfully detained. If the Court holds that he is illegally detained, it will have to issue the writ of _habeas corpus_ as it is a fundamental right guaranteed to a citizen of India under the Constitution.

It should also be noted that the Constitution of India has narrowed down the scope for the issue of the writ of _habeas corpus_ by empowering the Legislatures to enact laws under Schedule VI, like the Preventive Detention Act, etc.

1.1.5.2. **Quo Warranto**

_Quo warranto_ is a prerogative writ to prevent a person who has wrongfully usurped an office from continuing in that office. This writ calls upon the holder of the office to show the court under what authority he holds that office. In India the writ of _quو warranto_ has been used for two purposes, namely in cases of (a) usurpations of a public office, which is filled by appointment; (b) election to a public office, including office in a public corporation. In _G.D. Karkare v. T.L. Shevde_, it was held that this writ will lie regarding a public office of a substantial nature. However, in _Jamalpur Arya Samaj v. Dr. D_.

---

554 The Constitution of India, Schedule VII, list I, Entry 9; List III, Entry 3.
555 AIR 1952 Nag 330; see also Hamid Hassan v. Banwari Lal Ray, AIR 1947 PC 90.
Ram, it was held that the writ will not be issued against offices or private nature.

Ordinarily the power under Article 226 is exercisable for the enforcement of a right or performance of a duty at the instance of the person who has been personally affected. However, an application for the writ of *quo warranto* challenging the legality of an appointment to an office of a public nature is maintainable at the instance of any private person, although he is not personally interested or aggrieved in the matter. In *G.D. Karkare v. T.L. Shevde*, the Nagpur High Court has reiterated this principle.

1.1.5.3. Mandamus

The prerogative writ of *mandamus* can be issued for the enforcement of fundamental rights and for the redress of any injury of a substantial nature arisen due to some illegality or due to contravention of any other provision of the Constitution when an applicant whose rights are infringed applies for it. The object of the writ of *mandamus* is only to compel any public authority, including administrative and local bodies to act. This writ will not be issued to correct an error or irregularity in the judgment of a court, which could be corrected by appeal or revision, where effective and convenient remedy is provided by the statute that created the right which is infringed, where the aggrieved party would get an adequate remedy by an ordinary action in the civil court. The writ of *mandamus* will not be granted against some persons as follows: (a) The President or the Governor of a State for the exercise and performance of the powers and duties of his office; (b) Against the Legislature; (c) Against persons who are not holders of public offices; (d)

---

556 AIR 1954 Pat 297.
557 AIR 1952 Nag 330; also see *Biman Chandra v. Governor of West Bengal*, AIR 1952 Cal 799.
Against an inferior or ministerial officer who is obeying the orders of his
higher authority.563

1.1.5.4. Prohibition
Prohibition is a prerogative writ, issued by a superior court to an inferior court,
directing the inferior court not to exceed from the limits of its jurisdiction in the
performance of its judicial duties.564

Under the Constitution of India, the Supreme Court and all High Courts are
given powers to issue the writ of prohibition. This writ issues out of the High
Court to prevent an inferior court or tribunal, judicial or quasi-judicial, from
exceeding its jurisdiction or acting contrary to the rules of natural justice, e.g.,
to prevent a judge from hearing a case in which he is personally interested.565
Writ of prohibition will issue to prevent the tribunal from proceeding further
when the inferior court or tribunal proceeds to act—(a) without566 or in excess
of jurisdiction,567 (b) in violation of the rules of natural justice,568 (c) under a
law which is itself ultra vires or unconstitutional,569 and (d) in contravention of
fundamental rights.570

1.1.5.5. Certiorari
Certiorari is a prerogative writ whereby the superior courts restrict the lower
courts and courts of special jurisdiction from exceeding their function as
prescribed by law. Under the constitutional provisions the writ of certiorari can
be issued by the Supreme Court and all High Courts for mainly two purposes:
in the first instance for the enforcement of fundamental rights and in the second
instance for the redress of any injury of a substantial nature.

563 Babul Chandra, Re, AIR 1952 Pat 309, 311.
564 Shrirur Matt v. Commissioner, AIR Mad 613, 617.
566 East India Commercial Co. v. Collector of Customs, AIR 1962 SC 1893.
567 Sewpujanrai v. Collector of Customs, AIR 1957 SC 845, 855.
570 Bidi Supply Co. v. Union of India, 1956 SCR 267, 277-B.
In *T.C. Basappa v. Nagappa*, Justice Mukherjee said, “One of the fundamental principles in regard to the issuing of a writ of *certiorari* is that the writ can be availed of only to remove or adjudicate on the validity of judicial acts.” In *Praboth Verma v. Uttar Pradesh*, the Supreme Court has emphasized that a writ in the nature of *certiorari* is a wholly inappropriate relief to ask for when the constitutional validity of a legislative measure is being challenged. In such a case, the proper relief to ask for would be a declaration that a particular law is unconstitutional and void. If a consequential relief is thought necessary, a writ of *mandamus* may be issued restraining the state from enforcing or giving effect to the provisions of the law in question.

Both the writ of prohibition and *certiorari* are available against the same class of persons, namely authorities exercising judicial or quasi-judicial powers. They are issued practically on the similar grounds of “defect of jurisdiction” and violation of fundamental rights or unconstitutionality. The main difference between the two is that *certiorari* is issued to quash a decision after the decision is taken by a lower tribunal while prohibition is issuable before the proceedings are completed. The object of prohibition is prevention rather than cure. For example, the High Court can issue prohibition to restrain a tribunal from acting under an unconstitutional law. However, if the tribunal has already given its decision then *certiorari* is the proper remedy in such a situation. It may be that in a proceeding before an inferior body, the High Court may have to issue both prohibition and *certiorari*; prohibition to prohibit the body from proceeding further, and *certiorari* to quash what has already been done by it.

### 1.2. Basic Structure; Judicial Review of the Constitutional Amendments

The Constitution of India has vested in Parliament the power to amend the Constitution. In this regard, the main questions are, “Can the fundamental

---

571 AIR 1954 SC 440.  
574 The Constitution of India, Art. 368.
rights be amended? Does the word ‘law’ in Clause (2) of Article 13 include a Constitutional Amendment for the purpose of judicial review?” The Constitution, as it stood in 1950, did not ascertain whether a Constitutional Amendment is ‘law’ under Article 13 (3) of the Constitution for the purpose of fundamental rights. This discussion is necessary to clarify whether a Constitutional Amendment violating the fundamental rights contained in Part III of the Constitution is valid or not. To answer these significant questions, the Supreme Court has delivered some important judgments that are discussed in this section.

1.2.1. Before the 24th Constitutional Amendment

The question whether a Constitutional Amendment is ‘law’ under Article 13(3) was for the first time considered by the Supreme Court in Shankari Prasad v. Union of India. The Court held that the word ‘law’ in Article 13 must be taken to mean ordinary laws and not a Constitutional Amendment made under Article 368. Therefore, Article 13 did not affect the Constitutional Amendments; they cannot be invalidated by the courts on the ground that they violate the fundamental rights of the citizens.

The interpretation of Shankari Prasad’s Case was followed by the majority in Sajjan Singh v. State of Rajasthan. However, in Sajjan Singh, Justices Mudholkar and Hidayatullah while upholding the impugned Constitution (17th Amendment) Act, 1964 made some noteworthy remarks. Mudholkar expressed his worry about the erosion of “basic features” of the Constitution by the excessive use of constituent power of the Parliament and Hidayatullah wondered whether “fundamental rights could be the playthings of a majority.”

In Golak Nath v. State of Punjab, the Supreme Court for the first time interfered with the validity of a Constitutional Amendment made by the

---

575 AIR 1951 SC458.
576 AIR 1964 SC 854.
577 Ibid., pp. 864-65.
578 Ibid., p. 862.
579 AIR 1967 SC 1643.
Parliament. In this case, the Constitutionality of the Constitution (17th Amendment) Act affecting property rights was challenged again, and the Court reversed its two previous decisions in Shankari Prasad and Sajjan Singh. The majority (6 vs. 5) did not accept the thesis that there was any distinction between ‘legislative’ and ‘constituent’ process. The majority further asserted that the amending process in Article 368 was merely ‘legislative’ and not ‘constituent’ in nature. In this manner, the Court held that the word ‘law’ in Article 13(3) included every branch of law even the Constitutional Amendments, and hence, if an Amendment to the Constitution took away or abridged fundamental rights of citizens, it would be declared null and void. In the process, Chief Justice Koka Subba Rao, for majority propounded the famous “Doctrine of Prospective Overruling”

The doctrine of prospective overruling enables the Court to overrule an earlier decision and restrict the operation of the new ruling only to the future cases or future transactions. The decision in Golak Nath overruled the decision in Shankari Prasad; however, the Court using the doctrine of prospective overruling held that the decision in Golak Nath’s case would be only applicable to the future cases. The Court has laid down the following principles with respect to the application of the doctrine of prospective overruling:580

- This doctrine can be invoked only in constitutional cases.
- This doctrine can be applied only by the Supreme Court.581
- The scope of the retrospective operation to be given to an overruling decision is left to the discretion of the Court to be molded to the needs of justice.

1.2.2. After the 24th Constitutional Amendment

In order to remove the difficulty created by the Supreme Court’s decision in Golak Nath’s case, the Parliament enacted the Constitution (24th Amendment) Act, 1971. It is specifically declared in Articles 13(4) and 368(3) that a

---

580 Ibid.
581 In State of H.P. v. Nurpur Private Bus Operators Union, AIR 1999 SC 3880, the Supreme Court has made it clear that the doctrine of prospective overruling cannot be utilized by the High Court.
Constitutional Amendment is not a “law” for the purpose of Part III of the Constitution and nothing in Article 13 shall apply to any Amendment made under Article 368.

The validity of the 24th Amendment, to the extent that it made changes in Article 13 and 368, was challenged in *Kesavananda Bharati v. State of Kerala*, known as the *Fundamental Rights Case*. In this landmark case, 10 out of 13 judges of the Supreme Court declared that the ‘law’ in Article 13(2) refers to the exercise of an ordinary legislative power and does not include a Constitutional Amendment under Article 368. In other words, a Constitutional Amendment is not a ‘law’ for the purpose of fundamental rights. Therefore, the Supreme Court overruled the earlier decision of the Supreme Court in *Golak Nath* and upheld the validity of the 24th Constitutional Amendment, 1971 to the extent that it affected Articles 13 and 368. However, the Court held that the Parliament has the power under Article 368 to amend all the provisions of the Constitution including the Part III containing the fundamental rights but without affecting or taking away the ‘Basic Structure’ or ‘Basic Features’ of the Constitution.

### 1.2.3. After the *Kesavananda Bharati* Case

As observed above, with its landmark judgment in the *Fundamental Rights Case*, the Supreme Court had propounded the theory of ‘Basic Features’ or ‘Basic Structure’ of the Constitution to prevent the Parliament and other Legislatures from altering the basic philosophy of the Constitution.

The Supreme Court has not defined the concept ‘Basic Structure of the Constitution’ precisely. The Court has only given some examples of the basic structure. In fact, it seems that the basic structure cannot be catalogued but can only be illustrated. It is determined by the Court on the basis of the facts in each case.\(^{583}\)

---

In *Indira Nehru Gandhi v. Raj Narain*,\(^{584}\) the validity of the Constitution (39th Amendment) Act, 1975 was challenged. The Supreme Court in this case applied the theory of “basic structure” and held that the “democratic set-up” and “rule of law” are the basic features of the Indian Constitution and therefore the 39th Amendment violates the basic structure of the Constitution.

In *Minerva Mills v. Union of India*,\(^{585}\) the constitutionality of Clauses (4) and (5) of Article 368 inserted by Section 55 of the Constitution (42nd Amendment) Act, 1976 was challenged. These Clauses stipulated that there shall not be judicial review of any express or implied Constitutional Amendments and that the power of Parliament to amend the Constitution is unlimited under Article 368. In a unanimous decision, the Court declared Clauses (4) and (5) of Article 368 and Section 55 of the 42nd Amendment unconstitutional, because the said Clauses transgressed the limits of the amending power of the Parliament and destroyed the basic structure of the Constitution.

In *L. Chandra Kumar v. Union of India*,\(^{586}\) the Supreme Court upheld the decision of the Andhra Pradesh High Court on the ground that ‘judicial review’ is a basic feature of the Constitution. The Court declared that Article 323-A and Clauses 2(d) and 3(d) of Article 323-B added to the Constitution by the 42nd Amendment in 1976 are unconstitutional to the extent that they exclude jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 of the Constitution. The Supreme Court held that the power of judicial review over legislative actions vested in the Supreme Court under Article 32 and in the High Courts under Article 226 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure.\(^{587}\)

In short, the basic structure or basic features of the Constitution includes the following concepts: sovereignty of India,\(^{588}\) republican and democratic form of

---

\(^{584}\) AIR 1975 SC 2299.

\(^{585}\) AIR 1980 SC 1789.

\(^{586}\) AIR 1997 SC 1125.

\(^{587}\) Ibid., p. 1150.

government, 589 fundamental rights guaranteed by Part III of the Constitution, 590 supremacy of the Constitution, 591 secular character of the Constitution, 592 separation of powers between Executive, Legislative and Judiciary, 593 federal character of the Constitution, 594 mandate to build a welfare state contained in Part IV of the Constitution, 595 unity and integrity of the nation, 596 objectives mentioned in the Preamble to the Constitution, 597 rule of law, 598 judicial review, 599 principle of equality, 600 parliamentary system of government, 601 principle of free and fair election, 602 limited amending power of Parliament under Article 368, 603 independence of Judiciary, 604 and so on.

As discussed above, the constitutional courts in India, particularly the Supreme Court, have claimed the power to invalidate even a Constitutional Amendment made by the constituent body if it takes away or abridges the basic structure or basic features of the Indian Constitution. The constitutional courts in the other leading constitutional democracies have never such a remarkable power. As the Indian leading scholar, Upenra Baxi, rightly points out, the Supreme Court of India is probably the only court in the mankind history that has asserted the power of judicial review over the Constitutional Amendments. 605

589 Ibid.  
591 Ibid.  
593 Ibid.  
594 Ibid.  
595 Ibid.  
596 Ibid.  
597 Ibid.  
598 Ibid.  
600 Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.  
603 Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.  
2. Limitations of Judicial Review

Although it seems that the Indian Constitutional Courts have the vast power of judicial review for the enforcement of the fundamental rights, there are some limitations on this power in the Indian legal system.

2.1. Detention without Charge or Trial and Procedure Established by Law

Article 22 of the Indian Constitution creates an exception to the fundamental rights by authorizing the National and State Legislatures to make laws providing for detention without charge or trial of individuals considered as a threat to security or order. In addition, to avoid the threat that substantive due process posed to the State’s regulatory power, the framers of the Indian Constitution purposely removed the ‘due process clause’ found in the Fifth and Fourteenth Amendments of the American Constitution. Instead, they replaced it with the bland guarantee that “no person shall be deprived of his life or personal liberty except according to the procedure established by law.”606 The words ‘procedure established by law’ were specific and it was hoped that they would not give any scope for judicial veto against reforming legislation. While doing so, they unknowingly made the valuable fundamental right to life and liberty entirely dependent on the goodwill of the Legislature. In one of its earliest landmark cases, the Supreme Court dutifully followed the wording ‘procedure established by law’ in rejecting a substantive challenge to a preventive detention law allowing detention without trial.607

By virtue of what was discussed above, the scope of judicial review in India is not as wide as in the United States. The American Supreme Court can declare any law unconstitutional on the ground of its not being in “due process of law,” but the Indian Supreme Court has no such power. In Tata Cellular v. Union of India,608 the Supreme Court held that in the exercise of the power of judicial review the Court should observe the self-restraint and confine itself to

608 AIR 1996 SC 11.
the question of legality. Its concern should be whether a decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal would have reached, or abused its power.\(^{609}\) It is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of the policy is fair. The Court is only concerned with the manner in which those decisions have been taken.\(^{610}\)

Albeit, the Court’s interpretation in this regard, as it will be discussed later, has been considerably relaxed after the Emergency period of 1975-77.

### 2.2. Declaration of Emergency

Another limitation on the power of the Supreme Court is the Constitution’s authorization of procedures for emergency rule under conditions where national or state security is threatened.\(^{611}\) Under emergency rule, the powers of the national government, and in particular the powers of the executive, over the state governments are drastically expanded. Article 358 provides that when the proclamation of emergency is made by the President under Article 352 the freedoms guaranteed by Article 19 are automatically suspended and would continue to be so far the period of emergency. The suspension of rights guaranteed by Article 19 thus removes restriction on the legislative and executive powers of the state imposed by the Constitution. Any law made by the state during this period cannot be challenged on the ground that they are inconsistent with the rights guaranteed by Article 19. However, such laws shall cease to have effect as soon as the proclamation ceases and then Article 19 is automatically revived and brings to operate. Article 358, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over. Article 359 further empowers the President to suspend the right to move any court for the enforcement of rights

---

\(^{609}\) Ibid., p. 26.

\(^{610}\) Ibid.

conferred by Part III of the Constitution (except Articles 20 and 21) during the continuance of emergency.612

The controversial 42nd Amendment of 1976 made the declaration of emergency immune from judicial review, an immunity removed by the 44th Amendment of 1978.

2.3. Power of Parliament to Amend the Constitution

Another limitation on the power of the judiciary is the ease of amending the Constitution in India. Amendments that do not affect the structure of government (generally speaking) require only the assent of two-thirds of those present and voting (but at least a majority of all members) of each house of Parliament.613 From the 1960s through the early 1980s, there was a running conflict between Parliament and the Supreme Court over the amending power, out of which grew the Court’s remarkable claim to judge the validity of Constitutional Amendments, as well as the government’s demand for the appointment of judges “committed” to socialism.

Parliament and the Supreme Court clashed on their interpretation of the provisions on the right to property. It was felt that the Court construed the provisions of the Constitution narrowly and legalistically and thereby protected the rights of the property owners. Ultimately, Parliament had to use its power of amending the Constitution to nullify the interpretations of the constitutional provisions given by the Judiciary.614 The power of amendment of the Constitution was one of the most grossly abused powers during the emergency period and the government resorted to it frequently to circumvent and even curb the power of judiciary.

One event that indirectly precipitated the declaration of emergency in 1975 was the decision of the Allahabad High Court by which the election of Mrs.

