Chapter - III

JUDICIAL INTERPRETATION
OF SEPARATION OF
JUDICIARY JUDICIAL REVIEW
CHAPTER III

JUDICIAL INTERPRETATION OF SEPARATION OF JUDICIARY AND JUDICIAL REVIEW

3.1 General Introduction: The Judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature by the legislature and the executive and also they try to provide every citizen what has been promised by the Constitution under the Directive Principles of State Policy. All this is possible thanks to the power of judicial review. All this is not achieved in a day it took 50 long years for where we are right now, if one thinks that it is has been a roller coaster ride without any hindrances they are wrong judiciary has been facing the brunt of many politicians, technocrats, academicians, lawyers etc. Few of them being genuine concerns, and among one of them is the aspect of corruption and power of criminal contempt. In this paper I would try to highlight the ups and downs of this greatest institution in India.

The rule of law is the bedrock of democracy, and the primary responsibility for implementation of the rule of law lies with the judiciary. This
is now a basic feature of every constitution, which cannot be altered even by
the exercise of new powers from parliament. It is the significance of judicial
review, to ensure that democracy is inclusive and that there is accountability
of everyone who wields or exercises public power theme of uneasiness, and
even of guilt, colors the literature about the judicial review. Many of those who
have talked, lectured, and written about the Constitution have been troubled
by a sense that judicial review is "undemocratic". They argue that the strength
of the courts has weakened other parts of the government\(^1\). This legal debate
raises the important and inevitable question that how far this statement holds
true about judicial review powers and capacities of the Indian Judiciary.

The Indian Constitution, like other written Constitutions, follows the
concept of "Separation of powers" between the three sovereign organs of the
Constitution. The doctrine of separation of powers stated in its rigid form
means that each of the organ of the Constitution, namely, executive, legislature and judiciary should operate in its own sphere and there should be
no overlapping between their functioning. The Indian Constitution has not
recognized the doctrine of separation of powers in its absolute form but the
functions of the different organs have been clearly differentiated and
consequently it can very well be said that our Constitution does not
contemplate assumption, by one organ of the functions that essentially
belongs to another\(^2\). Though the Constitution has adopted the parliamentary
form of government, where the dividing line between the legislature and the
executive becomes thin, the theory of separation of powers is still valid\(^3\).

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\(^1\) Eugene V. Rostow: The democratic character of the judicial review ((1952) 66 Harv. L.R.
p.193.)

\(^2\) Ram Jawaya v State of Punjab, AIR 1955 SC 549, at 555

3.1.1 Independence of Judiciary Even though the Constitution of India does not accept strict separation of powers, it provides for an independent judiciary with extensive jurisdiction over the acts of the legislature and the executive. Independent judiciary is the most essential attribute of rule of law and is indispensable to sustain democracy. Independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but also to the people at large who seek judicial redress against perceived legal injury or executive excess. Judicial review is the basic structure, independent judiciary is the cardinal feature, and an assurance of faith enshrined in the Constitution. The need for independent and impartial judiciary is the command of the Constitution and call of the people. The subordinate judiciary is a complement to constitutional courts as part of the constitutional scheme and plays a vital part in dispensation of justice. Thus, subordinate courts are integral part of the judiciary under the constitution.

In Ajay Gandhi v B. Singh the Supreme Court extended the “theory of independence” to Tribunals performing judicial functions. The court observed: “The functions of the Tribunal being judicial in nature, the public have a major stake in its functioning, for effective and orderly administration of justice. A Tribunal should, as far as possible, have a judicial autonomy. The relevant provisions have conferred a statutory power upon the president to constitute Benches. The appellate Tribunal is a National Tribunal. The President, subject to delegation of powers senior Vice-President or the Vice-President, exercises the administrative control over the members thereof. The benches are to be constituted only by the President. No other authority is empowered to do so. Keeping in view the fact that the independence of the Tribunal is

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6 2004 (1) SCALE 84.
essential for maintaining its independence, any power which may be
certified upon the executive authority must proved to be in the interest of
imparting justice. We are of the view that this long-standing practice should be
allowed to prevail over the stand of the respondents herein. However, we are
of the opinion that by reason thereof, the President cannot be said to have an
unguided, unfettered and unlimited jurisdiction as the same may be flawed
with great consequences*.

3.2. Judicial Review

3.2.1 Scope and components of judicial review: Broadly speaking, judicial
review in India comprises of three aspects: judicial review of legislative action,
judicial review of judicial decisions and judicial review of administrative action.
The judges of the superior courts have been entrusted with the task of
upholding the Constitution and to this end, have been conferred the power to
interpret it. It is they who have to ensure that the balance of power envisaged
by the Constitution is maintained and that the legislature and the executive do
not, in the discharge of functions, transgress constitutional limitations7. Thus,
judicial review is a highly complex and developing subject. It has its roots long
back and its scope and extent varies from case to case. It is considered to be
the basic feature of the Constitution. The court in its exercise of its power of
judicial review would zealously guard the human rights, fundamental rights
and the citizens' rights of life and liberty as also many non-statutory powers of
governmental bodies as regards their control over property and assets of
various kinds, which could be expended on building, hospitals, roads and the
like, or overseas aid, or compensating victims of crime8.

In Union of India v K.M. Shankarappa the Supreme Court held that the provision for revision by Central Government of decisions of the Appellant Tribunal under Section 6(1) of the Cinematograph Act, 1952 is unconstitutional. The Supreme Court observed: "The Government has chosen to establish a quasi-judicial body which has been given the powers, inter alia, to decide the effect of the film on the public. Once a quasi-judicial body like the Appellate Tribunal gives its decision, that decision would be final and binding so far as the executive and the government is concerned. To permit the executive to review or revise that decision would amount to interference with the exercise of judicial functions by a quasi-judicial board. It would amount to subjecting the decision of a quasi-judicial body to the scrutiny of the executive. Under the Indian Constitution, the executives have to obey the judicial orders. Thus, Section 6(2) is a travesty of the rule of law, which is one of the basic structures of the Constitution. The legislature may, in certain cases, nullify a judicial or executive decision by enacting an appropriate legislation. However, without enacting an appropriate legislation, the executive or the legislature cannot set at naught a judicial order. The executive cannot sit in an appeal or review or revise a judicial order. At the highest, the government may apply to the Tribunal itself for a review, if circumstances so warrant. But the government would be bound by the ultimate decision of the Tribunal".