---

612 It is to be noted that while under Article 358 of the rights conferred by Article 19 are automatically suspended, the suspension under Article 359 can only be brought about by an order of the President. Sathe, supra note 391, p. 56.
613 The Constitution of India, Article 368. Amendments to the federal structure of the Constitution and to the nature of major governmental institutions require assent of two-thirds of those present and voting (but at least a majority of all members) in each house of Parliament and assent of the legislatures of at least half of the states; see Basu, supra note 418, pp. 147-48.
614 Sathe, supra note 391, p. 49.
Indira Gandhi to the Lok Sabha was set aside. She had taken recourse to a corrupt practice as defined in the Representation of the People Act, 1951, known as the Election Law. She appealed to the Supreme Court against the Allahabad High Court’s judgment. The Supreme Court had admitted her appeal and stayed the execution of her High Court’s decree subject to certain conditions. Consequently, Parliament passed several Constitutional Amendments. The Thirty-ninth Amendment was obviously passed with a view to preventing scrutiny of Mrs. Gandhi’s election to the Lok Sabha by the Court. It declared that the law that governed elections to the Lok Sabha would not apply to her election and her election would not be invalid on the ground that she had committed breach of any of the provisions of the law. It further said that notwithstanding any decision of any court, her election would continue to be valid.

By virtue of what was discussed, though the judiciary in India can declare the Acts of legislature null and void if they violate the constitutional provisions specially the provisions relating to the fundamental rights, Parliament possesses under Article 368 of the Indian Constitution the power to amend the Constitution itself. Through such amendments, judicial verdicts can be effectively nullified.

2.4. Martial Law

Article 34 of the Constitution of India empowers Parliament to indemnify by law any person in the service of the Union or a State, or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where Martial Law is in force. It can also validate any sentence passed, inflicted, forfeiture ordered or other act done under Martial Law in such area. Parliament can exercise the power under Article 34 if the act for which the indemnity law is to

---

617 The term “Martial Law” has not been defined in the Constitution of India. However, it means the action of the military, which imposes restrictions and regulations upon civilians in their own country in order to deal with an emergency amounting to a state of war. See Rai, supra note 421, p. 107.
be passed must have been in connection with the maintenance or restoration of order and the act must have been done while Martial Law was in force. In *A.D.M. Jabalpur v. S. Shukla*, the Supreme Court has held that it is implicit in Article 34 that the government may declare Martial Law in any area within the territory of India. However, mere declaration of Martial Law, by itself, would not deprive the courts of the power to issue the writ of *habeas corpus* or other process for the protection of the individuals’ right to life and property.

2.5. Laws under Articles 31(A) and 31(B)

Two important restrictions on the doctrine of judicial review in India were imposed by the Constitution (1st Amendment) Act in 1951 when Jawaharlal Nehru, the first Prime Minister of India, was the Leader of the Congress Party. Although the Constituent Assembly had taken utmost care to avoid judicial interference with the program of economic reforms to which the Congress Party had been committed since the days of the National Movement, the courts declared the laws authorizing changes in property relations unconstitutional.

Responding to the decision of the Patna High Court in *Kameshwar Singh v. State of Bihar*, Parliament enacted the Constitution (1st Amendment) Act, 1951 contained two new Articles, 31-A and 31-B. The purpose of both Articles was to protect some types of legislation that abolished certain types of property interests on the ground of their alleged violation of certain fundamental rights.

Article 31(A) as ‘saving of laws providing for acquisition of estates, etc.’ excludes from judicial review the laws that deals with the abolition of certain types of estates and their acquisition by the State with reference to the right to equality contained in Article 14, the rights to various freedoms contained in Article 19, and the right to property contained in Article 31.

---

618 *AIR 1976 SC 1207*.
619 Sathe, *supra* note 391, p. 46.
620 *AIR 1951 Pat. 91*. In this decision the Patna High Court upheld the objection that the differential rates of compensation provided under the land reform legislation, whereby the rates of compensation tapered down as the value of the land went up, were discriminatory.
621 Ins. by the Constitution (1st Amendment) Act, 1951, sec. 4 (with retrospective effect).
Article 31(B), too, excludes some laws from being challenged before the courts. This Article, as ‘validation of certain Acts and Regulations’ provides,

Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.622

In fact, Article 31-B confers immunity on the laws included in the Ninth Schedule from being challenged with reference to any of the fundamental rights guaranteed by Part III of the Constitution. In other words, once a law is enacted and included in the Ninth Schedule, it gets protection under Article 31-B and is not subject to judicial scrutiny. Even if an Act is declared unconstitutional by the courts, it is revived as soon as it is included in Ninth Schedule.623 Over the years, 284 laws were included in the Ninth Schedule.624

2.6. Directive Principles

Another restriction over judicial review in India has been imposed by Article 31(c) inserted by the Constitution (25th Amendment) Act, 1971. The Constitution of India in Part IV, Articles 36-51, declares the Directive Principles of State Policy, unlike the Fundamental Rights, not to be justiciable but rather to provide broad guidelines for government,625 they focus

622 Ins. by the Constitution (1st Amendment) Act, 1951, sec. 5.
625 The Constitution of India, Art. 37.
particularly on the government’s obligation to enhance the welfare of the society and its citizens. 626

In 1951, Justice S. R. Das, speaking for a unanimous court, in *Champakam Dorairajan’s case* 627 said, “The Directive Principles of State Policy which by Article 37 are expressly made nonenforceable by a court cannot override the provisions found in Part III which, not withstanding other provisions, are expressly made enforceable by writs, orders or directions under Article 32.”

But successive Constitutional Amendments protecting from judicial review legislation designed to secure the public good and to implement the directive principles had resulted in an altered approach by the courts, especially the Supreme Court, to the question of conflict between rights and directives. In 1970, in *Chandra Bhavan*, the Supreme Court made a more explicit statement on the nature of relationship between the fundamental rights and the directive principles, “We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other.” 628 This view was best reflected in the *Kesavananda* case, in Justice Mathew’s statement,

... The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience … Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claim embodied in Part IV or must yield to them is a matter which must be left to be decided by each generation in the light of its experience and its values. 629

---

626 Some of the Directive Principles are as follows: equal justice and free legal aid (The Constitution of India, Art. 39A), right to work, to education and to public assistance in certain cases (Art. 41), living wage, etc., for workers (Art. 43), uniform civil code for the citizens (Art. 44), duty of the State to raise the level of nutrition and the standard of living and to improve public health (Art. 47), organization of agriculture and animal husbandry (Art. 48), and promotion of international peace and security (Art. 51).


In this manner, the Court came to declare that the Fundamental Rights must be harmonically interpreted.630

In 1971, the Constitution (25th Amendment) Act was enacted. Article 31(c) inserted by this Amendment as ‘saving of laws giving effect to certain directive principles’ reads as under,

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]631 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]632 [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].633

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.634

Nevertheless, in Assam Sillimanite v. Union of India,635 the Supreme Court held that Article 31(c) does not bar judicial review to examine the nexus between impugned law and Article 39.636
2.7. *A Posteriori Review*

As clear, foundation of the judicial review in India by virtue of Article 13 of the Constitution is to support and safeguard the fundamental rights. These rights mostly concern individuals; that is to say, the individuals can challenge a law before the competent court (the Supreme Court and the High Courts) to safeguard one of their fundamental rights, which they suppose have been violated by the law. This even can happen after several years of the enactment and enforcement of the law (*a posteriori* review). Therefore, there is a possibility that many unconstitutional laws are excluded from being supervised for many years. For example, in *Mary Roy v. State of Kerala*, the constitutionality of provisions of the Travancore Christian Succession Act, 1916, which discriminated between sons and daughters in case of succession to father’s property, was challenged after 70 years of the enactment of the Act. This is an inherent limitation of judicial review in India. In such a case, is the enforcement of the law that is in nature contrary to the Constitution and delivering judgment relying on it fair and just? Here, there will be two groups of people: first, those who have been adjudged, before the annulment of the Act, and have suffered the judgment based on the Act, and second, those who have, after the annulment of the Act, had a narrow escape of the obligation arising from the Act. Does not this matter disturb the principle of equality of people before the law?

Albeit, this limitation at the same time seems to be an opportunity for the Indian system, because in this way every individual potentially has the right to challenge every law passed by the Legislature. When the people do not use their right to challenge a law, it means that the law is legitimate; therefore, its existence in the legal system of a country with the popular sovereignty is democratic.

---

Part Four
Constitutional Adjudication Procedure and
Decisions of the Courts

1. Locus Standi

Under Article 32 (1) of the Indian Constitution, there is no limitation concerning the kind of proceedings of the Supreme Court except that the proceedings must be “appropriate” and this requirement must be judged in the light of the purpose for enforcement of fundamental rights. The framers of the Constitution deliberately did not lay down any particular form of proceedings for the enforcement of fundamental rights nor did they stipulate that such proceedings should conform to any rigid pattern, because they knew that in a country like India where there is so much of poverty, ignorance, illiteracy, deprivation, and exploitation, any insistence on a right formula of proceeding for enforcement of fundamental right would become self-defeating.638

1.1. Traditional Rule

It is clear from Article 32 (1) that whenever there is a violation of a fundamental right any person can directly move the Supreme Court for an appropriate remedy. In this regard, the traditional rule of locus standi is that the right to move the Supreme Court is only available to those whose fundamental rights are violated. Article 32 provides a quick remedy for an aggrieved person for access to justice in the Supreme Court.

1.2. Public Interest Litigation (PIL)

The traditional rule of locus standi has been considerably relaxed by the Supreme Court after the Emergency period. The Court now permits “Public Interest Litigations” or “Social Action Litigations”639 at the instance of ‘public

638 S.P. Gupta v. Union of India, known as the Judges Transfer Case, AIR 1982 SC 149.
spirited citizens’ for the enforcement of constitutional fundamental rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief.

1.2.1. Origins and Importance of PIL

The Indian legal culture is vigorously rights-oriented. In 1977, immediately following India’s two-year period of Emergency Rule Justices Bhagwati and Krishna Iyer came forward with a recommendation for an extraordinary form of litigation. This was the beginning of public interest litigation. Some scholars have argued that creation of public interest litigation was a direct response to the legitimation crisis suffered by the Indian government in the post-emergency period. After having their power trampled by Indira Gandhi during her 1975-77 Emergency reign, as a part of its rebuilding, the higher judiciary needed to revamp its tarnished image. Therefore, the justices of the Supreme Court pursued their judicial activist tendencies vigorously. The Supreme Court took on this challenge by creating a very “pro-people” plan to uphold the interests of not just the elite. Yet, it went out of its way to protect the rights of the most disadvantaged members of the Indian public. Chief Justice Bhagwati has claimed, “Public interest litigation in India is primarily judge-led and even to some extent judge-induced, the product of juristic and judicial activism on our Supreme Court.”

However, Rajeev Dhavan argues that this type of thinking was the fruit of an overdue “alliance of protest and thinking” amongst India’s subaltern groups and its growing bevy of middle class intellectuals. The new wave of social movements and the first regional civil liberties organizations were formed after

---


the late 1960s to respond to state repression of reform and revolutionary movements.643 In this context the first hints of what was later to be called “judicial populism” occurred, as the dissenters in Kesavananda 644 justified absolute government power to amend the Constitution as a means to aid the “teeming millions.” On the other hand, the experience with the Emergency period of 1975-77 and its aftermath, as Smitu Kothari describes it, “was fundamentally politicizing. Political awareness expanded and rural and urban struggles widened. In the urban areas numerous new organizations were established …”645 The first national human rights organization, the People’s Union for Civil Liberties and Democratic Rights, was created in that context in 1975, “followed soon thereafter by other initiatives all over the country.”646 At the same time, foreign contributions to Indian social action organizations began to increase, growing eventually to the not insignificant amount of $400 million in 1991-92.647 By the late 1970s “support” organizations developed to conduct research and provide network connections for grassroots organizations; the newer support organizations in particular pursued public interest litigation.648

As Upendra Baxi has noted, the Indian press also adopted a more aggressive stance after the Emergency, cooperating with the intellectuals and social action organizations in publicizing abuses of power by government officials. The new empathy with the poorest classes encouraged a growing sense that something had to be done about what came to be called, in various terms, “repression and governmental lawlessness.”649

In the Judges Transfer Case,650 the Supreme Court has firmly established the rule regarding the public interest litigation. The Court held that any member

643 The first civil liberties organization, the Civil Liberties Union, was formed in the early 1930s to provide legal aid to supporters of national independence from Britain, but was “short lived.” See Kothari, Smitu. “The Human Rights Movement in India: A Critical Overview.” In Rethinking Human Rights: Challenges for Theory and Action, edited by Smitu Kothari and Harsh Sethi, eds. Delhi: Lokayan, 1991.


646 Ibid., p. 151.

647 Ibid., pp. 142-43.


649 Baxi, supra note 639, p. 297.

650 S.P. Gupta v. Union of India, AIR 1982 SC 149.
of the public having “sufficient interest” can approach the Court for enforcing constitutional or legal rights of other persons and redressing a common grievance. However, the Court said that it would have to be decided from case to case as to whether the person approaching the Court for relief has “sufficient interest” and has not acted with *mala fide* or political motives.

In this case, the Court upheld the right of the practicing lawyers to maintain a writ petition under Article 32 on matters affecting the independence of judiciary. Justice Bhagwati held,

> Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons ... and such a person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction … \(^{651}\)

Thus, the Indian Supreme Court took what seemed to be merely a dismal social problem -lack of access to justice by the poor and oppressed- and used that problem as the springboard for an ingenious answer: to build upon the strong Indian tradition of voluntary social action by empowering volunteer representatives to approach the court on behalf of the poor and oppressed.\(^{652}\) PIL allows the judiciary to pursue the constitutional goals of socio-economic development by relaxing the rules of standing. It makes access to justice and the higher courts simple by allowing a petition process that can take people straight to the Supreme Court without having to deal with lower courts and lengthy, expensive appeals processes.

**1.2.2. Types and Procedure of PIL**

Within Indian PIL there are actually two types of standing that are considered legitimate by the courts. The Supreme Court has quite consciously gone about

---

\(^{651}\) Ibid.

relaxing the *locus standi* rules so that more PIL cases can be heard.653 This liberalized version of standing has been termed “representative standing,” and it allows any citizen to petition on behalf of another individual or group. Clark Cunningham points out that representative standing, in fact, can be viewed as a “creative expansion of the well-accepted standing exception which allows a third party to file a *habeas corpus* petition on the ground that the injured party-cannot approach the court himself.”654 The creativity is found in the extension of standing to represent people who were not simply physically restrained, but were realistically not free to use the legal system because of socioeconomic factors.655

The second form is citizen standing. Like representative standing, it is also a modification of the traditional doctrine of *locus standi*. One who petitions under citizen standing does not sue only as a representative of others, but he is suing for the good of the public.656 The reason for having citizen standing at all is not to serve the poor or disabled, but to defend rights that are so “diffused” among the general public that there are no applicable individual rights or laws that would otherwise cover them. Some issues that these cases have covered include the President’s power to transfer judges, foreign adoptions of Indian children, limestone quarrying and its environmental impacts, and gas leaks from a chemical plant.657

PIL is not confined solely to the jurisdiction of the Supreme Court. If a petition points to a “legal wrong,” then it should be dealt with at the level of the state High Courts. If a “fundamental right” has allegedly been violated, then the petition may go either to the High Court or directly to the Supreme Court under Article 32 of the Constitution.658 In Indian “Public Interest Litigation”, the Supreme Court or a High Court allows volunteer lawyers or citizen petitioners

---

654 Cunningham, *infra* note 652.
655 For a discussion of distinctions between representative standing and class action, see Ibid., p. 500.
656 Ibid., p. 501.
to bring a case on behalf of some victimized group that does not have any means or access to legal services. The procedure is a simple one. A letter must be written and sent to the Court. Cases are most often financed completely by legal aid organizations, NGOs, and public interest advocates. In the past, these victimized groups have included prisoners, injured farm workers, the homeless, the Bhopal Union Carbide disaster survivors, victims of police brutality, residents of women’s shelters, etc. In recent years, PIL has been used quite a bit in the fight for environmental concerns. Petitioners have often included professors, journalists, lawyers, and other citizen activists, especially those representing certain NGOs.

In sum, the Supreme Court facilitated access to the Court by entertaining letters from persons interested in opposing illegal acts. It allows individuals or social activist organizations to fight on behalf of the poor and disadvantaged sections that possessed neither knowledge nor resources to activate the legal process. In addition, it permits citizens to speak on behalf of a large unorganized but silent majority against bad governance.

According to S.P. Sathe, in public interest litigation, the judges need not wait for the petitioner to prove everything, letting the respondent take recourse to mere denials as is done in adversary proceedings, but can order investigations and can employ inquisitorial methods for finding the truth. A good example of such collaborative effort was the decision in *Azad Rickshaw Pullers Union v. Punjab*. The Punjab Cycle Rickshaw (Regulation of Rickshaws) Act, 1975 provided that licenses to ply rickshaws could be given only to those owners who run the rickshaws. Licenses could not be given to those who owned but rented it out for plying to another person. This Act threatened to cause unemployment among a number of rickshaw pullers who did not own their rickshaws and leave many rickshaws owned by the non-driving owners idle. The Act was challenged on the ground that it would affect the right to carry on

---

659 In *Mohanlal Sharma v. State of U.P.*, [(1989) 2 SCC 609] a telegram was sent to the Court from the petitioner alleging that his son was murdered by the police in the police lock-up. The telegram was treated as a writ-petition by the Court and the case was directed to be referred to C.B.I. for a thorough and detailed investigation.
any trade, business, or occupation guaranteed by Article 19(1) (g) of the Constitution. Justice Krishna Iyer, instead of striking down the law, provided a scheme whereby the rickshaw pullers could obtain loans from the Punjab National Bank and acquire the rickshaws. The scheme provided for the repayment of the loan over a period. So the intention of the legislature to abolish the practice of renting the rickshaws from the owners was achieved without causing suffering to the rickshaw pullers.662

It should be noted that with only a few exceptions, PIL focuses largely on abuses of power and discrimination by low-level officials, rather than on corruption or policy failures at higher political levels. As Baxi remarks, “The respondents in the SAL matters are always political small fries.”663 In such a context, Baxi charges that the well-publicized judicial attacks on repression by low-level administrators and police, while clearly useful as checks on abusive state power, nonetheless does not challenge Parliament directly.664 Moreover, it is vivid that the Court by entertaining violation of fundamental rights through a letter is flooded with litigation resulting delay in deciding many other significant cases.665 By the late 1980s judges claimed that they were swamped with public interest cases. Cassels reports that the Supreme Court received 23,772 public interest letters between January 1, 1987 and March 31, 1988, a staggering load of claims.666 Judges began complaining that public interest litigation overwhelmed their ability to function effectively. The claimed overload of cases contributed to enforcement problems. The justices favoring egalitarian activism were unable to develop strategies for enforcing their orders in the many cases where orders were skirted or simply ignored.667

1.2.3. Limitations in PIL Cases
In the initial stages of PIL, the Court listened to cases brought by almost anyone complaining of any injustice. That has changed, however. For example,
the courts are now weighing conflicting public interests much more carefully before entertaining writ petitions for hearing. Former Chief Justice P.N. Bhagwati has enumerated certain limitations in PIL cases. The courts must work within the confines of the following in such cases: 1) It must be demonstrated to the court that the petitioner is acting in a _bona fide_ manner, and not for any sort of personal gain, private profit, partisan political motivation, or any other ulterior motive. 2) The court cannot allow its process to be abused by politicians or others in order to postpone legitimate administrative action, or in an attempt to gain a political objective. 3) The judiciary must be careful not to overstep the bounds of its functions into the territories of the executive and legislative branches of government. Such precautions must be taken in order to protect PIL from its own openness to access.