In the landmark judgment of Peoples Union for Civil Liberties v Union of India Justice Shah observed: "The legislature in this country has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts. The legislature may remove the defect, which is the cause for invalidating the law by the court by appropriate legislation if it has

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9 Ibid.
10 2003 (3) SCALE 263.
power over the subject matter and competent to do so under the Constitution. The primary duty of the judiciary is to uphold the Constitution and the laws without fear or favour, without being biased by political ideology or economic theory. Interpretation should be in consonance with the constitutional provisions, which envisage a republic democracy. Survival of democracy depends upon free and fair election. It is true that political parties fight elections, yet elections would be farce if the voters were unaware of antecedents of candidates contesting elections. Such election would be neither free nor fair.

These bold words of Justice Shah reflect the status, which the Indian judiciary is holding in the Indian Constitutional set up. The constitution makers have reposed great confidence and trust in Indian judiciary by conferring on it such powers as have made it one of the most powerful judiciary in the world. The Supreme Court has from time to time indulged in genuine and needful judicial activism and judicial review. It gave birth to the famous and most needed "Doctrine of basic Structure". The need of the changing society encouraged it to formulate and incorporate various theories, which originated outside India. One of such theory, which has great practical and social significance in India, is the "Doctrine of proportionality". The said doctrine originated as far back as in the 19th century in Russia and was later adopted by Germany, France and other European countries. By proportionality, it is meant that the question whether while regulating the exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the
rights, liberties or interests of persons keeping in mind the purpose for which they were intended to serve.\footnote{11}{Teri Oat Estates (p) Ltd v U.T. Chandigarh (2004) 2 SCC 130.}

The court as far back as in 1952 in State of Madras v V.G.Row\footnote{12}{AIR 1952 SC 196.} observed: "The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all the cases. The nature of right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at that time, should all enter the judicial verdict. In evaluating such elusive factors and forming their own conceptions of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judge participating in the decision would play an important part, and limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable." Ever since 1952, the principle of proportionality has been applied vigorously to legislative and administrative action in India. Thus, administrative action in India affecting the fundamental rights has always been tested on the anvil of the proportionality in the last 50 years even though it has not been expressly stated that the principle that is applied is the
proportionality principle. In Om Kumar v Union of India\textsuperscript{13}, however, the Apex Court evolved the principle of primary and secondary review. The doctrine of primary review was held to be applicable in relation to the statutes, statutory rules, or any order, which has force of statute. The secondary review was held to be applicable inter alia in relation to the action in a case where the executive is guilty of acting arbitrarily. In such a case Article 14 of the Constitution of India would be attracted\textsuperscript{14}. In relation to other administrative actions, as for example punishment in a departmental proceeding, the doctrine of proportionality was equated with Wednesbury's unreasonable\textsuperscript{15}.

In Delhi Development Authority v M/S UEE Electricals Engg.P.Ltd\textsuperscript{16} the Supreme Court dealt with the judicial review of administrative action in detail. The court observed: "One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality"; the second "irrationality"; and the third "procedural impropriety". Courts are slow to interfere in matters relating to administrative functions unless decision is tainted by any vulnerability such as, lack of fairness in the procedure, illegality and irrationality. Whether action falls in any of the categories has to be established. Mere assertion in this regard would not be sufficient. The law is settled that in considering challenge to administrative decisions courts will not interfere as if they are sitting in appeal over the decision. He who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are

\textsuperscript{13} (2001) 2 SCC 386.
\textsuperscript{15} The famous case Associated Provincial Picture Houses Ltd v Wednesbury Corpn (KB at .229:ALL ER p. 682) commonly known as "The Wednesbury's case" is treated as the landmark so far as laying down various basic principles relating to judicial review of the administrative or statutory direction.
\textsuperscript{16} 2004 (3) SCALE 585.
often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility”.

The administrative orders must also satisfy the rigorous tests of the “doctrine of legitimate expectation”. The principle of legitimate expectation is at the root of the rule of law and requires regularity, predictability and certainty in government’s dealings with the public. For a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either:

(i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rationale grounds for withdrawing it or where he has been given an opportunity to comment; or

(ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made than a benefit of substantive nature will be granted or if the person is already in receipt of the benefit than it will be continued and not be substantially varied, then the same could be enforced. An exception could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a
representation to an individual or to a class of persons. Another effective tool in the hands of judiciary, to test the validity of legislation, is to invoke the principle of "reading down". The rule of reading down a provision of the law is now well established and recognized. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing the creases found in a statute to make it workable. In the garb of reading down, however, it is not open to read words or expressions not found in it and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfill its purposes.

In B.R. Enterprises v State of U.P. the Supreme Court observed: "First attempt should be made by the courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretation leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavoring, sometimes to give restrictive or expansive meaning keeping in view the nature of the legislation. Cumulatively, it is to sub serve the object of the legislation. Old golden rule is of respecting the wisdom of the legislature, that they are aware of the law and would never have intended for an invalid legislation. This also keeps the courts within their track and checks. Yet inspite of this, if the impugned legislation cannot be saved, the courts shall not hesitate to strike it down. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. The principle of reading down, however, will not be available where the plain and literal

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meaning from a bare reading of any impugned of any impugned provision clearly shows that it confers arbitrary or unbridled power. It must be appreciated that a statute carries with it a presumption of constitutionality. Such a presumption extends also in relation to a law, which has been enacted for imposing reasonable restrictions on the fundamental rights. A further presumption may also be drawn that the statutory authority would not exercise the power arbitrarily. Further, where a power is conferred upon a higher authority, a presumption can be raised that he would be conscious of his duties and therefore will act accordingly. These presumptions have to be rebutted before an allegation of unconstitutionality of a statute can be sustained.

3.2.2 Limits of Judicial Review: It is true that the courts have wide powers of judicial review of Constitutional and statutory provisions. These powers, however, must be exercised with great caution and self-control. The courts should not step out of the limits of their legitimate powers of judicial review. The parameters of judicial review of Constitutional provisions and statutory provisions are totally different. In J.P. Bansal v State of Rajasthan the Supreme Court observed: "It is true that this court in interpreting the Constitution enjoys a freedom which is not available in interpreting a statute. It endangers continued public interest in the impartiality of the judiciary, which is essential to the continuance of rule of law, if judges, under guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matters come consider to be injurious to public interest. Where the words are clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no

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22 2003(3) SCALE 154.
scope for the court to innovate or to take upon itself the task of amending or altering the statutory provisions. In that situation the judge should not proclaim that they are playing the role of lawmaker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so”.

If case the court forgets to appreciate this judicial wisdom, it would undermine the constitutional mandate and will disturb the equilibrium between the three sovereign organs of the Constitution. In *State (Govt of NCT of Delhi) v Prem Raj*\(^{23}\) the Supreme Court took a serious note of this disturbing exercise when the High Court commuted the sentence by transgressing its limits. The court observed “The power of commutation exclusively vests with the appropriate government. The appropriate government means the Central government in cases where the sentence or order relates to a matter to which the executive power of the Union extends, and the state government in other cases. Thus, the order of the high Court is set aside”.

Similarly, in *Syed T.A. Haqshbandi v State of J&K*\(^{24}\) the Supreme Court observe: “Judicial review is permissible only to the extent of finding whether the process in reaching the decision has been observed correctly and not the decision itself, as such. Critical or independent analysis or appraisal of the materials by the court exercising powers of judicial review unlike the case of an appellate court would neither be permissible nor conducive to the interests of either the officer concerned or the system and institutions. Grievances must be sufficiently substantiated to have firm or concrete basis on properly

\(^{23}\) (2003) 7 SCC 121.
\(^{24}\) (2003) 9 SCC 592.
established facts and 'further proved to be well justified in law, for being
countenanced by the court in exercise of its powers of judicial review. Unless
the exercise of power is shown to violate any other provision of the
Constitution of India or any of the statutory rules, the same cannot be
challenged by making it a justiciable issue before the court". The courts are
further required not to interfere in policy matters and political questions unless
it is absolutely essential to do so. Even then also the courts can interfere on
selective grounds only. In Peoples Union for Civil Liberties v Union of India the
Supreme Court observed: "This court cannot go into and examine the
need of Prevention of Terrorism Act. It is a matter of policy. Once legislation is
passed, the government has an obligation to exercise all available options to
prevent terrorism within the bounds of the Constitution. Moreover, mere
possibility of abuse cannot be counted as a ground for denying the vesting of
powers or for declaring a statute unconstitutional".

Similarly, in Union of India. v International Trading Co the Supreme
Court observed: "Article 14 of the Constitution applies also to matters of
government policy and if the policy or any action of the government, even in
contractual matters, fails to satisfy the test of reasonableness, it would be
unconstitutional. While the discretion to change the policy in exercise of the
executive power, when not trammelled by any statute or rule is wide enough,
what is imperative and implicit in terms of Article 14 is that a change in policy
must be made fairly and should not give the impression that it was so done
arbitrarily or by any other ulterior criteria. The wide sweep of Article 14 and
the requirement of every state action qualifying for its validity on this
touchstone, irrespective of the field of activity of the state, is an accepted
tenet. The basic requirement of Article 14 is fairness in action by the state,

2003 (10) SCALE 967.
and non-arbitrariness in essence and substance is the heartbeat of fair play. Every state action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary".

Similarly, where a political question is involved, the courts normally should not interfere. It is also equally settled law that the court should not shrink its duty from performing its functions merely because it has political thicket\textsuperscript{27}. Thus, merely because the question has a political complexion that by itself is no ground why the court should shrink from performing its duty under the constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. So large as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so\textsuperscript{28}.

In B.R. Kapur v State of T.N\textsuperscript{29} the Supreme Court held that it is the duty of the court to interpret the Constitution. It must perform the duty regardless of the fact that the answer to the question would have a political effect. The role model for governance and decision taken thereon should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but also must create an impression that the decision-making was motivated on the consideration of probity. The government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The act of governance has to withstand the test of judiciousness and impartiality and

\textsuperscript{27} Peoples Union for Civil Liberties v Union of India, AIR 2003 SC 2363.
\textsuperscript{28} State of Rajasthan v Union of India, (1973) 3 SCC 592.
\textsuperscript{29} (2001) 7 SCC 231.
avoid arbitrary or capricious actions. Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play. Though on the face of it the decision may look legitimate but as a matter of fact the reasons may not be based on values but to achieve popular accolade that decision cannot be allowed to operate.

The Constitution of India envisages separation of power between the three organs of the Constitution so that the working of the constitution may not be hampered or jeopardized. This thin and fine line of distinction should never be ignored and transgressed upon by any of the organ of the Constitution, including the judiciary. This rigid perception and practice can be given a go by in cases of "abdication of duties" by one of the organ of the Constitution. Thus, the judiciary can interfere if there is an abdication of duties by the legislature or the executive. For instance, if the legislature delegates its essential and constitutional functions to the executives, it would amount to "excessive delegation" and hence abdication of the legislative functions by the legislature. In such cases, the theory of separation of powers would not come in the way of judiciary while exercising the power of judicial review.

This is more so, when the Constitution makers have conferred the important sovereign function of interpretation of the constitution and various statutes upon the judiciary. The Constitutional courts can even scrutinize the working of the lower courts besides analyzing legislative and executive actions. The superior courts, like High Courts and the Supreme Court, can issue various writs to control the functioning of lower judiciary. Besides, the High Court has supervisory jurisdiction over the lower courts. However, the High court cannot issue a writ against another High court. Similarly, the decision of the High Court or the Supreme Court cannot be questioned by

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30 Onkarlal Bajaj v Union of India, AIR 2003 SC 2562.
way of a writ proceeding. Thus, a final decision of the Supreme Court cannot be questioned under Article 32 of the constitution of India, except by way of review petition. The Supreme Court in Rupa Ashok Hurra v Ashok Hurra\(^3\) has judicially created an exception to this rule in the form of a "curative petition". Thus, a curative petition can be filed before the Supreme Court under Article 32 in appropriate cases. The Supreme Court only in exceptional cases would exercise this power. This fantastic judicial innovation is based on the premises that no person should suffer due to the mistake of the court. Similarly, an order passed by the court without jurisdiction is a nullity and any action taken pursuant thereto would also be nullity. A party cannot be made to suffer adversely either directly or indirectly by reason of an order passed by any court of law, which is not binding, on him\(^3\).

The power to entertain a curative petition is not specifically conferred by the Constitution but can be exercised by the apex court under its inherent powers. This means that the Constitution is organic and living in nature. It is also well settled that the interpretation of the Constitution of India or statutes would change from time to time. Being a living organ, it is ongoing and with passage of time, law must change. New rights may have to be found out within the constitutional scheme. It is established that fundamental rights themselves have no fixed content; most of them are empty vessels into which each generation must pour its contents in the light of its experience. The attempt of the court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. There cannot be any distinction between the fundamental rights mentioned in Chapter III of the Constitution and the declaration of such rights on the basis of the judgments

rendered by the Supreme Court\textsuperscript{33}. Thus, horizons of constitutional law are expanding. In State of Maharaashtra v Dr Praful B. Desai\textsuperscript{34} the Supreme Court observed: "It is presumed that the Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law".