2. Procedure of Appeal in Constitutional Matters

As noted earlier, the Supreme Court has appellate jurisdiction under Articles 132 (1), 133 (1), and 134 (1) of the Indian Constitution to deal with the question of the constitutionality of a law made by the Legislatures.

Under Article 132 of the Constitution, an appeal lies to the Supreme Court from any judgment, decree, or final order of any High Court, in the territory of India in any civil, criminal or other proceedings, provided that it involves a substantial question of law as to the interpretation of the Constitution, and the High Court certifies that effect. Under Article 134-A, the High Court can grant a certificate for appeal to the Supreme Court either on its own motion or on an application made to it by an aggrieved party. This certificate can be granted only when such an application is made immediately after the passing or making of such judgment, decree, final order, or sentence. When the certificate is granted by the High Court, the jurisdiction to hear the appeal is vested in the

---


670 According to Article 132, for the purpose of this Article, the expression ‘final order’ includes an order deciding an issue that -if decided in favor of the appellant- would be sufficient for the final disposal of the case.

671 For example, the Revenue proceedings, Tax Matters, Service and Electoral Matters.
Supreme Court and the aggrieved party can file an appeal to the Supreme Court by virtue of it, as a matter of right.

D.D. Basu has given a list of instances of question relating to the Constitutional appellate jurisdiction. They included: (a) a suit or proceeding challenging a statute as ‘ultra vires’ or ‘inconsistent’ with a mandatory provision of the Constitution, (b) cases directly involving the interpretation of some particular provision of the Constitution itself, (c) a conviction under a law which is challenged as ‘ultra vires’, and (d) the question as to application of an Act to the facts of a case.

In an appeal before the Supreme Court, the appellant cannot challenge the propriety of the judgment of the High Court appealed against on the ground other than that on which the certificate was granted by the High Court, except with the leave of the Supreme Court. The Court would normally grant such leave where the trial before the High Court has resulted in the grave injustice. Even after the certificate is granted by the High Court, the Supreme Court has the right to refuse to hear the appeal if it is satisfied that the appeal is not competent.

3. Decisions of the Supreme Court
3.1. Political Views of the Judges in Decision Making

Determining the political views of the Indian Supreme Court justices in the process of decision-making is too difficult. For one thing, observers of the Indian Supreme Court rarely attempt to analyze the views of individual justices. As George Gadbois, one of the few systematic analysts of the Court’s politics has written, “For the vast majority of that large fraternity who write about the Supreme Court (including the political scientists), the Court’s...
activities and Indian politics are distinct phenomena that seldom intersect; for them, Supreme Court decisions and Indian politics pass like two ships in the night. Even those scholars who engage in a political analysis, particularly Rajeev Dhavan, Upendra Baxi, and Gadbois himself, only rarely discuss the ideological sympathies and role orientations of individual justices. Unlike commentary on the U.S. Supreme Court, which routinely analyzes the role orientations and attitudes of individual justices, in India it is a rare justice whose individual contribution or political views are even noticed. In part, this is due to the tendency of Indian legal scholars and lawyers to hold a narrowly formalistic view of the nature of law. If the nature of judicial interpretation is thought to be one of formal analysis to the exclusion of political influences, then a natural consequence is the near-absence of systematic research on the political views of individual justices.

Systematic research also has been discouraged by more practical factors, in particular the structure and traditions of the Supreme Court. On the assumption that cases in which the vote is unanimous offer little room for the influence of political views, systematic research on judicial ideology relies on cases in which not all justices agree on the outcome. Yet Indian Supreme Court justices rarely dissent. When they dissent, their position is not a consistently-held one, for they often take exactly the opposite position and join the majority in later cases on the same issue. Thus, even on highly publicized issues, “it is difficult to locate the philosophical responses of all the judges with any certainty.” Additionally, due to the division into small benches and the random assortments of judges who make up the benches in each case, there is not much room for predictability in the Court’s rulings based on personal leanings. This can be positive, as it is not always certain how the Court will go on a certain matter. However the early retirement age, the short term served by most justices, “the large number of justices, and the fragmentation into small

---

680 Gadbois, supra note 423, p. 261.
682 Dhavan, supra note 423, pp. 32-35.
683 Dhavan, supra note 424, p. 204.
panels allow a great degree of inconsistency to creep into decision making,"\textsuperscript{684} and impede the development of a consistent judicial philosophy. Nonetheless, based on the views of a few leading justices some scholars have developed a general characterization of the political position of the Supreme Court across recent decades. For example, Subba Rao is known as a western-influenced libertarian justice who favored protection of individual rights, specially the right to property.\textsuperscript{685} On the other hand, Bhagwati is known as an egalitarian justice who was one of the creators of PIL in the post-emergency period.

According to S.P. Sathe, the Court in decision-making ought to be non-political. He maintains that the word ‘non-political’ differs from the word ‘apolitical’. A judge cannot be ‘apolitical’ because like any other citizen he/she has to share political preferences and ideologies. However, he/she can be non-political in the sense that his/her decisions are based not on considerations of power but on principles. A judge decides whether an individual’s fundamental right is violated without any regard to whether recognition of such a right would have any deleterious consequences for the power structure. The Court has to make a political judgment about the scope of a fundamental right because ultimately it is also a decision regarding the scope of the power of the government.\textsuperscript{686} As an example of the Court’s political judgment, he refers to the Prime Minister Election Case.\textsuperscript{687} He states,

When the Allahabad High Court held that Mrs. Indira Gandhi had used corrupt practices in her election and that therefore her election should be set aside, it was doubtless a political decision because it unseated a sitting Prime Minister and it had political consequences. The judges had not taken that decision because they wanted to unseat Mrs. Gandhi … Their social philosophy regarding how an election should be conducted might have influenced their

\textsuperscript{684}Epp, \textit{supra} note 427, p. 83.
\textsuperscript{685}Dhavan, \textit{supra} note 424, p. 204; also see Baxi, \textit{supra} note 423, p. 21; Gadbois, \textit{supra} note 423, p. 264.
\textsuperscript{686}Sathe, \textit{supra} note 391, pp. 293-94.
\textsuperscript{687}\textit{Indira Gandhi v. Raj Narain}, AIR 1975 SC 2299.
decision. In this sense, they were not apolitical. But they were non-political in the sense that they were impartial and objective.688

Sathe concludes that the judges are human beings as fallible as other human beings are. They have their predilections and those predilections may influence their judgments. However, the courts themselves have imposed restraints on their powers in order to minimize the chances of vagaries arising out of subjective lapses or prejudices of the judges (judicial self-restraint). The courts have to follow precedents based on the *stare decisis* doctrine, they have to follow the decisions of the higher courts, and they have to follow certain rules of interpretation. Further, decisions of courts are reasoned and are often subject to appeal. These restrictions would minimize the lapses.689


Because of the large number of justices and the heavy workload, cases in the Supreme Court are not heard by all twenty-six justices. The Court hears and decides cases by panels (benches). The Constitution of India has not provided for the minimum number of Judges who will constitute a bench for hearing case.690 Most of benches are composed of very small numbers of justices, typically two or three. Important constitutional benches may be composed of five, seven, or occasionally nine justices. The decisions are made by the relative majority (plurality) of the benches’ judges.

All Supreme Court business and proceedings are conducted in English. All documents submitted to the Court are required to be translated into English as well. Originally, the Constitution provided that English be used in both the High Courts and the Supreme Court, however, several states have now allowed the use of local languages in High Courts.691

The Supreme Court after examining the validity of laws made by the Legislatures may uphold the laws or may declare them null and void. But the

689 Ibid., pp. 310-11.
690 Pandey, *supra* note 416, p. 444.
fact is that there is no specific or express provision in the Constitution of India empowering the Court to invalidate laws. However, the Constitution has imposed definite limitations upon each of the organs, and any transgression of those limitations would make an act of law void. It is for the courts to decide whether any of the constitutional limitations has been transgressed or not.692

- Article 13 declares that any law which contravenes any of the provisions of Part III dealing with fundamental rights, shall be void;
- Article 245 makes the powers of both Parliament and State Legislatures, ‘subject to the provisions of this Constitution’;
- Article 246 says that the Central and State Legislatures have legislative powers over a specified list of subjects (List I, II, and III); and
- According to Articles 251 and 254, in case there is some inconsistency between Union and State laws, the State laws shall be void.

The Supreme Court’s decision is the final word in a case. It enjoys *res judicata* (a matter adjudicated) feature. The law declared by the Court is an authoritative precedent under Article 141 of the Constitution, and it is binding on all courts within the territory of India.693 However, the Court itself is not bound by its earlier decision and may depart from its earlier decision if it is convinced of its error and its beneficial effect.694 For example, the decisions in the cases of Shankari Prasad695 and Sajjan Singh696 were overruled by the Court in *Golak Nath* case697 and the decision in *Golak Nath* case was overruled by it in *Kesavananda Bharati* case.698

---

695 Shankari Prasad v. Union of India, AIR 1951 SC 458.
3.3. Report of Decisions

The Supreme Court’s Registrar compiles monthly and annual reports on the number of cases filed and disposed of in each of the Court’s major areas of jurisdiction particularly within the Court’s Article 32 jurisdiction, which deals with fundamental rights claims. Most of the decisions of the Court, naturally, are never published. The decisions that are published constitute the Court’s “public agenda.” All case reporters in India are privately published, and so the Court’s public agenda is shaped to some degree by the discretionary decisions of private publishers.\footnote{The most important and widely-used are the Supreme Court Cases and All India Reporter.} The unpublished cases constitute the Court’s “working agenda.” The bulk of the Court’s work is done in cases that never are published.\footnote{Dhavan, Rajeev. “Law as Struggle: Notes on Public Interest Law in India.” Institute for Legal Studies Working Paper, no. ILS 5-3. Madison, Wisc.: Institute for Legal Studies, 1993, p. 5.}

The caseloads at all levels of the Indian Judiciary are extremely heavy. In the year 1990, the Court alone disposed of over 56,000 cases including the cases relating to the examination of the Acts of Legislatures; but at the end of that year, there still were 185108 other cases waiting for decision.\footnote{Epp, supra note 427, pp. 82-3.} Rajeev Dhavan, in a careful analysis of the Supreme Court’s own workload data, found that the fastest growing segment of its docket in the late 1970s consisted of petitions under Article 32 of the Constitution, the mechanism for bringing fundamental rights claims directly to the Court.\footnote{Dhavan, Rajeev. Litigation Explosion in India. Bombay: N. M. Tripathi, 1986, pp. 60-1 & 80.} Dhavan reported that cases brought under the fundamental rights jurisdiction constituted 9.49% of all cases filed in 1979, 27.59% in 1980, 37.76% in 1981, and 46.4% in 1982,\footnote{Ibid., p. 61.} suggesting that “[t]here is no doubt that the fundamental rights jurisdiction is becoming a major jurisdiction within the Supreme Court.”\footnote{Ibid., p. 80.} Dhavan was circumspect about the source of such a dramatic increase; he noted that the source may be “what one distinguished academic observer calls the ‘populist’
image that the Court has created for itself," but apparently favored a view centered in the litigation strategies of lawyers and their clients.

Part Five
A Glance at the Role and Performance of the Indian Constitutional Courts

The role of the Constitutional Court in any nation is determined through the relationship between the legislative body and itself. Before moving on, a brief description of how the legislature functions on a national level in India should prove helpful. The Legislature in India consists of the Parliament and the State Legislatures. The Parliament of India consists of the President and the upper and lower Houses of Parliament. The two Houses, the Lok Sabha (House of the People) and Rajya Sabha (Council of States, also known as the House of the Elders), conduct acts of national legislation. On the other hand, the State Legislatures consist of the Governor and one or two Houses depending on the States. They conduct acts of local legislation.

Legislative bills in national level must be passed by both houses of Parliament before being passed on to the President for approval. The inclusion of the President in Parliament is important in that it emphasizes the strong interdependence of the Executive and Legislative branches of government. The Lok Sabha consists currently of 545 members, all directly elected for five-year terms from each state and union territory by proportion of population (except for two members who are nominated by the President from underrepresented Anglo-Indian groups). The Lok Sabha is far more powerful than the Rajya Sabha is. For instance, only the Lok Sabha has the power to pass a no-

---

705 Ibid., p. 61.
708 The Constitution of India, Art. 79.
709 According to Article 168 of the Constitution of India, there are two houses of Legislature, namely the Legislative Council and the Legislative Assembly, in the States of Bihar, Maharashtra, Karnataka, and Uttar Pradesh. In other States, there is only one house called Legislative Assembly.
confidence motion against the Executive; this power of censure effectively
gives them the right to dissolve the government. In the Rajya Sabha, 250
members are elected by the elected members of the State Assemblies. Terms in
the Rajya Sabha are for six years. There is a turnover of one third of its
members every other year.710

In the days of Nehru, just after independence, the Indian Parliament enjoyed
a good deal of power and status. In the years afterward, particularly during
Indira Gandhi’s reign as Prime Minister and then her son Rajeev’s, the
Parliament lost dominance significantly and was very much at the mercy of the
Executive.711 As discussed earlier, the Parliament does have the right to amend
the Constitution of India in a comparatively simple manner, and it has done so
quite often. By the same token, the Supreme Court of India holds the power to
declare any Act of Parliament unconstitutional. Thus, each branch does wield
some power over the other. As well, the Indian Supreme Court effectively
creates law and national policy through interpreting the Constitution and
binding its precedents on all other courts in the nation.712 That is to say, the
Court in fact transgresses its determined constitutional domain and enters the
domain of the legislative power. This practice, according to some scholars, is a
judicial usurpation of the rights of the Legislature. However, many claim that
what the Supreme Court is doing is making up for the shortcomings of the
national legislative process. When the legislature fails, it is the higher judiciary
that must pick up the slack. In other words, the Court and its supporters chose
to see it as a necessary intervention; one that was required for the democratic
functioning of India until the Legislature could straighten out itself and its
relationship with the Executive.713

710 For excellent summaries of how the Indian Parliament functions, see Hardgrave, Jr., Robert L., and Stanley
Press, 1957 (This classic study is good for a detailed account of the origins of Parliament).
711 Baxter, Craig and Yogendra K. Malik, eds. Government and Politics in South Asia, 3rd ed. Boulder, CO:
712 The Constitution of India, Art. 141.
713 Rudolph, Lloyd I. and Susanne Hoeber Rudolph. “Redoing the Constitutional Design: From an Interventionist
to a Regulatory State.” In The Success of India’s Democracy, edited by: A. Kohli. Cambridge: Cambridge
The role and performance of the Indian Constitutional Courts, particularly the Supreme Court, in supervising the Acts of Legislature will be discussed in three phases. Since the turning point of the Indian judicial review history is the Emergency period declared by the Indira Gandhi’s government in 1975, these three phases are classified as Pre-Emergency Period, Emergency Period (1975-1977), and Post-Emergency Period.

1. Pre-Emergency Period
Before Emergency, particularly in the early years of its formation, the Supreme Court made use of its judicial review power very conservatively. In this period, the Court judges had an inherited positivist conception of judicial role, though they gradually started acquiring an activist stance through constitutional interpretation. Two significant examples regarding the performance of the Court in this period are the Court’s interpretations of ‘right to property’ and ‘interrelationship of fundamental rights’.

1.1. Right to Property
The most controversial area of the Supreme Court’s performance before the Emergency period is the Court’s interpretations of the constitutional provisions on the right to property. 714 The Supreme Court during this period appeared to be a vigorous defender of property rights, 715 but was significantly less protective of individual rights under the Constitution’s due process guarantee.

In India, due to its colonial legacy and social stratification, issues of economic regulation centered on government acquisition of property, in part for redistribution to the propertyless masses. From 1950, the creation of a large state bureaucracy and its attempts to encourage economic development through control of industries and individuals properties and aggressive regulation of economy dominated Indian politics. On the other hand, in the 1950s and 1960s

---


715 Rajeev Dhavan has suggested that the standard interpretation of the Court’s role, as outlined above, is not entirely accurate because, of the many cases challenging restrictions on the use or ownership of property, the Court only rarely opposed the Government’s position. See Dhavan, supra note 423.
the leading justices of the Supreme Court appear to have favored a western-influenced libertarianism that favored protection of property rights.\textsuperscript{716} Therefore, Parliament and the Supreme Court clashed on the right to property. The Court strongly favored limits on legislative authority in that regard, interpreted the provisions narrowly and legalistically, and thereby protected the rights of the property owners.\textsuperscript{717}

Reacting to some High Court decisions on the question of validity of zamindari abolition laws passed by some states,\textsuperscript{718} and without waiting for an authoritative decision of the Supreme Court on the issues involved, Parliament hastened to enact the Constitution (First Amendment) Act in 1951. At this time, abolition of zamindari came foremost in the economic program of the Congress Party, which was in power at the center and almost every state. The First Amendment added two new provisions to the Constitution, namely Article 31A and Article 31B along with the Ninth Schedule. The main purpose of these provisions was incorporating legislative Acts in the Constitution itself to immunize them, and make them fully unchallengeable in a court against any attack under any fundamental rights.\textsuperscript{719} The constitutional validity of the First Amendment was challenged in the Supreme Court on various grounds. A Constitution Bench by a unanimous judgment and order dated 5 October 1951 upheld the validity of the impugned Act. The Court held that the provisions made in Articles 31A and 31B did not directly affect the jurisdiction of High Court and the Supreme Court and as such ratification of the impugned Amendment by not less than one half of the states was not required.\textsuperscript{720}

From the mid-1960s to the mid-1970s, the Court challenged Parliamentary sovereignty in a number of key cases related to the right to property. In the mid-1960s, Subba Rao Chief Justice led the Court’s opposition to the

\textsuperscript{716} Dhavan, supra note 424, p. 204; Baxi, supra note 423, p. 21; Gadbois, supra note 423, p. 264.