At this stage the words of Justice Bhagwati in the case of National Textiles Workers Union v P.R.Ramakrishnan\textsuperscript{35} need to be set out. They are: "We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree it will shed that bark and grow a living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law, which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast-changing society and not lag behind". It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation\textsuperscript{36}. These changed circumstances may also create a vacuum in the legal system, which has to be suitably filled up by the legislature. If the legislature fails to meet the need of the hour, the courts may

\textsuperscript{33} Peoples Union for Civil Liberties v Union of India, (2003) (3) SCALE 263.
\textsuperscript{34} (2003) 4 SCC 601.
\textsuperscript{35} (1983) 1 SCC 228.
interfere and fill-in the vacuum by giving proper directions. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. Thus, directions given by the court will operate only till the law is made by the legislature and in that sense temporary in nature. Once legislation is made, the court has to make an independent assessment of it. In embarking on this exercise, the points of disclosure indicated by this court, even if they be tentative or ad hoc in nature, should be given due weight and substantial departure there from cannot be countenanced. The courts may also rely upon International treaties and conventions for the effective enforcement of the municipal laws provided they are not in derogation with municipal laws.

The above discussion unerringly points towards the permissibility and democratic nature of the judicial review in India. The judicial review in India is absolutely essential and not undemocratic because the judiciary while interpreting the constitution or other statutes is expressing the will of the people of India as a whole who have reposed absolute faith and confidence in the Indian judiciary. If the judiciary interprets the Constitution in its true spirit and the same goes against the ideology and notions of the ruling political party, then we must not forget that the Constitution of India reflects the will of the people of India at large as against the will of the people who are represented for the time being by the ruling party. If we can appreciate this reality, then all arguments against the democratic nature of the judicial review would vanish. The judicial review would be undemocratic only if the judiciary ignores the concept of separation of powers and indulges in "unnecessary and undeserving judicial activism". The judiciary must not forget its role of being an interpreter and should not undertake and venture into the task of

38 Per P.V.Reddi,J in Peoples Union for Civil Liberties v Union of India, 2003(3) SCALE 263: JT 2003 (2) SC 528(Para 122).
lawmaking, unless the situation demands so. The judiciary must also not ignore the self-imposed restrictions, which have now acquired a status of "prudent judicial norm and behaviour". If the Indian judiciary takes these two "precautions", then it has the privilege of being the "most democratic judicial institution of the world, representing the biggest democracy of the world". Holding that there was no limit to judicial review, Supreme Court Chief Justice K G Balakrishnan has ruled out the question of having any compulsory annual declaration of wealth and assets by judges of the apex court and high courts. No self-respecting judge would accept the idea of such compulsory declaration or have any committee of lay persons to probe the conduct of the judiciary, Justice Balakrishnan maintained in an interview to a private TV channel. Welcoming the proposed National Judicial Council intended for enforcing judicial accountability, the Chief Justice, however, rejected the idea of involving any lay persons in the Council.

"It is a question of independence of the judiciary. If any other person conducts such an inquiry about any judge, it will cause serious encroachment into the independence of the judiciary. I personally believe if anyone else inquires into the allegations against the judges and imposes punishment, I don't think any self-respecting judge would like it. On the power of judicial review, the CJI observed, "There is no limit as such. Any Parliamentary legislation could be challenged but then the grounds for judicial review are limited." Justice Balakrishnan, however, clarified that nobody should jump to any conclusion that the legislation providing for 69 per cent reservations in Tamil Nadu would be struck down in view of the apex court's historic ruling in the Ninth Schedule case. To another query on the Centre's attempt to ignore the October 2006 judgment in the Nagaraj case wherein the apex court had asked the government to exclude the creamy layer from the reservation
benefits, Justice Balakrishnan hinted that any such disobedience of its orders could invite contempt proceedings.

'Judiciary Unlimited'- an unelected judiciary which is not accountable to anyone except its own temperament has taken over significant powers of Indian Governance. Conflict between the judiciary, legislature and the executive has been extant since 1950 and attempts of drawing the line have been dropped including the Judges (Inquiry) Bill, 2006. The courts have gone well beyond ensuring that laws are implemented. Now, the Supreme Court has invented its own laws and methods of implementation, gained control of bureaucracy and threatened officers with contempt of court if its instructions are not complied with. The question is not whether some good has come out of all this. The issue is whether the courts have arrogated vast and uncontrolled powers to themselves which undermine both Democracy and Rule of Law, including the powers exercised under the Doctrine of Separation of powers.

Our constitution is a very well-built document. It assigns different roles to all the three wings of governance- the legislature, executive and the judiciary. There is no ambiguity about each wing's powers, privileges and duties. Parliament has to enact law, Executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping. The Judiciary versus the Executive or legislature is a battle which is not new but in recent times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash-point. The first Salvo was fired by the Lok Sabha Speaker, Som Nath Chatterjee who accused the Judiciary for interfering in the legislative matters and stated publicly that 'every one has to remain within the Laxman Rekha of the Constitution'. A conflict nevertheless arises in practical application of statutes.
that can sometimes be overstepping. Who is then to decide? Who has been entrusted with the responsibility of conflict resolution in such cases? Ultimately it is the judiciary to decide whether there has been a trespass in each other’s territories. And while taking such decisions the judiciary should keep within the tenet of the Constitution.

Under Article 121 of the Constitution, the conduct of a judge cannot be debated in the Parliament. There is a separate procedure for impeachment; this is with the intention to secure the independence of the judiciary. Similarly, under Article 122, the proceedings of the parliament cannot be questioned by the judiciary— even if a point of order is found contrary to the statute. This is indirectly envisaging the supremacy of the legislature in making laws, based on reasonable policies that cannot be questioned. Nehru was engaged at the Supreme Court over agrarian legislations, whereas Mrs. Gandhi wanted a ‘committed’ judiciary (1969-75). The Judiciary has failed the nation during the time of Emergency (1975-77) but invented public interest litigation (hereinafter referred to as Public Interest Litigation) to project a new image of itself. Has the Supreme Court gone too far? Public Interest Litigation started with a limited focus but has expanded into whatever areas the court wishes to engage. This tool of Judicial review was also used to implement promote Judicial Activism, but without any Judicial accountability. It was after the First amendment that the tussle of limits on the power of these wings started. This resulted in the judiciary creating a Constitutional dustbin for all the unconstitutional actions. This tussle resulted in landmark judgments of Indira Gandhi, Golaknath, and Keshavananda and also laid down the basic structure doctrine. Where, Separation of Powers was also made the basic structure of the constitution.
Therefore, an argument based in the extracts from the constitution indicating the supremacy of one wing is completely absurd and misses the high ideals of democracy envisaged by the framers of the constitution. India is a democracy and it has to be and should be governed by elected representatives and not merely judges, amicus curiae or committees and commissions that is accountable to the Supreme Court. The bottom line remains that the judiciary should go after established wrongs, instead of going after there enforcement. The Conflict of the wings unless resolved, would result in repercussions for governance. It’s time for Judge’s (Inquiry) Bill, 2009.

3.3 Separation of Powers: In the context of Separation of Power, judicial review is crucial and important. We have three wings of the state- Judiciary, Legislature and Executive (not necessarily in that order) with their function clearly chalked out in our constitution. Article 13 of the constitution mandates that the ‘State shall make no law, which violates, abridges or takes away rights conferred under Part III’. This implies that both the Legislature and the Judiciary in the spirit of the words can make a Law. But under the theory of checks and balances, the judiciary is also vested with the power to keep a check on the laws made by the legislature. Hence, the introduction of Judicial Review. But where is the judicial accountability of a judicial review. The Judge is accountable to no one, not even to another judge, the question of legislature and executive does not arise. There is supremacy of the constitution that prevails, but the limit of such supremacy has too been left to a judge to decide. The issue is whether any amendment or any ordinary law is put beyond the scrutiny of judicial review? Frictions between the wings of the state are indeed not new. Every department justifies its actions ‘as per the
provisions of the constitution'. But, finally, it is the judiciary that has a firm foot in interpreting the constitution, and this was reiterated by nine judge bench. 30

The Rule of law pre-supposes that the state is constituted in these three distinct organs. One of the important facets of the Doctrine of Separation of Power is the independence of the judiciary which gives teeth to the maintenance of rule of law. Alexander Hamilton in Federalist 78 remarks 40 on the importance of the independence of the judiciary to preserve the separation of power in the following words: “The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited constitution, I understand one which contains certain specified exception to the legislative authority; such for instance that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than the courts of justice, whose duty must be to declare all acts contrary to the manifestation tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”

Montesquieu finds that tyranny pervades when there is no separation of powers, I quote: “There would be an end of everything, where the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting the laws, that of executing the public resolution and typing the causes of individuals.” The Supreme Court of India has held the Separation of Power as the basic Structure of the Constitution. 41 And even before the doctrine of Basic Structure was propounded, the importance of

30 Coelho I.R. v. Union of India (2007) 2 SCC 1
40 Quoted by the Supreme Court in I.R. Coelho v. Union of India(2007) 2 SCC 1
Separation of Power was illustrated by the Supreme Court in the Re-Special Reference No. 1 of 1964\textsuperscript{42} (Legislative Privilege Case).

In an unprecedented move, the Chief Justice of India, Justice K.G. Balakrishnan, wrote to the Prime Minister, Manmohan Singh, recommending that the proceedings contemplated by Article 217(1) read with Article 124(4) of the Constitution be initiated for removal of Justice Soumitra Sen, Judge, Calcutta High Court. Earlier, an in-house committee, in a report submitted to the Chief Justice of India on February 1, recommended that Justice Sen be removed from office. The committee comprised Justice A.P. Shah (then Chief Justice, Madras High Court), Justice A.K. Patnaik (Chief Justice, Madhya Pradesh High Court) and Justice R.M. Lodha (Judge, Rajasthan High Court). Under Article 217(1) (b) of the Constitution, a Judge of the High Court may be removed from office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court.

Article 124(4) states: "A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity." The procedure for removing a Judge involves three stages. In the first stage, under the Judges (Inquiry) Act, 1968, a notice for presenting an address to the President for the removal of a Judge has to be signed by 100 members of the Lok Sabha, and submitted to the Speaker. A similar notice can also be signed by 50 members of the Rajya Sabha and submitted to the Chairperson of the Rajya Sabha. If the Speaker or the

\textsuperscript{42} (1965) 1 SCR 413.
Chairperson admits the motion, he must appoint a three-member committee comprising the sitting Chief Justice of India or a sitting Judge of the Supreme Court, a sitting Chief Justice of a High Court, and an eminent jurist.

In the second stage, the committee takes over the investigation into the charges of misbehaviour against the Judge. If the committee reports that the Judge is not guilty, the motion pending in the House shall not be pursued. It is only if the Committee finds the Judge guilty of any of the charges of misbehaviour that Article 217(1)(b) or 124(4) comes into play, in the third stage.

3.3.1 Jurisdictional Issues: It is instructive to recall the role of an in-house committee constituted by Chief Justice Sabyasachi Mukherji when audit reports in 1990 carried detailed charges against Justice V. Ramaswami regarding improper use of funds by him as the Chief Justice of the Punjab and Haryana High Court, before his elevation as a Supreme Court Judge. This committee, comprising three Supreme Court Judges, inquired whether or not, in the interest of the administration of justice, Justice Ramaswami should continue as a Judge of the Supreme Court. At the beginning of the inquiry itself, Justice Ramaswami told the committee that it had no jurisdiction to hold an inquiry into his conduct. The committee, nevertheless, found that there was no prima facie case before it since inquiries by competent authorities were going on. Ramaswami maintained a studied silence over the charges against him. Subsequently, the inquiry committee set up by the Speaker of the Lok Sabha found that the charges against him were substantially true. Parliament, however, failed to remove him from office because the then ruling party, the Congress, had orally directed its members to abstain from voting on the motion in the Lok Sabha on May 11, 1993, thus leading to the defeat of the motion.
Justice Soumitra Sen was a practising advocate of the Calcutta High Court before he was appointed a Judge of that High Court on December 3, 2003. The charges against him pertain to his conduct as Receiver before his appointment as Judge. A Receiver is an impartial person appointed by the court to collect and receive the rents and profits of land or personal estate, and to protect, preserve and manage property during the pendency of a suit. A Receiver is an officer of the court and subject to its orders. The in-house committee constituted by the Chief Justice of India has in its report accused Justice Sen of breach of trust and misappropriation of Receiver’s funds for personal gain. In 1983, Steel Authority of India Limited (SAIL) filed a money suit in the Calcutta High Court against Shipping Corporation of India Limited, and others, seeking that it make an inventory of fire bricks lying at Bokaro Steel Plant and sell them. The High Court, on April 30, 1984, appointed Soumitra Sen as a Receiver to make an inventory of these goods, which had been imported and then rejected by SAIL, and to sell them and hold the sale proceeds to the credit of the suit. The court directed Soumitra Sen to deduct 5 per cent of the sale price towards his remuneration as Receiver, keep the balance in a separate bank account in a bank of his choice and to hold the same free from lien or encumbrances, subject to the further orders of the court. The in-house committee found that Soumitra Sen did not have honest intention, since he mixed the money received as Receiver and his personal money and converted the Receiver’s money to his own use; and that there had been misappropriation (at least temporary) of the sale proceeds.