\textsuperscript{717} Sathe, supra note 391, p. 49.

\textsuperscript{718} For example, in Kameshwar Singh v. State of Bihar, AIR 1951 Pat. 91, the High Court of Patna declared the Bihar Land Reform Act, 1950 as unconstitutional for it violated of Article 14 of the Indian Constitution, the principle prescribed for payment of compensation to erstwhile zamindars had classified them in separate classes based on their annual net income. According to Sathe “this decision was a clear example of legal positivism with a hidden class bias.” See Sathe, supra note 391, p. 46.

\textsuperscript{719} Jain, supra not 623, p. 88.

\textsuperscript{720} Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.
government on the property rights issue, culminating in the landmark *Golak Nath* decision.\textsuperscript{721} In this case, the petitioner challenged the validity of the First, Fourth, and Seventeenth Amendment Acts, which had foreclosed judicial review of the laws pertaining to property. As discussed earlier, the Supreme Court by a majority of six against five judges held that an Amendment passed in accordance with the procedure laid down by Article 368 was ‘law’ within the meaning of that word as used in Article 13(2) of the Constitution. The Court further held that Parliament had no power to pass any Amendment that would have the effect of abridging or taking away any of the fundamental rights guaranteed by the Constitution.\textsuperscript{722} In this case, for the first time, the judges of the Supreme Court openly took a political position. They held that it was not desirable that power of Parliament to amend the Constitution should be unlimited and that the fundamental rights should be at the mercy of the special majority of members of Parliament required for Constitutional Amendment. In fact, this ruling was an assertion by the Court of its role as the supervisor and protector the Constitution. Until then the Court had not taken such a bold position on its constitutional role.\textsuperscript{723} While that decision appeared to favor property, several leading scholars have suggested that its significance was less clear. Baxi has suggested that the decision was rendered in a context of increasing fear over the unchecked power of the government, and was viewed by the justices themselves as a decision in favor of constitutional rights in general.\textsuperscript{724} Similarly, Rajeev Dhavan argues that the Court upheld most challenged legislation that regulated property or authorized its taking, and that judicial decisions in favor of property rights were motivated less by sympathy for the interests of property holders than by an attempt to maintain fidelity to such western legal niceties as judicial review and the concept of full compensation.\textsuperscript{725}

\textsuperscript{721} See Dhavan, supra note 424, p. 204; Baxi, supra note 423, p. 21; Gadbois, supra note 423, p. 264.


\textsuperscript{723} Sathe, supra note 391, p. 67.

\textsuperscript{724} Baxi, supra note 423, pp. 19-20.

\textsuperscript{725} Ibid., pp. 129-30.
The property right had three components (a) the right to acquire and dispose of property free from any restriction other than reasonable restrictions for the purpose of public welfare or to serve the interests of a Scheduled Tribe; (b) the right not to be deprived of property except by procedure established by law; and (c) that state acquisitions of property must be for a public purpose and some compensation must be given to the owner.\(^{726}\) In 1954, the Supreme Court interpreted compensation to mean full market value,\(^{727}\) to which the government, fearful that its nationalization and development plans would be halted, responded by passing a constitutional amendment removing court jurisdiction over the adequacy of compensation.\(^{728}\) The Supreme Court nonetheless still insisted that the word “compensation” in the Constitution meant full market value at the time of government acquisition,\(^{729}\) and the government responded with the 25th Amendment by replacing the word “compensation” with the word “amount” in the Constitution,\(^{730}\) and by exempting from any compensation certain laws related to nationalization and development. Of particular importance was the Amendment’s provision that exempted from constitutional review under the equality, fundamental liberties, and property rights Articles (14, 19, and 31 respectively) any law attempting to equalize the distribution of wealth or nationalize the means of production. The Supreme Court in the *Kesavananda Bharati v. State of Kerala*\(^{731}\) responded with a stunning decision declaring that the government may not amend the Constitution in ways that are inconsistent with its basic structure. Because judicial review is a basic feature of the Constitution, the provisions of the Amendment removing certain laws from judicial review under the fundamental rights were unconstitutional. The Court in this case upheld the validity of Article 31(c) enacted by the 25th Amendment which altered the nature of the directive principles embodied in Clauses (b) and (c) of Article 39 of the Indian

---

\(^{726}\) Basu, *supra* note 418, pp. 116-17


\(^{728}\) Basu, *supra* note 418, p. 117.

\(^{729}\) *Cooper v. Union of India*, AIR 1970 SC 564 (*Bank Nationalization Case*).

\(^{730}\) Basu, *supra* note 418, p. 117.

\(^{731}\) AIR 1973 SC 1461.
Constitution. These directives were distinctly property-related laying down the principles that the ownership and control of material resources of the community must be distributed as to serve the common good and that the operation of the economic system must not result in concentration of wealth and means of production, to the common detriment. In this case, the Court sanctioned the elevation of the two property-related directive principles the fundamental rights.

When *Kesavananda Bharati* was being decided, the Congress Party led by Mrs. Indira Gandhi had an overwhelming majority in the new Parliament. The Party interpreted this decision as a coup by the judges to wrest supremacy from the Parliament. Some legal scholars also in favor of the Supremacy of Parliament criticized the Court’s decision in *Kesavananda Bharati*. In this case, leading justices of the Court were clearly divided in two groups; several justices (Hegde, Mukherjea, Shelat, and Grover) reasserted their power to challenge the government’s Amendments to the Constitution, while others (Ray and Bhagwati) disagreed and sided with the government, justifying their position as one of support for social justice for the “teeming millions.” When the next opening for the chief justiceship occurred, the Government responded to its defeat in the *Kesavananda* decision by passing over the three most senior Justices, Hegde, Grover, and Shelat, and appointed Justices A. N. Ray, one of the dissenters, for the position. The three senior judges resigned in protest. This has come to be known as the “Supersession of the Judges.” The event showed not just the power of the executive to influence appointments but also the presence of pliant judges who would do the executive’s bidding.

The clash between Parliament and the Supreme Court on the right to property was continued until 1978 when that right (Article 31) was deleted.

---

732 Clauses (b) and (c) of Article 39 reads as under: The State shall, in particular, direct its policy towards securing— (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.


from the Chapter on Fundamental Rights by the Constitution (44th Amendment) Act in 1978.

1.2. Interrelationship of Fundamental Rights

1.2.1. The Gopalan Approach

The Indian Constitution, while establishing a constitutional rule of law, nonetheless authorizes the national government to use preventive detention to aid in the defense and security of the nation. It authorizes both the national and state governments to use the mechanism to aid in security of a state government, the maintenance of public order or of essential supplies and services. Consequently, the Indian Supreme Court, though periodically asked to strike down laws authorizing preventive detention, consistently has upheld such laws. At that time, the Supreme Court’s policy was that the due process standard contained in Article 21 of the Constitution is limited to matters of procedure. Accordingly, following the wording ‘procedure established by law,’ the Court rejected a substantive challenge to a preventive detention law allowing detention without trial in the landmark case of A.K. Gopalan v. State of Madras, and upheld the first national Preventive Detention Act. In this case, the constitutional 5-judge bench of the Court was exposed to a dilemma of either infusing the ‘doctrine of reasonableness’ through Article 19 into Article 21 or to literally interpret the ‘procedure established by law’ as a legal framework prescribed by legislature without any substantive notions of fairness. Finally, the second approach was adopted by the majority of judges. The majority held that Article 19 could not be applied into the domain of Article 21.

---

737 Shukla, supra note 432, p. 185.
738 Article 21 of the Indian Constitution states, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”
740 Article 19 of the Indian Constitution provides certain rights regarding freedom of speech, etc., such as the right— to freedom of speech and expression; to assemble peaceably and without arms; to form associations or Unions; to move freely throughout the territory of India; and to reside and settle in any part of the territory of India.
The decision of the Supreme Court in *Gopalan*, according to some scholars, was regarded as the mark of the cold positivism.\(^{741}\) The approach of narrowing down ‘law’ into procedural law was also criticized by some.\(^{742}\) The *Gopalan* approach was applied in the subsequent cases during the years 1950-70,\(^{743}\) though the Court tried to move gradually towards an activist approach.

In *Shabbir Hussain*,\(^{744}\) the Allahabad High Court invalidated section 7(2) of the Abducted Persons (Recovery and Restoration) Act 1949 on the ground that removal of people from the territory of India under the Act abridged freedom of residence and movement guaranteed under Article 19(1).

In *Ajaib Singh*,\(^{745}\) constitutionality of the Abducted Persons (Recovery and Restoration) Act 1949 was challenged based on Articles 14, 19, and 21. The Punjab High Court applied the ‘directness of legislation test’\(^{746}\) and held that the Act was to be tested only under Article 21.\(^{747}\)

In *Ram Manohar Lohia* case,\(^{748}\) the petitioner had been detained for making a speech to instigate farmers into agitation. The Allahabad High Court differentiated the facts of this case from those in *Gopalan*, and came to the conclusion that where a law directly abridged the freedom of speech, it was to be examined under Article 19(1) (a) rather than Article 21. In this case, the issues of reasonableness of restriction under the law and closest relation with public order were examined under Article 19, and lack of jurisdiction to detain and the


\(^{745}\) *Shabbir Hussain v. State of U.P.*, AIR 1952 All. 257.

\(^{746}\) *Ajaib Singh v. State of Punjab*, AIR 1952 Punj 309.

\(^{747}\) Chief Justice Kania, in *Gopalan* case, propounded the doctrine of directness of legislation. He observed, “If however, the legislation is not directly in respect of these subjects (speech, expression, assembly, etc.) but as a result of the operation of other legislation, for instance for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of detention otherwise valid on the mode of the detenu’s life.” *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27: 1950 SCR 88, pp. 35 & 96.

\(^{748}\) *Ram Manohar Lohia v. Supdt., Central Prison*, AIR 1955 All. 193.
consequent violation of procedure were examined under Article 21. The Supreme Court, too, affirmed the reasoning of the High Court on appeal.749

In *Kockunni*750 where the relation between Articles 19(1)(f) and 31(1)751 was in question, the Supreme Court for the first time declared its disagreement with the *Gopalan* approach, and adopted an integrationist approach concerning above Articles. The impact of *Kockunni*’s decision in reducing the difficulties of *Gopalan* approach was considerable, though it did not overrule that.

In *Gopalan*,752 the right to equality guaranteed in Article 14753 was not set into service as an instrument of controlling administrative discretion to protect personal liberty. However, a significant development in this regard took place beginning with *State of West Bengal v. Anwar Ali Sarkar*,754 wherein the right to equality was applied to control criminal procedure. In this case, the Court invalidated section 5(1) of the West Bengal Special Courts Act 1950 on the basis that it conferred arbitrary powers on the government to categorize offences at its pleasure for trial by special courts whose procedure was less beneficial to the accused person. The real significance of *Anwar Ali* case lies in infusing the notions of reasonableness and control of administrative discretion into the domain of procedural law. In this way, the egalitarian revolution silently began.

In *Lachman Das v. State of Bombay*,755 the constitutional validity of the Bombay Security Measures Act 1947 was under question. The Act, for example, increased punishment and whipping, and allowed the special judge to give up summoning of defense witnesses. It further deprived the accused person of the right to apply for transfer or revision. The Supreme Court invalidated the Act as violative of Article 14 reasoning that it departed from the ordinary procedure to the prejudice of the accused person without being based on reasonable classification.

751 Articles 19(1) (f) and 31 (about the property right) were repealed by the Constitution (44th Amendment) Act, 1978.
753 Article 14 of the Indian Constitution as ‘equality before law’ stipulates, “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”
All in all, recognition of the interrelationship between Articles 14 and 21 and equality’s contribution to personal liberty established that the *Gopalan* approach is not an overwhelming approach to govern the relations of fundamental rights.

### 1.2.2. The ‘Cooper’ Approach

With developing the notion of integration between Articles 14 and 21, the Supreme Court found it opportune to lay down an alternative to the *Gopalan* approach in *R.C. Cooper v. Union of India*.\(^{756}\) In this case, the constitutional validity of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1969 was challenged. The constitutional 11-judge bench of the Court by 10:1 majority annulled the Act as violative of Articles 14, 19, and 31. Concurrent application of these Articles eventually gave rise to the golden triangle of Articles 14, 19, and 21.

The *Cooper* decision began a new era in the interpretation of fundamental rights and prepared a clear pathway for integrated application of fundamental rights. This is manifestly reflected in *Jagmohan Singh v. State of U.P.*\(^{757}\) In this case, the constitutionality of Section 302 of Indian Penal Code, which imposed death penalty or life imprisonment for murder convicts, was challenged based on Articles 14, 19, and 21. The Supreme Court in this case rejected the argument that conferring discretion on judges to impose death penalty was unguided and uncontrolled, and hence abridged the right to equality. The Court reasoned that the power was conferred on judges, to be exercised after examining the mitigating and aggravating circumstances and it was not possible to lay down standards. The Court, holding that there were sufficient procedural safeguards under the Criminal Procedure Code and the Constitution, found fair and reasonable procedure at the trial stage subsequent to conviction and upheld the impugned law under Article 21.

\(^{756}\) AIR 1970 SC 564; (1970) 3 SCR 530 (also known as Bank Nationalisation case).

\(^{757}\) AIR 1973 SC 947; (1973) 2 SCR 541; (1973) 1 SCC 20.
Jagmohan is a significant decision commencing the approach of requiring a reasonable procedure by means of applying Articles 14 and 19 into the domain of Article 21.  

2. Emergency Period

Scholarly analysts of Indian politics generally observe that as the size and activism of the Indian State increased, its ability to govern Indian society and achieve its economic goals declined. Indira Gandhi’s efforts to centralize political power in the Executive branch in the late 1960s and early 1970s compounded the growth in State power but also removed the top political leaders from their support base in the Congress party and decreased the effectiveness of their control. Gandhi progressively claimed more power for herself, depending less and less on the Congress Party organization that had formed the backbone of indigenous Indian political organization since the early 20th century. Ultimately, she imposed Emergency Rule for two years from 1975 to 1977, imprisoning thousands of political opponents.

One event that indirectly led to the declaration of emergency in 1975 was the decision of the Allahabad High Court. The election of Mrs. Indira Gandhi to the Lok Sabha was set aside on the ground that she had taken recourse to a corrupt practice as defined in the Representation of the People Act, 1951, known as the Election Law. Her opponents put pressure on her to resign. She had appealed to the Supreme Court against the Allahabad High Court’s judgment and the Supreme Court had admitted her appeal and stayed the execution of her High Court’s decree subject to certain conditions. The order of the Proclamation of Emergency was issued on 25 June 1975.

The emergency was for resolving the problem created by the threat of an internal disorder. During the Emergency, Parliament, dominated by Mrs.


761 The Constitution of India, Art. 352.
Gandhi’s party, maintained the rubber stamp character it had acquired under her leadership and seemed willing to endorse and enact whatever reforms she sought. At the same time, the Administration appeared more interested in institutionalizing authoritarian political rule through political and constitutional changes than through meaningful economic reforms whose success probably would have assured popular support for authoritarianism. Worst of all, in the absence of any check on the use of Government’s power, the nature of authoritarianism practiced under the Emergency turned increasingly despotic.\textsuperscript{762} The actions of the Emergency are discussed here under two headings: (1) Emergency, Constitutional Amendments, and Judicial Review, (2) Consequences of the Amendment Acts.

\textbf{2.1. Emergency, Constitutional Amendments, and Judicial Review}

During the Emergency period, Parliament passed several Constitutional Amendments. The main purpose of these Amendments was the elimination of judicial review of several laws violating fundamental rights during the Emergency and concentration of power in the ruling Government to develop its socialistic ideals. In the process, several justices of the Court committed to these ideals\textsuperscript{763} helped the Government and participated in a series of decisions in which the Court dealt with challenges to various aspects of emergency rule and in which the justices approved expansions of the Government’s power.

\textbf{2.1.1. The 38th Amendment Act}

The Constitution (38th Amendment) Act, 1975 sought to expand the power of the Executive to derogate from the citizens’ fundamental rights, during times of emergency. The earlier provisions had merely granted the President the power to suspend the right of the citizen to move courts during an emergency for the enforcement of his fundamental rights and to suspend all pending proceedings


\textsuperscript{763} These justices are Krishna Iyer, Desai, Chinnappa Reddy, Thakkar, and Bhagwati.
for the period during which the proclamation was in force or for such shorter period as specified in the order. An addition to Article 359 of the Indian Constitution, that pertained to the status of fundamental rights during an emergency, barred the citizen, for all times, from challenging any executive measure taken during an emergency that may have violated his fundamental rights, even his right to life and personal liberty.\textsuperscript{764} This provision accordingly assured that there would be no need for the executive to account for even \textit{mala fide} violations of the citizens’ rights committed during the period that the emergency lasts.

The Presidential ‘satisfaction’ to issue a proclamation of Emergency, as prescribed in Article 352(1), was also declared to be final, nonjusticiable, and conclusive by the 38th Amendment.\textsuperscript{765}

In \textit{Pran Nath v. Union of India}\textsuperscript{766}, the Delhi High Court held the 38th Amendment Act valid although it excluded judicial review of the satisfaction of the President to declare emergency under Article 352(1). The Court argued that judicial review was not a basic feature of the Constitution and that, in specific fields, lack of judicial review might not affect any basic feature of the Constitution.

\subsection*{2.1.2. The 39th Amendment Act}

A day before Indira Gandhi’s election appeals case came up for hearing before the Supreme Court, the Constitution (39th Amendment) Act, 1975, was passed. The 39th Amendment excluded all disputes regarding the election of the Prime Minister and the Speaker of Lok Sabha from judicial scrutiny. Clause (4) of Article 29A inserted by the 39th Amendment said that no law made by Parliament before the commencement of this Amendment insofar as it relates to election petitions was to apply or be deemed ever to have applied, to the election of the Prime Minister or the Speaker to Parliament. Such election was

\begin{footnotes}
\footnote{764} The Constitution (38th Amendment) Act, 1975, Cl. 7 (Amendment of Article 359).
\footnote{765} The Law Minister justified the measure on the grounds that there were matters which could not be subjected to judicial scrutiny and were for political judgment only. \textit{Times of India}, 23 July, 1975.
\footnote{766} AIR 1977 Del 167.
\end{footnotes}
not to 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 had before the
commencement of the Amendment been declared to be void under any such
law. The Clause further said that notwithstanding any order made by any court
before such commencement, declaring such election to be void, it was to
continue to be valid in all respects. Any such order and any finding on which
such order was based was to be deemed always to have been void and of no
effect.

That Amendment was obviously passed with a view to preventing scrutiny
of Mrs. Gandhi’s election to the Lok Sabha by the Court. The hurry with which
the bill was passed showed the anxiety that lay beneath its enactment. It was
introduced in the Lok Sabha on Aug. 7, 1975 and was passed in that house on
the same day; it was passed by the Rajya Sabha on Aug. 8, was ratified by half
the State Legislatures on Aug. 9, and obtained the President’s assent on Aug.
10. The appeal of Indira Gandhi was to come up before the Supreme Court for
hearing on Aug. 11.767

The validity of the 39th Amendment was challenged in Indira Gandhi v. Raj
Narain768 on the ground that it destroyed the basic structure of the Constitution.
The Supreme Court avoiding confrontation with the political establishment
dismissed Raj Narain’s petition on merits and upheld Mrs. Gandhi’s election
but struck down the impugned Amendment relying on the basic structure
doctrine.

The 39th Amendment also amended the Ninth Schedule to bring within its
scope 38 Acts (entries 87-124) which by virtue of their inclusion in the
Schedule would be extended protection from judicial scrutiny. Of these Acts,
the Maintenance of Internal Security Act (MISA) and the Conservation of
Foreign Exchange and Prevention of Smuggling Act (COFEPOSA) are worth
mentioning here due to their obvious violation of the citizens’ fundamental
rights.

768 AIR 1975 SC 2299.
Following the proclamation of the Emergency MISA was amended and the few safeguards that the detenu retained under it were all virtually eliminated. The MISA (Amendment) Act of August 5, 1975 provided for a new category of detentions “for dealing effectively with the emergency.” Provided the detaining authority made a declaration that the detention was necessary for this purpose, the detenu could be held for a maximum of one year without being informed of the grounds for the detention order.\(^{769}\) Detention may extend even beyond that period, but only after pursuing the normal course such as supplying him with the grounds for the detention and refer the detention to advisory boards etc.\(^{770}\) The Amendment also provided that the revocation of a detention order shall not constitute a bar against the issue of another detention order against the same person.\(^{771}\) Further, no MISA detenu was allowed to be released on bail, bail bond or otherwise;\(^{772}\) nor could they seek relief under “rules of natural justice” nor claim a “right to personal liberty by virtue of natural law or common law.”\(^{773}\) Another major provision authorized the attachment of properties of a person against whom a detention order had been made and who had failed to surrender himself, or had absconded or was in hiding.\(^{774}\) Because of these Amendments MISA detenus were effectively prevented from approaching the courts for relief either because no grounds had been given to them or because the detention order had violated “canons of natural justice” or “natural or common law.”

In January 1976, the MISA was again amended. The new provisions further eroded the safeguards against abuse that the original Act had included. The Amendment stipulated that an individual whose detention had been revoked or disallowed earlier may be redetained and that no person against whom an order of detention had been made shall be entitled to the communication of the grounds of detention or be afforded the opportunity to make representation.\(^{775}\)

\(^{769}\) Maintenance of Internal Security (Amendment) Act, 1975 (No. 39 of 1975), Cl. 6.
\(^{770}\) Ibid.
\(^{771}\) Ibid., Cl. 4.
\(^{772}\) Ibid., Cl. 5.
\(^{773}\) Ibid., Cl. 7.
\(^{774}\) Ibid., Cl. 5.
\(^{775}\) Maintenance of Internal Security (Amendment) Act, 1976 (No. 78 of 1976), Cl. 3 & 4.
It further mandated that the grounds on which an order of detention had been made shall be treated as confidential and shall be deemed to refer to matters of state and that it shall be against public interest to disclose the grounds.\textsuperscript{776} Finally, it required the Central Government to obtain details on detentions from the State Governments.\textsuperscript{777} The major objective of this Amendment was to eliminate those safeguards that would have offered detenus relief from detentions ordered under the Act.

The MISA underwent a third and final ‘Emergency Amendment’ in August 1976. This Amendment related to detentions in connection with the Emergency and was made applicable with retrospective effect from June 29, 1975, the date the MISA was first amended during the Emergency. It extended the maximum period all such Emergency detentions from 12 to 24 months.\textsuperscript{778} The cumulative effect of the Amendments to MISA was the virtual elimination of all restraints against the abuse of preventive detention powers by the Government particularly as it related to detentions under the new provision 16A of the Act that authorized detentions to deal with the Emergency.

The other preventive detention measure, which was used, was the Conservation of Foreign Exchange and Prevention of Smuggling Act (COFEPOSA) originally passed in December 1975. The COFEPOSA Amendment of August 1975 provided that no person detained under the Act may be released on bail, bail bond or otherwise.\textsuperscript{779} It further stated that no detention order under the Act may be held invalid or inoperative merely because some of the grounds of the detention order are vague, nonexistent, not relevant, or invalid for any reason.\textsuperscript{780} Moreover, if detention is made for dealing with the Emergency no grounds need be conveyed to the detenu and no review of the charges by the Advisory Board may be permitted.\textsuperscript{781}

\textsuperscript{776} Ibid., Cl. 4.
\textsuperscript{777} Ibid.
\textsuperscript{778} Maintenance of Internal Security (Second Amendment) Act, 1976 (No. 78 of 1976).
\textsuperscript{779} The Conversation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1975 (No. 35 of 1975), Cl. 3.
\textsuperscript{780} Ibid., Cl. 2.
\textsuperscript{781} Ibid., Cl. 4.
2.1.3. The 42nd Amendment Act

During the Emergency of 1975, the Indira Gandhi government urged the Supreme Court to reverse its “basic structure” doctrine to enable the government a free hand to legislate by Constitutional Amendment. The Court, under the direction of a Chief Justice appointed by Indira Gandhi, convened a constitutional Bench for that purpose but then dissolved the Bench when none of the participants - neither the various states’ advocates nor the government’s advocates nor members of the Bench - appeared willing to accept the implication of a completely flexible Constitution. The Gandhi government responded by passing the notorious 42nd Amendment that made Constitutional Amendments immune from judicial review and gave supremacy to any legislation implementing the directive principles over any of the fundamental rights in cases of conflict.

The 42nd Amendment was the most dangerous assault on the Indian constitutional democracy. Passed in November 1976 by the Parliament with an overwhelming majority, it introduced changes of such far-reaching implications that H. V. Kamath, a member of the Parliament who had also been a member of the Constituent Assembly that drew up the Indian Constitution, was impelled to describe it “as neither amending nor mending, but simply ending the Constitution.” To guarantee Legislative supremacy and Executive unaccountability, it sought to make fundamental alterations to the legal and political order, amending existing provisions of the Constitution including judicial review, fundamental rights, and the amendability of the Constitution.

The 42nd Amendment modified Article 368 of the Constitution, which dealt with the amendment of the Constitution. It explicitly declared Parliament’s prerogative to amend any part of the Constitution including Part III that dealt with the fundamental rights of the citizen. The new addition to Article 368 said in part, “No Amendment of this Constitution (including the provisions of Part III) … shall be called in question in any court except upon the ground that it

782 Baxi, supra note 423, pp. 70-76.
783 The Constitution (42nd Amendment) Act, 1976.
has not been made in accordance with the procedure laid down by this Article.”785 By this provision, the 42nd Amendment virtually eliminated whatever feeble limitations had existed in respect of the Amendment of the Constitution by Parliament. The provision sought to overcome the restraint on the amending power of the legislature, arising out of the Kesawananda case.786 In that case, the Supreme Court had ruled that Parliament did not possess the power to alter the “basic structure” of the Constitution. With the Kesawananda decision thus effectively overturned,787 many of the changes that the 42nd Amendment proposed did indeed affect the “basic structure” of the Indian Constitution.

The 42nd Amendment elevated directive principles over fundamental rights by providing that legislation purporting to further the former could no longer be challenged on the ground that it violated the latter. Thereby, the directive principles, which at the time of the adoption of the Constitution were nonetheless made expressly nonjusticiab le under the Constitution, were given precedence over those rights designated as fundamental and extended special protection. Henceforth, the aspirations of the community, as embodied in these directives would prevail over even the right to life and liberty.

In the Kesawananda decision, as discussed earlier, the Supreme Court sanctioned the elevation of the two property-related directive principles the fundamental rights. Not content with this, Parliament in the Emergency period acted to extend the same degree of protection from judicial review to all the directive principles under the Constitution. The amended Article 31(c) of the 42nd Amendment declared that no law giving effect to the policy of the State towards securing all or any of the directive principles shall be voided on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 or 31. It further declared that no law containing a declaration that it is for giving effect to such policy shall be called in question

785 The Constitution (42nd Amendment) Act, 1976, Cl. 55 (Amendment of Article 368).
787 This followed an earlier abortive attempt to have the Supreme Court overturn the decision. On November 10, 1975 the full 13-member Bench was convened at the Administration’s request to review its 1973 decision which had held that Parliament’s power to amend the Constitution was limited by the principle of the “Basic Structure.” After two days, the Bench was dissolved without rendering an opinion.
in any court on the ground that it does not give effect to such policy. The only safeguard, if needed it may be referred to as such, was that where legislation embodying the directives is passed by a State Legislature it was to receive the assent of the President of India before becoming the law.

The citizens’ freedom was further circumscribed by the Amendment by the introduction of a new provision relating to so called “anti-national activities” and “anti-national associations.” All legislation enacted for preventing and prohibiting such activity or association was placed beyond judicial review on grounds of conflict with the three fundamental rights. “Anti-national” activity was defined very broadly to cover any activity: 1) which was intended towards or in support of cession or secession of part of the territory of India; 2) which threatens or disrupts the sovereignty and integrity of India, or security of the State or unity of the nation; 3) which is aimed at the overthrow of the State by force; 4) which seeks to create internal disturbance or the disruption of public services; and 5) which disrupts or threatens harmony between different religions, racial, language, or regional groups, or castes or communities. The power to make laws banning ‘anti-nationalism’ was vested exclusively in Parliament. State legislatures -which had shared with the center the right to impose reasonable restrictions on the freedom of association in the interests of public order, morality, and the sovereignty and integrity of India- were barred from enacting anti-national legislation; only the Center was allowed to determine the measures required to combat anti-nationalism in India.

There was very little protection against abuse of the extended powers, which the Center assumed through the Amendment. Judicial review was severely curtailed by a series of amending provisions, as was the right of the citizen to constitutional remedies. The Amendment altered the existing pattern of judicial review whereby the constitutionality of central and state laws could be challenged in either the Supreme Court or the High Courts. The direct access to the Supreme Court that the citizen enjoyed whenever his fundamental rights

---

788 The Constitution (42nd Amendment) Act, 1976, Cl. 5 (Insertion of new Article 31D).
789 Ibid., Subcl. 4.
were affected was limited. A new provision stated that where such violation occurred as a result of state laws the citizen may move only the High Courts in the first instance “unless the Constitutional validity of any central law is also in issue in such proceedings.” Until now, the original jurisdiction of the Supreme Court had extended to all cases of violations of fundamental rights whether from central or state laws. The effect of this measure was to reduce the scope of the citizen’s right to constitutional remedies for the enforcement of fundamental rights guaranteed by Article 32. At the same time, the new provision also took away the power of the High Courts to rule upon the validity of central laws by mandating that, in the future, only the Supreme Court may decide questions of the constitutionality of legislation by the Center.

The writ powers of the High Courts were severely curtailed by the substitution of a new Article 226 in place of the existing one. The former Article 226 conferred broad powers to the High Courts to issue writs “in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.” The Amendment deleted the phrase “for any other purpose” from the Article and thereby confined the writ jurisdiction of the High Courts to issues affecting fundamental rights; the courts would no longer be allowed to grant writ remedy to the citizen for invasion of other legal rights. The new Article 226 also specified that the grounds for the issue of a writ must be “injury of a substantial nature” or a “substantial failure of justice.” No longer would violation of the citizens’ rights constitute, by itself, grounds justifying the issue of writs by the High Courts. There would also have to be proof of the “substantial” nature of the injury resulting from it, with the burden of such proof presumably resting on the citizen protesting the invasion of his fundamental rights.

790 Ibid., Cl. 6 (Insertion of new Article 32A).
791 Ibid.
792 Ibid., Cl. 38, Subcl. 1(b) (Substitution of New Article for Article 226).
793 Ibid., Subcl. 1(c).
The Amendment curbed judicial review in other respects as well. It altered the existing provision on the requirements of majority needed to resolve challenges in court to the validity of central and state laws. First, it provided for a minimum of seven judges at the Supreme Court and five at the High Court levels to determine the constitutionality of all impugned statutes.\(^{794}\) Secondly, and more importantly, the Amendment laid down that a two-thirds majority of the bench would be needed to strike down as invalid any legislation.\(^{795}\) Assuming benches of seven in the Supreme Court and five in High Courts, the judicial majority required to rule against existing statutes would be five to two and four to one, respectively. In effect, it granted a judge deciding in favor of the government twice as much judicial power as one ruling against the government.

Several other changes were proposed by the Amendment, which also effectively expanded the powers of the central government.

### 2.2. Consequences of the Amendment Acts

The sweep of the above retroactive Amendments effected several changes, altered the notion of executive accountability, and exhibited total contempt for the rule of law in a democracy. The most important consequences of these Amendments regarding the judicial review are as follows:

The Supreme Court acquiesced in virtually all of the Gandhi government’s encroachments. The Court also refused to hear a challenge to an Amendment as contrary to the basic structure of the Constitution. As one leading lawyer said of Constitutional Amendments, among them the suspension of judicial review of the emergency declaration (Constitution 38th Amendment Act, 1975), that were rushed through by the Government during the Emergency,

---

\(^{794}\) Ibid., Cl. 25, Subcl. 1 (Insertion of new Article 144A).

\(^{795}\) Ibid., Cl. 25, Subcl. 2 (Insertion of new Article 144A) and Cl. 42, Cl. 4 (a) (Insertion of new Article 228A).
If I say anything about the recent Amendments in public I shall be probably arrested. In fact, the only place where there is freedom of speech in this country is the few hundred square feet of various courtrooms.796

Even the sanctuary of courtrooms was not secure. Upendra Baxi, in reviewing the history of the Emergency, stated,

There was no knowing whether the Supreme Court building might be locked on one ‘fine’ morning. There was a feeling pressing upon the Court, in a diffuse and subtle but unmistakable manner, that its actions were being watched by the regime and there were hints that judicial power might be curbed in the days to come.797

As a consequence, respect for the Court diminished significantly, and this formed part of the urban middle class’s growing disillusionment with the Indian State.

During the Emergency, what Amnesty International called “the most significant event in terms of human rights in Asia,”798 the national and state governments relying on the above Acts detained at least 40,000 political opponents and journalists and held most for the entire two year period.799 The aggrieved party was denied all relief by the inclusion of the violating laws such as COFEPOSA and MISA in the Ninth Schedule,800 thereby rendering them nonjusticiable.

Pressure was brought to bear even upon the Judiciary. High Court judges who did not decide in favor of the Government in cases that came before them suddenly were transferred out of their regular jurisdictions, purportedly “in the interests of national integration.”801 Legally, of course, it was within the Government’s power to affect the transfer of High Court Judges after

796 Palkhivala, Nani, cited in Baxi, supra note 423, p. 73.
797 Baxi, supra note 423, p. 34.
798 Reproduced in Desai, supra note 762, p. 196.
799 Ibid., p. 200.
800 The Constitution (39th Amendment) Act, 1975, Cl. 5 (Amendment of the Ninth Schedule).
consultation with the Chief Justice of India. However, in the past this power had seldom been exercised and then only with the consent or at the request of the judge being transferred. But in May 1976 a report announced the transfer of 16 judges with the comment that “this process will probably continue in appropriate installments at reasonable intervals.” As the transfers continued, it became obvious to the judges that “a finding against the Government was an invitation to transfer.”

During the Emergency, censorship was imposed on the Indian press under Rule 48 of the Defense and Internal Security Rules. Even the reporting of parliamentary and court proceedings was subjected to censorship during the Emergency. The first guidelines relating to the coverage of court proceedings issued on July 13, 1975 could “prevent the press from publishing the ruling of the Supreme Court if it gives an unfavorable judgment on Mrs. Gandhi’s appeal.” Nevertheless, as one sympathetic critic put it,

It was a happy development on the Indian scene that the Emergency gave rise to movements of civil liberties and democratic rights. Their presence cannot be ignored now … Human rights groups would however do well to take some stock-taking, assessing the nature and extent of impact that more than a decade of selective, ad hoc investigative reporting, publishing and litigating on human rights violations might have had on laws, institutions, public conscience and action programs of political parties in the country.

The six general elections to the Lok Sabha took place in March 1977. The abuse of authority in the Emergency period aroused the greatest popular resentment against Mrs. Gandhi and her Congress Party. Therefore, this Party that had held power for the last nearly 30 years was defeated at the polls and the Janata Party won a decisive majority and formed the government.

802 Ibid.
803 Statesman, April 13, 1976.
3. Post-Emergency Period

The Indian Supreme Court, according to scholars, is “the world’s most active judiciary.” After the end of the Emergency in 1977, the Supreme Court drastically shifted from its passive stance during the Emergency and loudly championed the fundamental rights, interpreting them in a decidedly egalitarian way in several leading cases, a shift that attracted widespread attention in the press. In its activist stance, the Court created a range of new rights and extended a number of old ones. Upendra Baxi, in an influential analysis, has interpreted that development as an attempt by the Court to regain legitimacy lost during its acquiescent response to the Emergency.

In the formation of the new jurisprudence, the Supreme Court judges played undoubtedly a significant role. India’s judges typically hail from elite landed classes, and have often been accused of protecting the interests of their brethren. However, the end of the Emergency combined with an unwillingness to engage in conflict with Prime Minister Gandhi’s government, allowed for a period of rejuvenation for the Supreme Court justices. Upendra Baxi has shown a strong incentive after the Emergency for the egalitarian justices to redeem their reputations as supporters of constitutional rights. Because of the justices’ egalitarian sentiments, the result was a flowering of egalitarian judicial activism.

Gobind Das argues that the period between 1980 and 1984 “opened up new fields of interest and different areas of judicial activities; it chose the poor, the helpless, and the oppressed in the name of socialism, constitutional conscience, and the rule of law.” Indian PIL was created during this period. Five judges, in particular, Bhagwati, Krishna Iyer, Desai, Thakar, and Chimappa Reddy, are often mentioned as those who led the way for a more progressive and socialist judicial period. Of those five, Krishna Iyer and Bhagwati created a

---

807 Baxi, supra note 423, p. 121.
808 Ibid. See also Baxi, supra note 639, p. 294.
jurisprudential link between the Article 14 equality guarantees, the Article 19 fundamental liberties guarantees, and the Article 21 procedural protections. They were also the strongest supporters and the creators of PIL. Krishna Iyer is known for broad egalitarian concerns and more specifically, prisoners’ rights. Bhagwati’s work has also been driven by the cause of social justice, and he is an unflaunting champion of judicial activism. Moreover, he has explained that the Supreme Court is not required to interpret the Constitution through literal meaning or original intent, and that it is also not limited to reading into it only formal rights.\textsuperscript{810} “Instead, the text can be read as one which is ‘vibrant with a socio-economic ideology geared to the goal of social justice’ and can be infused with principles that transcend mere formal equality, and transform legal rights into positive social entitlements.”\textsuperscript{811} Thus it is crucial to see that the Court’s judges have refused to simply go by the letter of the law, and have taken it upon themselves to address social inequality and injustice.