On April 10, 2006, Justice Kalyan Jyoti Sengupta of the High Court, on a petition from SAIL, directed Justice Sen to repay Rs.57,65,204, which included interest amounting to Rs.26,25,644 (since the purchase consideration was Rs.31,39,560). In his judgment, Justice Sengupta made
several adverse remarks against Justice Sen. After paying the entire money as directed, Justice Sen went on leave. After the expiry of the leave, no judicial work was allotted to him. Meanwhile, a Division Bench heard his appeal against Justice Sengupta's judgment and found that there was no material to hold that he had misappropriated any amount or had made any personal gain. The Division Bench directed deletion of all observations made against Justice Sen in Justice Sengupta's order. Interestingly, none of the parties to the litigation contested the proceedings before the Division Bench or made any allegations against Justice Sen.

The Chief Justice of India's letter to the Prime Minister recalls this factual matrix but does not explain why the Division Bench's judgment could not be considered final. Legal experts say it is because the Division Bench's judgment was not appealable and was seen as collusive that the Supreme Court had to step in, by constituting the in-house committee. Justice Sen's critics point out that he ought to have returned the money held by him as Receiver before he was appointed as a Judge. But sources close to Justice Sen said the money held by him as Receiver was not his personal property irrespective of the place he had kept it and could only be returned after proper adjudication and a direction by the court. The sources also added that there was no mala fide intention on Justice Sen's part and there was absolutely no proof whatsoever that he utilised any part of the purchase consideration for personal gain. The Chief Justice of India has forwarded a copy of the committee's report to Justice Sen. A fair appreciation of the case for Justice Sen's removal from office may have to wait until this report is made public.

The Chief Justice of India's letter to the Prime Minister indicates his keenness to strengthen the people's confidence in Judges at a time when serious cases of judicial corruption have cast their shadow on the credibility of
the higher judiciary. Chief Justice Balakrishnan also happens to be the first Chief Justice of India to grant permission to an investigating agency to register a criminal case against Judges of a High Court. This power, conferred on the Chief Justice of India in 1991 in the Justice K. Veeraswami case, remained unused all these years even though several cases of corruption within the higher judiciary had come to light.

Chief Justice Balakrishnan allowed the Central Bureau of Investigation (CBI) to interrogate two Judges of the Punjab and Haryana High Court, Nirmaljit Kaur and Nirmal Yadav, in connection with the cash-for-judge scam. A law officer sent Rs.15 lakh to Justice Nirmaljit Kaur's official residence and later claimed that it was meant for Justice Nirmal Yadav and had been delivered to Justice Kaur by mistake. Though intended to protect a Judge from frivolous prosecution and unnecessary harassment, the power also bestowed on the Chief Justice of India a great deal of discretion. In the Justice K. Veeraswami case, the Supreme Court laid down that no criminal case can be filed against a Judge or Chief Justice of the High Court or Judge of the Supreme Court without the consent of the Chief Justice of India.

In the Ghaziabad provident fund (PF) scam, involving 34 Judges belonging to lower courts, High Court and the Supreme Court, a misappropriation of Rs.23 crore from the PF of Class III and IV employees was detected on the basis of the confessional statement of Ashutosh Asthana, a Ghaziabad court official. He reportedly confessed that he used the PF funds to buy expensive gifts for Judges and their families. Although the police had secured vouchers and delivery receipts as preliminary evidence, the Chief Justice of India permitted the police to interrogate the Judges only through questionnaires. However, with the Uttar Pradesh Police pleading its helplessness to investigate further the case with all its ramifications, the
Supreme Court conceded the State government’s request to hand over the case to the CBI. The outcome of these cases will be keenly watched as they have a bearing on the accountability of the higher judiciary.

3.3.2 Conflict of three wings: Certain Instances: The first wave of judicial intervention in legislative matters came in the mid-1990’s when the four important decisions of the constitution overturned the then existing balance of Power. Various high courts reinterpreted Article 356 so that the blanket powers of the governors to dismiss state governments were curtailed, the power to punish for contempt of court under Article 142 was expanded beyond court rooms and ‘inherent powers’ of the Supreme Court was used to cover a wider range of subjects. But the most important change came in the process of appointment of judges under Article 124 and 217 in 1994. Executive’s exclusive right was diluted now the Supreme Court’s collegiums consisting of the Chief Justice of India and four senior most judges. The executive may stall the appointments of those it doesn’t want but want but cannot foist those it wants on the benches. This follows attempts by late Prime Minister Indira Gandhi to pack the benches with her acolytes that led to infinite pressure on the judiciary. The Executive had to withdraw from transferring of Judges. All this may have imparted a sense of security and immunity to the judiciary from political interference but also left the politicians insecure. Predictably, politicians have bristled at the directions to the administration as they see this as encroachment on their turf.

3.3.2.1 Supreme Court on Reservations in Private Institutions: The Supreme Court’s stance on the reservation of the OBC’s in Private Institutions ignites the confrontation with the Legislature, a confrontation that is assuming grave dimensions. Very categorically on August 2005, the Supreme Court takes out private educational institutions out of the quota net. Five months
later the parliament amends Article 16 to enable OBC quota, against which a Public Interest Litigation is filed. Later, the students call off strikes on the Supreme Court assurance. The Government then forms an oversight panel. Strangely and confidently the Supreme Court demands the bill from the legislature, as it wants to know the exact OBC population to decide the Quantum of Quota.

3.3.2.2 Public Interest Litigation on the Constitutional Validity of Office of Profit Bill: It sparked in March 2006, when after Sonia Gandhi resigned and negotiations began to save the 12 left MP’s and several others MLA’s across the political spectrum. All this happened in the backdrop of Jaya Bachan's membership being terminated by the Election Commission citing court’s precedents on office of profit. Finally in May-August 2006, the bill was passed to exempt the offices from the office of profit despite the objections from the president. The MP’s believe that defining office of profit is the prerogative of the Parliament. But, the Supreme Court was ready to consider a Public Interest Litigation on the constitutional validity of such a bill, as any legislation has to conform to the letter and spirit of the constitution. Was the Judiciary wrong or right? This is left for the judiciary to decide. Is our state still under the control of a limited judiciary or have the other organs become subordinate to it? The Constitution gives the answer, in the name of 'Doctrine of Separation'.

3.3.2.3 The Supreme Court on the Cash for Queries Scam: The Lok Sabha speaker when taunting the Judiciary to stay within the Laxman Rekha was referring to the judicial deliberations of 11 MP's in the Cash-for-Queries scam. The stake of the Judiciary was raised higher by refusing to entertain summons filed in the Supreme Court. On 11th September 2005, 11 MP's were caught on Camera accepting bribes and were expelled after all party
meeting. The Supreme Court Suo Motu issued summons to the speaker for the reason behind expulsion. But the Speaker refused to answer the court summons on the process of expulsion being a purely legislative matter. Still later, when plea were filed by the MP's on House privilege of self-regulation and the Supreme Court admitted it without any hesitation and second thought. The tussle was that the Supreme Court believed that it was under a constitutional mandate to review this decision, whereas the legislature titled it as an 'unnecessary interference'. Is the judiciary really going beyond the spirit of the Constitution?

3.3.2.4 The Supreme Court on the Power of Clemency with the Governor: It was when the former Andhra Pradesh governor Sushil Kumar Shinde granted clemency to Gowru Venkata Reddy, a congress activist; it led to another landmark judgment by the apex court. The Supreme Court said the power to grant clemency is not absolute and has to be unbiased and the reasons have to be explained for the same. But, the governor said that he had exercised powers under Article 161 of the Constitution, which is not questionable. Also, Article 72(3) says, that:“ Nothing shall affect the power to suspend, remit or commute sentence of death exercisable by the Governor of a state under any law for the time being in force” The court was of the opinion that the any action under this Article is hit by Judicial Review, if it is against the basic structure of the Constitution. The court in order to protect one basic structure violated another, namely 'Separation of Power'.

3.3.2.5 Instances of 'Judiciary Unlimited': The CNG decision of the Supreme Court may be applaudable in its effect, but are these issues of the Legislature. The order clearly reflects transgress of the judiciary into the domain of the legislature with the use of Public Interest Litigation. Under the implementation of the forest legislation, the court has appointed committees
which have now become 'maharajas' of the forest throughout India. Their work is unpredictable and the effects devastating. Also, in forest cases, levies running into Crores have been imposed on a formula devised by the Court itself and entrusted to a fund created by it again. Surely, these are matters of no one but the Executive and Legislature respectively.

One might fail to understand why and how the lapses in the enforcement of planning laws in Delhi fall under the direct supervision of the Supreme Court. This is a clear case of trespass in the functioning area of the executive. The court has made attempts in implementing the un-enforced laws, under the title of 'Judicial Review' knowingly that there is no accountability. Indeed to an extent the court can implement the plan of the parliament but by no means peremptorily bypass land use planning devised by the legislature for Delhi. A few years ago, the court had also thrown out a large number of industries without the statutory law on the subject. And in a King Canute gesture, the court has commanded the cleaning up of the Yamuna and the Ganga. It has also prohibited habitations within 300 meters from Yamuna. This is the spark of the judicial dictatorship. Both in 1999 and 2005, the Supreme Court seriously transgressed into the autonomy of the Jharkhand and the UP state legislatures by ordering them to follow certain procedures in internal affairs constitutionally entrusted exclusively to the legislature. Examples can be multiplied. More recently, in 2006, in the Police case, the Supreme Court has created new extra-constitutional institutions who have virtually taken over the administration of the police especially in service and operational matters contrary to the existing laws, rules, regulations and orders. This has resulted in a situation of power without responsibility with the Supreme Court. The result will be that there is no consistency in the approach because there are no set rules to be followed. Approach and Attitudes may vary from judge to judge. This leading to the democratic power flows from the
Judiciary through the legislature and executive. Evidence is, that today, in some areas, bureaucrats in committees approved by the Supreme Court can bypass their own ministers because they report to the Supreme Court. So, we now have an Executive cum legislating Judiciary.

3.3.2.6 The unregulated judicial review: The first amendment introduced Article 31B in 1951 with a Ninth Schedule containing items 1 to 13. Pandit Nehru had assured the parliament while speaking on the First Amendment that there was no desire to add to the 13 items which were being incorporated in the Ninth Schedule and even this small list of 13 items was described by the Prime Minister as a long schedule\textsuperscript{43}. This amendment was first challenged in Shankari Prasad v. Union of India\textsuperscript{44} where the Supreme Court held that 1) it was not Ultra-vires or unconstitutional. 2) Article 13(2) does not affect amendments under Article 368 of the Constitution and 3) Article 31A and 31B do not make any changes in Article 226 or 136 so as to attract the provisions of Article 368. But, in view of Doubt expressed in the case, a bench of 11 judges was constituted in the case of Golaknath v. State of Rajasthan\textsuperscript{45}, to reverse Shankari Prasad and to hold that Article 13(2) includes amendments made in the constitution. And an amendment affecting fundamental rights is covered by the proviso of Article 368. Finally, with the coming of this order the legislature from 27.2.1967 had no power to amend part III. Irrespective of this judgment the Parliament passed the Twenty fourth, Twenty fifth, Twenty Sixth and the Twenty Ninth Amendment Acts. The challenge to this was before a 13 judge bench in Keshvananda Baharti’s case\textsuperscript{46}. The court by majority overrules Golaknath and laid down that the Constitution does not enable the Legislature to amend the basic structure of the Constitution.

\textsuperscript{43} Waman Rao v. Union of India(1981) 2 SCC 382 at 396.
\textsuperscript{44} (1950) 2 SCR 89.
\textsuperscript{45} (1965) 1 SCR 933.
\textsuperscript{46} Supra Note 4.
In Indira Gandhi v. Raj Narain⁴⁷: In June 1975 the elections of Mrs. Indira Gandhi were set aside by the Allahabad High Court on grounds of alleged corrupt practices, and an appeal against this order was pending. During the pendency of the appeal the 39th Amendment act was passed to ouster Judicial Review. A challenge to this in the Supreme Court resulted in striking down the addition of Clause 4 and 5 of Article 329A.