The backbone of the new jurisprudence is certainly judicial activism and one of the most significant dimensions of this activism after Emergency is the leading justices’ aggressive attempt, by loosening the traditional \textit{locus standi} criteria, to hear the claims of individuals and groups previously unable to get their concerns into court. Through their brand of unorthodox\textsuperscript{812} liberal judicial activism, the Supreme Court justices have tried to accomplish what critical legal\textsuperscript{813} scholar Duncan Kennedy has described the task of the leftist/post-modern legal project as being, namely “to change the existing system of social hierarchy, including its class, racial, and gender dimensions, in the direction of greater equality and greater participation in public and private government.”\textsuperscript{814}

In fact, Indian public interest litigation is a form of legal activity that was


\textsuperscript{811} Cassels, \textit{supra} note 658, p. 502.

\textsuperscript{812} For a detailed account of what may be considered “orthodox” roles for the judiciary, see Lucy, William. \textit{Understanding and Explaining Adjudication}. Oxford: Oxford University Press, 1999, pp. 45-92.


created by the justices of the higher judiciary in an effort to bring some part of social development under the auspices of the Court.

In this section, some controversial areas of the Indian constitutional court’s activism in post-Emergency period will be briefly discussed.

3.1. Heart of the Changes: Rejection of Gopalan Approach

After the Emergency, in what the leading scholar, Baxi, has called “a populistic quest for legitimating” the Supreme Court’s attention to, and protection of individual rights has expanded. In fact, in this period, a major part of the activism by the Court involved the nature and conditions of individual rights. The creation of substantive due process, a creation that directly contradicted the deepest assumptions of the Indian constitutional tradition, formed the heart of that change.

3.1.1. The Maneka Gandhi Approach

In Maneka Gandhi v. Union of India the Supreme Court rejected its earlier approach to the protection of personal liberty embodied in Article 21, propounded in Gopalan, and instead created a substantive due process standard. In this landmark decision, the constitutional validity of an executive order and related provisions of the Passport Act impounding the passport of the petitioner without giving any opportunity of hearing was challenged on the ground that the Passport Act 1967 conferred undefined power of impounding, and hence was violative of Article 14. Moreover, since petitioner’s freedom of speech and occupation was incidentally denied because of impounding of her passport, such denial should be consistent with the requirements of Article 19. Finally, procedure established by law under Article 21 should not be arbitrary and should provide reasonable opportunity of hearing. The 7-judge constitutional bench of the Supreme Court by 6:1 majority upheld the

---

815 Baxi, supra note 423, p. 121.
817 AIR 1950 SC 27.
contentions to some extent and held that the procedure established under Article 21 should be just, fair and reasonable considering the interaction of Articles 14, 19, and Article 21.

In Maneka Gandhi, the Court declared that Article 21 allows both a procedural and a substantive evaluation of law. In particular, the reinterpretation connected the meaning of the Article 21 due process guarantee with the Article 14 equality guarantees and the Article 19 protections of fundamental liberties so that Article 21 came to be used as a means for evaluating the substance of legislation in light of equality and liberty.\(^{818}\) Albeit, Maneka decision was criticized on the various grounds; for example, it was criticized that sudden change of judicial approach is not in accordance with the norms of constitutional adjudication.\(^{819}\) Moreover, it was criticized as providing for dilution of principles of natural justice by allowing post decision hearing.\(^{820}\)

### 3.1.2. The Bachan Singh Approach

Bachan Singh v. State of Punjab\(^{821}\) tested the tenability, efficacy, and limits of the Maneka approach.\(^{822}\) In this case, the majority while upholding section 302 of the Indian Penal Code and section 354 of Criminal Procedure Code elaborately examined the cases on interrelationships among Articles 14, 19, and 21 in order to refine the Maneka approach and infuse into it appropriate scope for flexibility to meet the problems of penal laws. After interpreting Article 21 as providing for procedure established by law, which is just, fair and reasonable, the Court analyzed the adequacy of procedural safeguards in case of death penalty under the new Criminal Procedure Code. The Court stated that

---

\(^{818}\) For a thorough discussion of the jurisprudential developments surrounding Article 21, see Bhat, *supra* note 758, pp. 115-161. See also Jain, *supra* note 623, pp. 22-52.

\(^{819}\) Survey of cases for a period of 27 years after Gopalan shows gradual dilution of Gopalan approach and introduction or re-orientation of alternative approach.

\(^{820}\) See Bhat, *supra* note 758, pp. 128-29.


\(^{822}\) Although in Jagmohan Singh v. State of U.P., AIR 1973 SC 947: (1973) 2 SCR 541: (1973) 1 SCC 20, the constitutionality of section 302 of the Indian Penal Code, which imposed death penalty for murder, was upheld on the grounds of Articles 14 and 19, the Supreme Court dealt with thoroughly the same issue in Bachan Singh, because the judicial standards about imposition of death penalty had fluctuated in some cases such as Ediga Ajinamma v. State of A.P., AIR 1974 SC 799: (1974) 4 SCC 443, and the interpretation of Article 21 in Maneka as well as the provisions of Criminal Procedure Code had been changed.
since in the laws there were enough protections such as bifurcated trial and pre-sentence hearing under section 235 and requirement of recording special reasons for imposing death penalty under section 354 etc., the requirements of Articles 14, 19, and 21 were satisfied. However, the Court formulated broad guidelines for the sentencing judge with a clear warning that death penalty should be imposed only in rarest of rare cases.

Justice P.N. Bhagwati in his dissenting judgment made out his case for abolition of death penalty. The judgment distinguishes death penalty as it is “irrevocable and beyond recall.” Turning the conferment of power as “untrammeled, unguided, unfettered, standardless,” it points out that the value systems, responses and social philosophy of each judge would weigh on the court in deciding on the death sentence, leaving justice to the chances of court composition, rather than a rule of law.823

3.1.3. Post-Maneka Development

It is a very significant constitutional development that Maneka case resulted in making a number of decisions where due process components were creatively regenerated by application of Articles 14 and 19 into the domain of Article 21. In this manner, the due process revolution with a strong sense of human justice jumped into life and showed its liveliness in the subsequent domains and cases.

There is little doubt that the reinterpretation of Article 21 constituted a deliberate rejection of the orthodox view, based on the Constituent Assembly debates, that the Article’s procedural protections were merely procedural and applied only to the misuse of administrative discretion in implementing laws and not to the substance of the laws themselves. As Jamie Cassels notes, the new approach to Article 21 created such rights as the right to a livelihood, the right to be free from exploitation, the right to legal aid, and the right to be free of environmental pollution.824 The Court also began to use Article 21 more aggressively as a check on abuse of power by police and administrators. The

824 Cassels, supra note 658, pp. 503-4.
practical import of this reinterpretation was to allow the Court to reject as unreasonable a range of government actions under legislative authority that previously would not have been examined by the courts. These included, among others, the impoundment of a passport to prevent international travel, the extended imprisonment of defendants facing trial, the conditions of prison and discipline, mandatory death sentences for prisoners who commit murder while sentenced to life in prison, and fairness and reasonableness in the negotiation and granting of government contracts. Importantly, since the Maneka Gandhi case made the connection between the equality and due process standards, the Court has come to hold that the equality standard does not merely require that equally situated parties be treated equally, but also that any “arbitrary or unreasonable actions … are per se discriminatory.”

In Sunil Batra I, the Supreme Court considered the constitutionality of section 30(2) of the Prisons Act. While interpreting this section as providing for separate confinement rather than solitary confinement of any person under the sentence of death penalty, the Court finally utilized the principles of classification and non-arbitrariness under Article 14 of the Constitution. In this way, the prisoner’s liberty to move, mix, mingle, talk, and share company with co-prisoners could be protected through application of Article 14. The Court further issued important guidelines concerning constitutional and administrative aspects of prison justice. It ruled against bar-fetters and said that writ of Habeas Corpus would be available against actions of jail authorities which violated Articles 14, 19, and 21.

---

825 The following list is by no means either exhaustive or representative. It is intended merely to indicate the broad range of new issues examined by the Court after 1978.
826 Maneka Gandhi v. Union of India, AIR 1978 SC 597.
827 Many “under trials,” as they are called in India, were found to have been imprisoned waiting trial for periods far longer than the maximum sentence for the crimes for which they were charged. The practice was vigorously rejected in Hussainara Khatoon v. Home Secretary, Bihar (I), AIR 1979 SC 1360.
828 Sunil Batra v. Delhi Administration (I), AIR 1978 SC 1675. In that case, Justice Krishna Iyer stated that “True our Constitution has no ‘due process’ clause … but … after Cooper … and Maneka Gandhi …, the consequence is the same.” See Shukla, supra note 432, p. 171.
830 Ramana Dayaram Shetty v. International Airport Authority, AIR 1979 SC 1628.
831 Shukla, supra note 432, p. 70.
833 Ibid., p. 1715.
In *Sunil Batra II*, the Court once again dispensed epistolary justice by entertaining a letter petition addressed to a co-inmate against atrocities committed by prison officials against a fellow prisoner.

It is difficult to overstate the extent of change in constitutional interpretation wrought by the Supreme Court after 1978 under its new approach to Articles 14, 19, and 21. Commentators typically describe it in revolutionary terms. Baxi, for example, called the new jurisprudence a “remarkable development” and nothing less than the Supreme Court’s “transition from a traditional captive agency … into a liberated agency.”

### 3.2. Religion and Secularism

India has a peculiar brand of secularism that is embedded in the concepts of equality and democracy. In the 1930s, the dominant Congress Party leaders had rejected Hindu nationalism as a definer of Indian nationality. This was strengthened after the assassination of Mahatma Gandhi, the great leader of Indian Independence, in 1948. The Constituent Assembly members rejected a Hindu state and opted for liberal citizenship. In other words, the Constitution makers of India vehemently supported a secular state over a Hindu one. However, the nature of secularism was left unresolved since the members were unable to agree on whether church and state should be completely separate. A compromise solution was adopted in a later Parliamentary Act where appeals to religion were excluded from the electoral sphere. In all other areas, religious issues could function in the public sphere provided that the state treated all religions equally.

The concept of secularism envisioned in the Indian Constitution has recently been under attack by the dominant elites. These elites are divided into two distinct categories: Hindu nationalists including the BJP (Baharathi Janata

---

835 Baxi, *supra* note 639.
837 Representation of Peoples Act, 1951.
Party) and ultra-secularists including Congress Party. Hindu nationalists relying on the principle and rhetoric of Hindutva are trying to link secularism with majoritarian (in this case, Hindu) cultural nationalism, while the secularists “promote a more rapid process of modernization based on the principle of ultra-secularism.” How does the Supreme Court rule when faced with the cases relating to the concept of secularism?

3.2.1. Election Cases

On Jan 31, 1948, Mahatma Gandhi was assassinated by an RSS cadre member. This tragic event swung the chain of events in favor of the Nehruvian vision of strict separation between religion and politics. In the 1950s, the Congress party under Jawaharlal Nehru had an overarching majority of seats in Parliament and passed laws limiting the role of religion in politics. The Jana Sangh (precursor of the BJP), the Hindu Mahasabha, and the RSS were the main opponents of such a view. In fact, curbing the mobilization activities of the RSS and Hindu Mahasabha topped Nehru’s agenda once the secular ideal had been adopted by the Constitution. In the months following Gandhi’s murder, Nehru tried to impose curbs on the RSS. Some 70,000 swayamsevaks (RSS members) were arrested and the organization was banned. Nehru continued to send warnings to the Chief Ministers of states to keep a vigilant eye on the Hindu Mahasabha’s activities. After the ban was lifted, RSS leaders took a conscious decision in 1951 to form a party that would champion the Hindu cause in politics. Nehru realized that the only way to stem religious forays into politics was to enact a law that forbade religious rhetoric in elections.

838 Sheth and Mahajan, eds., supra note 836, pp. 322-23.
839 Jaffrelot. The Hindu Nationalist Movement and Indian Politics—1925 to the 1990s. Delhi: Penguin Publishers, 1999, p. 95. The Hindu Mahasabha, a Hindu religious party, was not banned. The ban was lifted on 11 July, 1949 when the RSS complied with the Government’s demand that it adopt a written Constitution. The Hindu Mahasabha now found itself as the Front-runner in the political sphere. In 1949, a split occurred and the main group decided to undertake political activities with the objective of forming ‘a cultural state of Hindu Rashtra (nation)’.
841 “Sangh [RSS] must take part in politics not only to protect itself against the greedy designs of politicians but to stop the un-Bharatiya and anti-Bharatiya [un-Indian and anti-Indian] policies of the Government and to advance and expedite the cause of Bharatiya through state machinery side by side with official effort in the same direction.” wrote Malcani, a senior RSS leader, in the December 1949 issue of the Organizer, the RSS newspaper. See Jaffrelot, supra note 839, p. 116.
Therefore, to prevent candidates (including those from his own party) from using religious motifs, Nehru piloted the Representation of People Act in Parliament (1951).  

Section 123(3) of the Representation of the People Act 1951 describes various corrupt practices. It defines unfair and corrupt electoral practices as,

(i) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols, or the use of, or appeal to national symbols, such as the national flag or national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

(ii) The promotion of, or attempt to promote feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community or language, by a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

After Emergency, particularly in 1990s, the Supreme Court in numerous cases has dealt with the validity of section 123(3). In Subhash Desai v. Sharad Rao, it was argued that a call given to the voters to vote for a candidate who served the interests of Hindus could not be held to be a corrupt practice. If section 123(3) or 123(3A) of the Representation of the People Act covered such a speech, within the definition of corrupt practice, the Section must be declared unconstitutional for being restrictive of the fundamental right to freedom of religion guaranteed by Article 25 of the Constitution. The Supreme Court rejected this argument and held that since an election should not be

---


843 The Act is generally read in conjunction with the Constitution’s circumscriptions of public order, morality and health on the right to freedom of religion. Therefore it does not carry with it the right to make inflammatory speeches, nor a license to spread violence nor to speak of religious intolerance as an aspect of religious faiths.

contested on the ground of religion, race, caste, community, or language, the Legislature in this Act has declared appeal on ground as corrupt practices, which shall vitiate the election. In other words, the right to propagate religion given by Article 25 does not include the right to appeal to voters to cast their vote on religious considerations.

In Dr. Dasrao Deshmukh v. Kamal Kishore Kadam, where a candidate declared in his election speech and canvassing materials that he would teach Muslims a lesson, the election was held to be vitiated by the corrupt practice since it created enmity and hatred between Hindus and Muslims. The Court observed that where a party drew its members entirely from one community, and such a party was registered, it was bound to appeal to religion while seeking votes. In this case, the constitutionality of sub-sections 3 and 3A was challenged but since the Court found that the appellant had committed a corrupt practice and that the sub-section was not unconstitutional because it imposed a reasonable restriction on freedom of speech, it was not necessary to decide the question of the constitutionality of sub-section 3.

The question of the constitutionality of section 123(3) of the Representation of the People Act came up for consideration in Dr. Ramesh Prabhu v. Prabhakar Kashinath Kunte and Manohar Joshi v. Nitin Bhaurao Patil. Joshi and Prabhu won on a joint Shiv Sena and Bharatiya Janata Party (Indian Peoples Party) ticket, which used ‘Hindutva’ as its rallying platform. The defeated candidates from the rival Congress Party challenged the win at the High Court of Bombay saying that both had committed corrupt practice as defined in section 123(3) of the Representation of the People Act by referring to religion in an election speech. The High Court agreed and nullified the elections of Prabhu and Joshi. Both appealed the verdict before a three-judge Bench at the Supreme Court. The Supreme Court upheld Joshi’s win and voided Prabhu’s victory. On a cursory inspection, the verdicts do not make

845 Ibid., p. 455.
847 (1996) 1 SCC 130.
848 (1996) 1 SCC 169.
sense. After all, both speeches wore religious motifs of appeals to voters as Hindus. So how could the same Justices of the Supreme Court classify only one of the speeches as being of a religious nature?

In the *Prabhu* case, the Justices chose a principle based/non-contextualized approach while in the *Joshi* case, the interpretation was more policy based/contextualized.\(^{849}\) Citing the *Bukhari v. Mehra* case, Justice Verma said that the relevant sections were enacted “so as to eliminate from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and indeed, of any civilized, political and social order ... It is evident that if such propaganda was permitted here, it would injure the interests of members of religious minority groups more than those of others.”\(^{850}\) Justice Verma therefore concluded that,

> When it is said that politics and religion do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the ground of the candidate’s religion or alienating the electorate against another candidate on the ground of the other candidate’s religion ... It is obvious that a speech referring to religion during election campaign with a secular stance in conformity with the fundamental right to freedom of religion can be made without being hit by the prohibition contained in sub-section (3) if it does not contain an appeal to vote for any candidate because of his religion or to refrain from voting for any candidate because of his religion ... It is only the promotion of, or attempt to promote feelings of enmity or hatred, which are stronger words, that is forbidden in the election campaign.\(^{851}\)

Prabhu was alleged to have participated in three public meetings with the leader of Shiv Sena, Bal Thackeray, where Thackeray had appealed to the voters to vote for Dr. Prabhu as a Hindu. Justice Verma tried to clarify the court’s position by saying that the statement ‘politics and religion do not mix’

---

\(^{850}\) Bukhari was a candidate of the Muslim League party while the defeated candidate was from the Congress party. Both were Muslims. Bukhari had said in his election speeches that he (Bukhari) was a true Muslim, *Ziauddin Bukhari v. Brijmohan Ramdass Mehra*, 3 (1976) 2 SCC 17.
merely meant that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the ground of the candidate’s religion or alienating the electorate against another candidate on the ground of the other candidate’s religion. However, “a speech with a secular stance alleging discrimination against any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism.”

The Court said that Prabhu and particularly Thackeray had engaged in corrupt practices by appealing to religion for votes and promoting religious enmity.

Joshi, too, had made several statements about establishing the first Hindu state in several meetings and video and audiocassettes. The Supreme Court held that “a mere statement is by itself not an appeal for votes on the ground of his religion but the expression, at best, of such a hope.”

In the Joshi decision, the Court firstly did not ban all types of religious rhetoric; and secondly, portrayed Hindutva as a benevolent expression of a cultural rather than a religious concept.

The conflicting precedents are visible in the difference between two Court rulings on Hindutva; one treats it as religious and the other as non-religious rhetoric. Why the same three Justices chose to categorize the two similar cases differently? Was it because of the pressures from the ruling party? In order to assess when Supreme Court justices can be bracketed as having been influenced by political preferences of the ruling party, a rough test would include the following: a) What was the preference of the ruling party? b) Did the Court verdict mirror those preferences? If it did, then the reasons could include past precedents or a politicized judiciary. If the ruling differed from political biases, then independence can be established. Of course, the next question would be whether the judgment reflected the personal biases of the justices or was based on some structural processes such as past precedents. In

---

852 Ibid., p. 131.
854 Other cases heard with these appeals were mainly dismissed for lack of reliable evidence on whether the candidate had been present and consented to the speeches. It is puzzling that the Court chose to ignore the presence of Joshi at the meeting where Thackeray made the ‘Hindutva’ statement.
the case of the Prabhu and Joshi judgments, a minority coalition led by the Congress party, which had a preference for banning all references to ‘Hindutva’, was in power. However, the Supreme Court judgment in Joshi upheld the position of the Hindu right parties that ‘Hindutva’ was an ideological and not a religious appeal. Therefore, in this instance the Court can be said to have been independent of political preferences.

The Court ruling on Joshi was seen by the Hindu right as giving a judicial imprimatur to the notion of ‘Hindutva’ as an ideology rather than a religion and legitimizing its use in politics.855 L.K. Advani, the President of the BJP in a special press statement on the verdict said,

I feel extremely gratified about yesterday’s verdict … principally because the Constitution Bench has lent its seal of judicial imprimatur to BJP’s ideology of Hindutva … Somehow during the past few years, our adversaries have succeeded in creating an impression that if any party or candidate talked about religion, temples, Hindutva, Hinduism etc., it was guilty of a corrupt practice … I am happy that the 2-Judge Bench … has cleared these cobwebs of confusion and obfuscation.856

On the opposite side of the fence, it was asked whether it was really necessary for the Court to make general remarks about Hinduism and appear to give respectability to Hindutva by using it interchangeably with Hinduism. One scholar echoes these sentiments, saying that “by effectively blurring the distinction between religion and culture, the Court was left with insufficient evidence to substantiate the charge of corruption [by Joshi].”857 Cossman and Kapur argue that the Court does not stop to consider that this uniform ‘way of life’ is one based on assimilating religious and cultural minorities and on reconstituting all Indian citizens in the image of the unstated dominant norm,

855 Asserting that Hindutva was synonymous with nationalism and “Bharateeyatva,” Mr. Vajpayee argued in a public meeting that the concept did not merit further debate as the Supreme Court had defined it in totality in its judgment. Times of India, June 7, 1996.
that is, a Hindu norm. “In fact, the Court seems to assume that the majoritarian norms are the appropriate measure against which the practices and rhetoric of the Hindu right can be judged.”\textsuperscript{858} By adopting the Hindu right’s self-definition of ‘Hindutva’ as an ideology rather than a religion, these scholars accuse the Supreme Court of demonstrating a growing tendency towards appropriation of the BJP-RSS conceptual framework by the state institutions.\textsuperscript{859}

Ironically, in a previous judgment, the Supreme Court itself recognized the potential of ‘Hindutva’ as a divisive religious mobilizing concept and affirmed the active spirit of secularism as separation of church and state.\textsuperscript{860} The trend towards a more passive form of secularism began in \textit{Ismail Faruqui v. Union of India}.\textsuperscript{861}

\subsection*{3.2.2. Dispute over a Sacred Site; Ayodhya Case}

The dispute in Ayodhya case is over the ownership of a holy site in northern Indian city of Ayodhya between religious Hindu and Muslim organizations.\textsuperscript{862} The disputed site was a functioning mosque from 1528 to the 1930s. Ayodhya is a sacred city for Hindus because it is considered the birthplace of a Hindu God, Rama. The Hindu organizations claim that Babri Masjid was build by a Mughal conqueror after he had razed an 11th century temple of Rama. The Muslim bodies claim that there is no proof of the existence of a temple, and anyhow, the mosque stood on that site for four hundred years. The colonial courts decided to keep the status quo which was the existence of the mosque, but after India’s independence from Britain in 1947, a case was registered by the leader of a Hindu organization (Hindu Mahasabha) claiming the right to worship at the site. Some idols of Rama were secretly installed in the Mosque in 1919 triggering riots between the two communities. The next year, the


\textsuperscript{859} ibid.

\textsuperscript{860} \textit{S.R. Bommai v. Union of India}, AIR 1994, SC 1918: (1994) 3 SCC 1, known as ‘Bommai case’. For a nuanced reading of the implications of the Bommai case for the Joshi case, see Cossman and Kapur, supra note 858, pp. 2613-630.

\textsuperscript{861} (1994) 6 SCC 360.

\textsuperscript{862} A factual road map of major events on the dispute over the sacred site of Ayodhya has been succinctly summarized by the Supreme Court in \textit{Ismail Faruqui v. Union of India}, (1994) 6 SCC 360.
district court ruled that the status quo was the existence of the idols and that Hindus had the right to worship in the mosque. However, the Prime Minister, Jawaharlal Nehru locked the site in a bid to stem communal passions. In 1959 and 1981, lawsuits were filed by the two groups claiming title. In 1986, the Vishwa Hindu Parishad, a member of the Sangh Parivar, took up the struggle for the temple.

The politicization of the Babri Masjid issue at the national level occurred only in the 1989 election manifestos and in parliamentary debates in the early 1990s. In 1989, the Allahabad High Court ruled that the 1950 status quo be maintained. Meanwhile, the BJP made the construction for a Ram temple on the disputed site, a major plank of its election campaigns in 1989 and 1991. The mosque in Ayodhya was demolished by kar sevaks (Hindu volunteers mobilized by the VHP to construct a temple), on December 6, 1992 during a rally at which top RSS, VHP and, BJP leaders were present. Following the demolition, the Parliament passed the Acquisition of Certain Area at Ayodhya Act, 1993. The Act authorized the Union Government to acquire a land adjacent to the disputed land and authorized itself to give it to a suitable body in the future.

In Ismail Faruqui v. Union of India, the Supreme Court examined the constitutionality of the Acquisition of Certain Areas Act. After the demolition of the Babri mosque, the Hindu fundamentalists had built a makeshift temple on that site and had started worshipping the deity. The Act under the guise of maintaining the status quo allowed Hindus to continue to offer prayers on the disputed site while forbidding the Muslims from doing so. The majority (three of the five justices) held that section 4-3 of the Act negated the rule of law but the rest of the Act was valid. “Irrespective of the status of a mosque under the Muslim law applicable in the Islamic countries, the status of a mosque under the Mohammedan law applicable in secular India is the same and equal to that of any other place of worship of any religion; and it does not enjoy any greater

---

863 The Sangh Parivar consists of the RSS (the parent body), the BJP (the political wing), VHP (the cultural wing), and the Bajrang Dal (the youth wing).
864 Muslims refer to the site as Babri Masjid because a mosque stood there for 400 years, whereas Hindu organizations call it Ramjanmabhoomi (birthplace of Ram).
865 (1994) 6 SCC 360.
immunity from acquisition in exercise of the sovereign or prerogative power of
the state, than that of the places of worship of the other religion.”

The Justices made a distinction between essential religious practices and
non-essential ones and said that “a mosque is not an essential part of the
practice of the religion of Islam and namaz (prayer) by Muslims can be offered
anywhere, even in the open.” The Court justified its stance on the ground that
British India had regarded the right of Hindus and Muslims to worship in
temples and mosques as a civil right. The minority opinion disagreed on the
grounds that state acquisition of the site effaced secularism, and was
therefore unconstitutional. In response, the majority opinion said that the Act
gave Hindu devotees a lesser right of worship than that in existence between
1949 and 1992, and therefore the Act “does not create a new situation more
favorable to Hindus.” The Court argued that the demolition of the mosque in
December 1992 should not be attributed to the entire Hindu community
because it was the work of miscreants.

The majority ruled that the Central government was merely acting as a
limited statutory receiver who would transfer the site to the entitled claimant
after final adjudication of the dispute. Therefore, the rationale was that the
acquisition of properties affected Hindus and Muslims equally because both
had claims and titles to different parts of the acquired lands.

The difference between the two opinions emanated from the
characterizations. The three Justices characterized the dispute as a clash
between the rights of religious freedom of two groups, whereas the minority
opinion saw the same issue as a clash between the right to political equality of
minority religious group and attempts by majority group to circumvent that

866 Ibid., para. 96, p. 362. The Justices also rejected the assertion that Mosques enjoyed a particular position in
Muslim Law.
867 Ibid., p. 376.
868 Ibid., p. 377.
869 The dissenting judgment by Justices Bharucha and Ahmadi (a Muslim judge who later became the Chief Justice) said
that the core provisions of the Act (sections 3, 4, and 8) were unconstitutional. The effect of section 4 was that the
Muslim Waqf Board which administered the mosque that was housed in the disputed structure, and the Muslim
community lost their right to plead adverse possession of the site. The idols of the Hindu worshippers remained on
the site only under the orders of the Court. The Muslims could not challenge it under the Act and therefore section
4 “offends the principle of secularism by privileging one religious community against another … Therefore the Act
was slanted in favor of the Hindu community.” Ibid.
870 Ibid., p. 369.
Therefore, the tenor of the majority judgment outlined the clash as that of ‘equal treatment to Hindus and Muslims in the exercise of their religious rights’ versus ‘more than equal treatment demanded by Muslims by asking for sole rights over the mosque’.

The implication of the majority verdict was that all pending suits relating to the disputed area stood revived for adjudication. More importantly, the status quo ante as on Jan. 7, 1993 was to be maintained which meant that Hindus could continue worshipping their idols in the makeshift temple, while the worship rights of Muslims remained unaffected. However, the right of Muslims to the site was affected by the ruling because the justices implicitly legitimized the right of Hindus to worship at the site, even though that right was instituted by force.

3.2.3. Women’s Rights and Personal Law

“On paper, India now boasts some of the more advanced legislation in the world pertaining to equality rights for women,” but as Ratna Kapur observes, the women’s movement in India often fails to recognize that reforms on paper may bear little relationship to enforcement or implementation of those reforms in practice.

Judicial support for some kinds of rights for women grew substantially after 1977. The Indian Supreme Court has decided several important cases on women’s rights, particularly violence, the continued existence of the personal laws, and discrimination in employment. For example, in 1983, in a public interest case brought by a social worker, the Supreme Court struck down as a violation of the equality guarantees a State’s policy of paying women engaged in famine relief work less than men so engaged due to the extraordinary nature of the work. As well, in 1986 the Court rejected as a violation of the...
Constitution’s equality rights a State law requiring married women to obtain their husbands’ consent for applying for public employment. Some of these cases may be considered of major significance.

Undoubtedly, one of the most controversial issues on which advocates of women’s rights in India have focused their attention is the Indian system of religious personal laws. The formal law of India compounds the problems faced by women because in one important respect it does not recognize the formal equality of the sexes. Indian law distinguishes between ordinary civil law and what are called “personal laws” associated with each of the major religious communities in India (Hindu, Muslim, Christian, and Parsi). Each community has its own personal laws governing what is ostensibly the private sphere of marriage, divorce, inheritance, and adoption. Each religious community’s personal law governs its adherents regardless of where they live geographically within India. The various personal laws differ in the rights they grant to women and each community’s laws extend fewer benefits to women than to men. For example, under the Hindu system there are 14 grounds for divorce, but for Christians there is only one ground and “divorce is almost impossible.” Similarly, the Indian Criminal Procedure Code generally understood as applicable to any individual, grants to women a right to adequate maintenance by their husbands in the event of divorce, but the law governing Muslims grants maintenance only for a period of three months after the divorce, in addition to the minimum lump sum of her dower (Mahr). For Muslim women, the Muslim code prevails. Additionally, each of the systems of personal laws disadvantages women in the matter of inheritance by according either full or predominant inheritance rights to sons rather than to the wife and daughters. The system of personal laws, then, directly contradicts a standard of

---

877 This discussion is based on Parashar, Archana. Women and Family Law Reform in India. New Delhi: Sage, 1992.
879 Section 125 of the Criminal Procedure Code provides for maintenance of a destitute wife by her husband either on divorce or on desertion.
formal equality before the law, both by providing different legal rights depending on community membership and by providing fewer rights to women than to men. Such a system appears to contradict the Indian Constitution’s explicit fundamental rights to equality before the law contained principally in Articles 14 and 15. In addition, one of the Constitution’s Directive Principles direct the government to establish a uniform civil code; while Directive Principles are not justiciable, the Supreme Court in other matters has declared that they must be used to interpret the nature of the fundamental rights. The Indian Constitution, then, appears to provide a foundation for rejection of the system of personal laws.\textsuperscript{881} On the other hand, one of the compromises reached in framing the Constitution appears to have been that the judiciary would not have the authority to abolish the system of personal laws.\textsuperscript{882} The system endures, and no scholar of the subject expects a uniform civil code at any time in the foreseeable future due to the deep communal rifts in Indian society. Several cases in the Supreme Court have challenged the system of personal laws. While women’s rights organizations supported some of the more important cases involving violence against women, individual women acting largely on their own brought most of the cases challenging the system of personal laws that make gender discrimination with ambivalent approaches. Several women won significant victories in the Supreme Court. For example, in \textit{Gita Hariharan}\textsuperscript{883} the Supreme Court construed the Guardianship legislations in the light of Articles 14 and 15 to the effect that mother was entitled to be natural guardian even during the life time of father; while in fact the statutes had relegated the status of woman to a secondary position.

The most controversial case challenging the system of personal laws was \textit{Mohamed Ahmed Khan v. Shah Bano Begum} (commonly called the \textit{Shah Bano} case),\textsuperscript{884} in which a Muslim woman prosecuted her former husband under the

\begin{footnotesize}
\begin{enumerate}
\item Parashar, \textit{supra} note 877, p. 215 n. 7.
\item Austin, \textit{supra} note 389, pp. 80-81.
\item \textit{Gita Hariharan v. Reserve Bank of India}, 1999(2) Supreme 123.
\item AIR 1985 SC 945: (1985) 2 SCC 556.
\end{enumerate}
\end{footnotesize}
Code of Criminal Procedure for failure to provide maintenance after he divorced her.

The question in Shah Bano case was whether the respondent was entitled to maintenance. An application for revision filed by the respondent the High Court enhanced the amount of Rs 25 as maintenance fixed by the Magistrate to Rs 179.20 per month. In appeal, a two-Judge bench of the Supreme Court referred the matter to the present bench. The husband’s appeal was dismissed with costs.

The Supreme Court, referring to a number of authorities, writers\(^8\) claimed to interpret the holly Koran\(^8\) and concluded that Muslim law in fact required a divorcing husband to maintain his former wife as required by the national Code. It ruled that Shah Bano was entitled to take recourse to Section 125 of the Code and that the term ‘Mahr’ in its real (Islamic) sense is an amount payable by the husband to the wife on marriage and not on divorce, whatsoever be its variety. Moreover, its payment is not occasioned by the divorce\(^8\).

While ostensibly a victory for women’s equality rights, the Shah Bano case produced a dramatic backlash from conservative Muslims who forced Parliament to enact a law undoing the main holding of the case.\(^8\) To minimize the political pressures the Congress party led by Rajeev Gandhi, fearing that annoyance of Muslims would cause detriment to the party in power in the forthcoming election to a state legislature, by a brute majority in 1986 passed an Act entitled Muslim Women’s (Protection of Rights on Divorce) Act. The Act as criticized in newspapers by jurists has a number of flaws.\(^8\) This was disliked by many forward-looking Muslims. Daniel Latifi, a senior advocate of the Supreme Court and a scholar of Muslim law, filed a writ petition challenging the constitutionality of the Act. Section 3(1)(a) of the Act provided that a divorced woman was entitled to a reasonable and fair provision and maintenance to be made and paid to her within the period of *iddat* by her former husband. Interpreting this

---

\(^8\) See Kulshreshtha, *supra* note 417, p. 424.

\(^8\) According to Islamic belief, only Muslim clerics may interpret the Koran; many Muslims were offended by the Supreme Court’s claim to do so, and that fact, perhaps more than the substance of the decision, contributed to the vigorous Muslim reaction to the decision.

\(^8\) That the first wife is entitled to maintenance when a Muslim husband contracts a second marriage was affirmed by the Supreme Court in *Begum Subanu (Saira Banu) v. A.M. Abdool Gafoor*, (1987) 2 SCC 285: 1987 SCC (Cri) 300.


\(^8\) For a discussion, see Kulshreshtha, *supra* note 417, p. 425.
provision, some High Courts\textsuperscript{890} held that a divorced Muslim woman was entitled to a fair and reasonable provision for her future to be made by her former husband. This must include maintenance for the future extending beyond the period of \textit{iddat}, while some other High Courts\textsuperscript{891} took the opposite view and held that the husband’s liability would end after providing maintenance for the period of \textit{iddat}. Accordingly, the Supreme Court had before it two acceptable interpretations. It was argued that the Act undermined the secular character, which was the basic feature of the Indian Constitution. Moreover, it was claimed that the Act without any reason deprived the Muslim women of the applicability of the provisions of section 125 of Criminal Procedure Code and therefore it violated Articles 14 and 21 of the Constitution, and discriminated between women and women on the ground of religion. A constitutional 5-judge bench of the Supreme Court held that only if section 3(1)(a) was interpreted so as to oblige the husband to pay maintenance and make provision for the future within the period of \textit{iddat}, the Act would be saved from the infirmity arising from the inconsistency with Articles 14, 15,\textsuperscript{892} and 21 of the Constitution.\textsuperscript{893} In this way, “the Court chose to uphold the law by interpreting it liberally so as not to deprive a Muslim woman of what had been given by the earlier law, instead of striking it down as being violative of Articles 14, 15(2), and 21.”\textsuperscript{894} According to the Court, in a male dominated society, where woman sacrificed many of her personal interests at and after marriage, compensating her at divorce assumed the character of basic human right like right to livelihood. The Court held that solutions to such problems should be given on considerations other than religion.\textsuperscript{895}

\textit{Shah Bano} was shown as an example of Muslim appeasement by the Congress Party. After this case, the BJP made its campaign for uniform civil code more

\textsuperscript{890} High Courts of Gujarat, Kerala, Madras, Bombay, and Punjab.
\textsuperscript{891} High Courts of Andhra Pradesh, Calcutta, Madhya Pradesh, and Delhi.
\textsuperscript{892} Prohibition of discrimination against any citizen on grounds of religion, race, caste, sex or place of birth or any of them.
\textsuperscript{894} Sathe, \textit{supra} note 391, p. xlvii.
aggressive. In the political advancement of BJP, *Shah Bano* contributed as much as the Ram temple (*Ayodhya* case).896

The conflicts over the personal law are prevalent not just in the Muslim but also in the Christian, Hindu, and Parsi communities. In *Mary Roy v. State of Kerala*897 the petitioner through a writ petition challenged the constitutionality of provisions of the Travancore Christian Succession Act, 1916 and its sections 24, 28, and 29 which discriminated between sons and daughters in case of succession to father’s property. *Mary Roy* tested the bitterness of legal discrimination when she separated from her Bengali Brahmin husband to lead a lonely trail with her two children. She found that though her ancestral property was worth more than a crore she could claim just rupees 5000 as inheritance from her parents. Her father died intestate. Her brothers inherited the estate and her mother found no injustice in the arrangement. This law was the essence of the existing Christian traditions in Kerala.898 The Supreme Court held that on the coming into force of Part B States (Laws) Act, 1951, the Travancore Cochin Succession Act, 1916 stood repealed and Chapter II of Part V of the Indian Succession Act, 1925 became applicable. In this manner, the Court agreed with Mary Roy’s challenge to Travancore Christian Succession Act as a violation of her right to inherit family property.

The decisions in *Shah Bano* and *Mary Roy* constituted the high point of Supreme Court support for movement toward a uniform civil code; since then, the Court has delayed action on further challenges to the personal laws by failing to bring them up for hearing.899

The Constitution of India enjoins upon the States to ‘secure for the citizens a uniform civil code throughout the territory of India.’900 This provision refers to the existing personal laws of different religious communities that govern matters such

---

898 Christians in Kerala converted by St. Thomas still tugged their Brahminical origins and traditions which included the patriarchal or patrilineal system of society and the practice of streedhanam or dowry for women. Even after the Christian society evolved, ancestry continued to be traced through males entrenching the practice of dowry and the subordinate status of women. Education and progress in society failed to dissolve and eradicate this discrimination. See Kulshreshtha, *supra* note 417, pp. 425-26.
900 The Constitution of India, Art. 44.
as marriage, divorce, inheritance and succession, etc. The Supreme Court in a series of judgments in the 1980s and 1990s asked the Legislature to pass a uniform civil code that would put an end to the disputes over precedence of religious personal laws. For example, in *Sarla Mudgal v. India*, Justice Kuldip Singh was agitated over the fact that people converted to Islam to enter into polygamous marriage. Therefore, the judge issued a notice to the Government of India asking it to explain why it had not taken any steps for enacting a uniform civil code.

The Court has been careful to maintain the facade of parliamentary sovereignty while simultaneously ruling where it could for the supremacy civil over religious law. Recently, the Court dismissed three petitions against allegedly discriminatory provisions in laws covering the Muslim, Hindu, and Christian communities. The bench pointed out that the remedy to such petitions “lies somewhere else and not by knocking at the doors of the courts.”

3.3. Protective Discrimination; Job Reservation

Article 16(4) of the Indian Constitution enables the state to make any provision for the reservation of appointments or posts in favor of any backward class of citizens that, in the opinion of the state, is not adequately represented in the services under the state. The Indian Constitution makers, while framing Article 16(4) intended to complement the guarantee of formal equality with a system of preferential treatment to correct social inequality amassed due to some historical reasons.

The policy of protective discrimination under Articles 16(4) and 15(4) brings into sharp conflict several competing interests such as the claims of

---

901 (1995) 3 SCC 635.
902 For instance, the Court rejected the plea of one petitioner, Julekhabi saying that she should approach the Parliament. Julekhabi had sought changes in the divorce provisions of Muslim personal law and asked the Court to declare polygamy as illegal. Julekhabi had refused to stay with her husband after he married another woman. Her husband immediately divorced her. Times of India, September 8, 2001.
903 See the views of Dr. B.R. Ambedkar, Constitutional Assembly Debates, vol. 7, p. 701.
904 In response to the decision of the Court in *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226: 1951 SCR 525, Article 15(4) was added by the Constitution (1st Amendment) Act, 1951 enabling the State to make special provisions for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.
backward classes, rights of candidates competing on the basis of general merit, and social claim for efficiency in administration. In numerous cases, the Supreme Court has striven to play a significant role in disseminating the constitutional values and controlling the abuses of the system in this controversial issue.905

3.3.1. Reservation more than 50 Percent and Reservation in Promotion

In Indra Sawhney v. Union of India,906 the Supreme Court held that reservation of jobs in public service under Article 16(4) of the Constitution should never exceed fifty percent of the total number of jobs to be recruited. Moreover, the word ‘employment’ in Article 16 would not include ‘promotion.’ In this regard, the Court ruled that policy of reservation in promotion upheld in Rangachari case907 violated the principle of equality, and therefore it overruled the Rangachari decision. However, both of these rules were rejected by Parliament through the Constitutional Amendments in the subsequent years because the overruling of the long standing rule of Rangachari and the withdrawing of the conferred privilege of reservation in promotion was not favorably responded by public opinion. Moreover, politics in some of the southern States were based on the completely contrary view. The Tamil Nadu state government organized a band to protest against the decision of the Supreme Court and the Tamil Nadu Legislature passed an Act providing for reservation of 69 percent of posts to various backward classes. Under pressure from the state government, Parliament enacted the Constitution (76th Amendment) Act, 1994 incorporating the Tamil Nadu Act into the Ninth Schedule908 to immunize it from being challenged.909 By another Constitutional Amendment, i.e., the Constitution (77th

905 For a thorough discussion of the jurisprudential developments surrounding protective discrimination and job reservation, see Bhat, supra note 758, pp. 217-48.
908 The Constitution (76th Amendment) Act, 1994 added Entry 257A to the Ninth Schedule. It reads as follows, “The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993, Tamil Nadu Act 45 of 1994.”
909 The Karnataka State Legislature also passed a statute providing for 73 percent reservation in 1994 and sought its incorporation into Ninth Schedule, which was not responded to by Parliament because of government change.
Amendment) Act, 1995, Clause 4A was added to Article 16. According to Article 16(4A),

Nothing in this Article shall prevent the State from making any provision for reservation (in matters of promotion, with consequential seniority, to any class) or classes of posts in the services under the State in favor of Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.\(^{910}\)

In this way, the Amendment restored *Rangachari* rule and permitted reservation in promotion for the Scheduled Castes and the Scheduled Tribes. Concerning promotion claims of Other Backward Classes, *Indra Sawhney* is still governing the field.

Where the Constitutional Amendments were approved with such strong support of Government and all the political parties, it was much more difficult for the Supreme Court to interfere. Therefore, in *Ashok Kumar Gupta v. State of U.P.*,\(^{911}\) the Court upheld an Uttar Pradesh Act providing for reservation in promotion for Scheduled Castes and the Scheduled Tribes, as it was well within the period of prospective overruling, and made no discrimination nor offended Article 14 as the rights of general and reserved employees were to be mutually balanced.\(^{912}\) The Constitution (85th Amendment) Act, 2001, modifies Article 16(4A). It now reads as follows,

Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion with consequential seniority of any class or classes of posts in the services of the State in favor of the Scheduled Castes and Scheduled Tribes which in the opinion of the State are not adequately represented in the services under State.

\(^{910}\) Words in bracket were inserted by 85th Amendment in 2002.
\(^{912}\) The Supreme Court further held that Clause (4A) inserted by the Constitution (77th Amendment) Act, 1995 has converted reservation into a fundamental right; also see *Commissioner of Commercial Taxes, Hyderabad v. C. Sethumadhava Rao*, AIR 1996 SC 1915: (1996) 7 SCC 512.
Another aspect of reservation in promotion, *i.e.*, consideration of efficiency in administration, figures in the light of the Constitution (82nd Amendment) Act 2000, which added a proviso to Article 335. Now Article 335 reads as follows:

The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

Provided that nothing in this article shall prevent in making of any provision in favor of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

The reason for this change was that of supporting the policy underlying Article 16(4A). Since the *Indra Sawhney* approach of 'no reservation in promotion' was built on the premise of Article 335, for a relaxation of qualifying standard for promotion this proviso was to be instrumental.913

In *Ajit Singh v. Punjab II*,914 the Supreme Court has again held that there should not be reservation in promotion. The Court further clarified that provision for reservation was an enabling provision and not a fundamental right. This ruling was criticized on the ground of equal protection of law. According to Sathe, to say that provisions contained in Article 15(4) and Article 16(4) are merely enabling provisions is tantamount to going back to the legal positivism of *Champakam Dorairajan*.915 He maintains that in an unequal society, without such affirmative actions there would not be any equality. They are therefore not merely enabling but they enable the State to help the backward classes to overcome their backwardness.916

---

913 The Supreme Court in *S. Vinodkumar v. Union of India* on July, 22 1997 had nullified the relaxation of qualifying marks for promotion as violative of Article 16(4).
3.3.2. Reservation in Technical and Specialist Posts

The Supreme Court in *Indra Sawhney* emphasizing on the mandate of Article 335 of the Indian Constitution for maintenance of efficiency in administration held that reservation in technical posts of specialists in medicine and engineering, research and science, in defense service, air navigation, nuclear and space application, scientists, technicians, and professors is inadvisable and impermissible.\(^{917}\)

In the landmark case of *Preeti Srivastava*,\(^ {918}\) the Supreme Court laid down important principles for upholding the interests of merit in post-graduation education in medicine. In this case, the constitutional validity of an Uttar Pradesh Act and a Madhya Pradesh Act was under question. The Uttar Pradesh Act had fixed 20% marks in Post Graduation Entrance Test in Medicine (PGETM) as a minimum requirement for Scheduled Castes, the Scheduled Tribes, and Other Backward Classes whereas for the general category candidates it had fixed 45% marks. On the other hand, the Madhya Pradesh Act had not fixed any minimum of marks in PGETM for any category of students. The Court stating that in the post graduation level, national interest rather than the individual self-interest of the candidate should be safeguarded\(^ {919}\) invalidated both Acts as violative of Article 15(4). The Court ruled that a common entrance test for PGETM required fixing of minimum of marks. It further ruled that at the level of admission to super specialty courses, no special provisions were permissible, and merit alone could be the basis of selection. According to the Court, since super specialties required high levels of intelligent understanding of medical knowledge and skill and high ability to innovate and devise new lines of treatment in critical conditions, it would be detrimental to the national interest to have reservation at this stage. In this manner, the Court applied the *Indra Sawhney* principle of no-reservation in specialization posts into the domain of post graduation medical education.

---


\(^{918}\) *Dr. Preeti Srivastava v. State of M.P.*, 1999(7) Supreme 81.

\(^{919}\) Ibid., p. 98.
At last, it should be noted that the Indian judiciary in the reservation issue acted as a critic of the governmental policy, disseminated the constitutional values, checked the abuses of the system, and debated on policy alternatives. According to Marc Galanter, “It would be wrong to visualize the courts as enemies or even as inadvertent wreckers of compensatory discrimination policy, somehow responsible for its deficiencies and shortcomings.”\textsuperscript{920}

3.4. Controversies over Judicial Activism

In spite of its beneficial effect, judicial activism is criticized by many. In short, the Supreme Court is charged not only with exceeding its institutional capacity, but with reversing constitutional priorities, usurping both Legislative and Executive functions, causing conflict and imbalance of powers between the three branches of the government, violating the rule of law, riding roughshod over traditional rights and succumbing to the corrupting temptations of power.\textsuperscript{921} For instance, in the matter of expansion of the scope and ambit of Article 21 of the Constitution, by liberal judicial interpretation, there is a criticism that the Supreme Court has gone beyond its jurisdiction. The reason of this criticism is that due to the Supreme Court’s judicial activism, now Article 21 contains almost 30 kinds of implicit fundamental rights such as right to privacy, right to health, right to free legal aid, right to livelihood, right to shelter, and so on.\textsuperscript{922} It seems that in this kind of practice the Indian Supreme Court that is an appointed body acts as an elected body like the Parliament or Constituent Assembly. Moreover, some of these implicit rights, for example the right to livelihood and the right to shelter, cannot be ensured by Judiciary. “In the absence of an existing and enabling legislation, a person whose such implicit fundamental rights are violated has to approach the Court for enforcing the same. It is too lengthy a process and very time-consuming, apart from being quite expensive.”\textsuperscript{923}

\textsuperscript{921} Cassels, \textit{supra} note 658, p. 509.
\textsuperscript{922} See Reddy, \textit{supra} note 401, pp. 367-68.
\textsuperscript{923} Ibid.
On the other hand, supporters of judicial activism assert that the courts merely perform their legitimate function. According to A. H. Ahmadi, the former Chief Justice of India, judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest is the main concern.\textsuperscript{924} The supporters also maintain that India’s democratic socialism has been protected and promoted by judicial activism. The courts have been successful in doing this by reading substance into otherwise formal guarantees of the Constitution. The Supreme Court has employed its writ jurisdiction under Article 32 of the Indian Constitution extensively, and has expanded the reach of these powers through its hearings of PIL writ petitions filed directly to the Court. The Court uses this creative activism effectively to make national policy. Through this type of activity, the Court has been heralded as an important agent for social change, and is often portrayed as revolutionary.\textsuperscript{925}

S.P. Sathe considering this controversy maintains that it is a conflict between democracy and judicial review. In fact, because the power of judicial review is essentially counter-majoritarian, such a conflict is inherent. This power gives the judges the right to examine the Acts of the popularly elected legislature to find whether they violate any of the citizen’s fundamental rights. In a country with a written Constitution containing a bill of rights, this power is bound to acquire larger dimensions. Democracy means rule by majority but it does not mean rule of the majority. The justness of judgments issued by the courts cannot be determined by the number of citizens who are in favor of it.\textsuperscript{926} Accordingly, Sathe concludes,

Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. It also

\textsuperscript{925} Cassels, \textit{supra} note 658, p. 503.
\textsuperscript{926} Sathe, \textit{supra} note 391, p. 79.
must function within the limits of the judicial process. Within these limits, it performs the function of legitimizing.\textsuperscript{927}

According to Sathe, with all the lapses of the judicial process, it seems that it is more legitimate than the political process, because, although people know the courts may make wrong decisions, may exceed their determined limits or may not always be fair, their experiences tell them such instances are exceptional. This widely shared belief in the fairness of the courts and their decisions is the meaning of the legitimacy of judicial activism.\textsuperscript{928}

Conclusion

Constitutional review in India is inspired by the American judicial review; however, in contrast to the United States, the Constitution of India has explicitly given the Supreme Court and the High Courts the power to supervise the constitutionality of laws.

Independence of the Judiciary is now the basic structure of the Indian Constitution. Appointing the most qualified persons as the judges of the courts, the manner of appointing them, the length of their tenure, the difficult procedure for the removal of judges, the difficult procedure for their transfer, and several other constitutional provisions have been made to ensure the judicial independence.

The judicial review power in India is exercised by relying on two different concepts. The first concept is “Fundamental Rights” which is invoked to examine the ordinary laws enacted by the Parliament and the State Legislatures, and the second one is “Basic Structure” which is utilized to control the Constitutional Amendments enacted by the Parliament.

India’s set of fundamental rights guaranteed in Part III of the Constitution is, in effect, its counterpart to the American Bill of Rights. They form the basic structure of the Constitution and, therefore, they may be abridged by Constitutional Amendment but cannot be abrogated or destroyed. For the

\textsuperscript{927} Ibid., p. 310.
\textsuperscript{928} Ibid., p. 307.
enforcement of the fundamental rights, special remedies including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari have been provided. Any person whose fundamental right is violated can directly move the Supreme Court for an appropriate remedy. This traditional rule of locus standi has been considerably relaxed by the Supreme Court after the Emergency period.

Judicial review in India is of a posteriori and concrete type. The Supreme Court’s decision is the final word in a case. The law declared by the Court is an authoritative precedent binding on all subordinate courts. A statute that is inconsistent with the Constitution is not wiped out entirely from the statute book. Therefore, if by the subsequent Constitutional Amendment the inconsistency is removed, the law will become enforceable. Therefore, although the Indian courts can declare the unconstitutional Acts null and void, Parliament can effectively nullify judicial verdicts through amending the Constitution.

Before Emergency period (1975), particularly in the early years of its formation, the Supreme Court had a positivist role. Favoring a western-influenced libertarianism, the Supreme Court during this period appeared to be a vigorous defender of property rights, but was significantly less protective of individual rights under the Constitution’s due process guarantee. In this period, the Gopalan approach, declaring that the due process standard contained in Article 21 was limited to matters of procedure, was prevailing. This approach was applied in the subsequent cases during the years 1950-70. However, the Court tried to move slowly towards an activist approach.

During the Emergency, Parliament passed several Constitutional Amendments, such as the 42nd Amendment, to eliminate judicial review of several laws violating fundamental rights. The Supreme Court acquiesced in virtually all of the Government’s encroachments. The Court also refused to hear a challenge to an Amendment as contrary to the basic structure of the Constitution.
After the end of the Emergency in 1977, the Supreme Court, to regain its legitimacy, drastically shifted from its passive stance during the Emergency and loudly championed the fundamental rights, interpreting them in a decidedly egalitarian way in several leading cases. In this period, a major part of the activism by the Supreme Court involved the nature and conditions of individual rights. In *Maneka Gandhi* the Supreme Court rejected the *Gopalan* approach to the protection of personal liberty embodied in Article 21 and declared that Article 21 allows both a procedural and a substantive evaluation of law. In fact, the reinterpretation connected the meaning of the Article 21 due process guarantee with the Article 14 equality guarantees and the Article 19 protections of fundamental liberties so that Article 21 came to be used as a means for evaluating the substance of legislation in light of equality and liberty. The new approach to Article 21 created some new rights such as the right to a livelihood, the right to be free from exploitation, and the right to legal aid, and so on.

However, in some cases relating to the secularism, such as the *Hindutva* cases (Election Cases) as well as the *Ayodhya* case (*Ismail Faruqui*), the Court has failed to act effectively, because it chose a more passive form of secularism in these cases and showed more acute clemency towards the majoritarian view of secularism. While interpreting the provisions of the election law, it appears to have adopted a very formal approach. In addition, the Indian Supreme Court is charged mostly with usurping both Legislative and Executive functions and violating the rule of law, although the Court and its supporters claim that what the Court is doing is making up for the shortcomings of the national legislative process. However, supporters of the Court and judicial activism assert that the Court merely performs its legitimate function.