In Minerva Mills v. Union of India⁴⁸: The legislature passed the 42nd Amendment to enlarge its role, by adding clause 4 and 5 of Article 386. This expansion of power was considered unconstitutional by the Judiciary and was thrown in the constitutional dustbin unanimously. In the words of N.A. Palkhivala⁴⁹ the judgment of Minerva Mills can be best summarized as: "The limited amending power of the legislature was to preserve and protect the basis structure of the constitution. Since, the parliament has no right to alter any fundamental feature, it has no right so to amend Article 368 as to destroy that basic feature by abrogating the fundamental limitation on the amending power....and after all the supreme Court has laid down the law that parliament had no competence to alter the fundamental features, for the parliament to declare that it has the competence is not merely an act constitutional impertinence but an irrational exercise in futility" Therefore, Prof. Granville Austin in his book 'Working a Democratic Constitution (1999), has described the Ninth Schedule as: "The constitutional vault, into which legislations could be put, safeguarded, for judicial review, the judges being denied the key..." but, the Judiciary ended up creating a 'Constitutional Dustbin' for the Unconstitutional Laws. The Supreme Court had three choices to make. First

⁴⁷ (1975) Suppl. SCC 1
⁴⁸ (1980) 3 SCC 625
choice would be to abolish the very mechanism of creating such a dustbin. This is what I believe the court should have done. The very idea that a constitutional amendment can provide preferential protection to specially selected statutes (ranging 284 in number and many more) seem to be an imprecation or an anathema (something that you hate). Even if it was required for the agrarian reforms in 1950, it has become of potential abuse now. The original constitutional makers did not envisage such huge constitutional subversions. Sometime the very width of the ‘enabling power’ of judiciary is so frighteningly wide that it’s very existence and potential is a threat to the constitution’s basic structure and separation of Powers. It is this very width and potential that arose anxieties in the famous Kesavananda Case (1973), which then created the basic structure doctrine and laid down the rule of law indicating at the separation of powers. The mere confrontation of wide powers disturbs the scheme and structure of Constitution.

The Second option with the Supreme Court was to provide total immunity to the Ninth Schedule from Judicial review and Fundamental rights. This would have gone to the other extreme, as judicial review and fundamental rights are the basic structure of the constitution. Any ways, nine judge benches could not have overruled an 11 judge bench that is Kesavananda Bharti, which protected the basic structure of the constitution.

A Third Approach- I.R.Cœlho v. Union of India: The Supreme Court chooses the third alternative which looks like the middle curse. After the Coelho judgment, there are now two classes of statutes. The ‘preferred’ (Ninth Schedule) statutes which will have limited immunity and the ‘non-preferred’ statutes which will fall rigour of constitutional rights. Parliament is exercising its amendment power is not at all satisfactory. Such a distinction is baseless. No heaven would fall if all statutes are given the same constitutional
status even of evaluate differently. All statutes should uniformly be subjected to the fundamental rights provisions, which, in turn, balance the requirements of rights and the public interest. India's constitutional concept of reasonableness is precisely about all this. I do not indicate that some statutes are not more important than the others but then reasonableness will take all that into account. The ninth schedule currently gives preferred status to 284 statutes and many others may follow, because once in the schedule, they will have higher immunity.

A greater immunity of these laws is provided by this latest judgment. Two tests have been discussed by the court. Legislations or Executive actions under protected laws must meet the dual test. Such laws must not violate the Fundamental rights and the Basic Structure of the Constitution. Article 14 (Equality), Article 19 (Freedom of Speech and Expression) and Article 21 (Right to life) belong to the Basic structure, Article 15 (non-discrimination) and amendments relating to reservations are no included. Why are religious or cultural rights or exploitation and untouchability not a part of the basic structure? Or are they? They are all left to chance by the Supreme Court. And the Judicial decisions are checked by the Judge's (Inquiry) Bill, 2008. The Ninth Schedule dustbin should have been buried, but the court ignored the opportunity. This 21st Century Judgment views the constitution with a 20th century eye, but the Parliament still has the tool to abolish the ninth schedule. Article 124(4) of the Constitution provides for the removal of a judge only on the ground of proved misbehaviour or incapacity. The process of impeachment is cumbersome and the result uncertain. Effective alternative measures are necessary because in a democracy governed by the rule of law under a written Constitution the Judiciary has been assigned the role of a sentinel on the qui vive to protect the fundamental rights and to hold even the scales of justice between the citizen and the state. There are credible
complaints against the higher Judiciary. People talk with nostalgia of the not-
so-distant past when, win or lose, the integrity of the higher Judiciary was
never doubted. As the Supreme Court has said, "judicial office is essentially
public trust. Society is, therefore, entitled to expect that a judge must be a
man of high integrity, honesty and required to have moral vigor, ethical
firmness and impervious to corrupt or venal influences."

Hundreds of years ago, Francis Bacon, in his essay on 'Judicature',
emphasised that "the place of justice is a hallowed place; and therefore not
only the Bench, but the foot pace and precincts and purpose thereof ought to
be preserved without scandal and corruption." But such is the irony that
Bacon disgraced himself by indulging in acts of bribery and favouritism at the
fag end of his career. This highlights the complexities and the sensitivities in
the matter of effective, implementation of judicial honesty. It is correct that the
Supreme Court has neither administrative control over the High Courts nor the
power on the judicial side to inquire into the misbehaviour of a Chief Justice or
a judge of a High Court. But that does not mean the judge is an absolute
master, not answerable for his conduct except through impeachment
proceedings.

The Supreme Court has ruled that the Chief Justice of India and two
senior colleagues on being prima facie satisfied about the correctness and
truth touching the conduct of a High Court judge inconsistent with such high
office could proceed against him through a process other than impeachment.
In such a case, the judge concerned could be offered the option of resigning
or facing an inquiry. I know the alternative of permitting the judge to resign
when there has been misconduct may seem like taking the soft option, but
considering the place of the Judiciary in our Constitutional frame as the
bedrock of the rule of law, I would, to avoid public embarrassment, frankly
want to vote for this option unless it involves: an open atrocious misconduct which must be publicly disclosed to serve as a warning. This Enquiry Committee will have the same personnel as is mandated for the impeachment proceedings, so as to inspire confidence about the impartiality of the proceedings. The plus point in this suggestion is that the constitution of a Committee of Judges to inquire into the misconduct could be initiated by the Chief Justice and his two colleagues and need not await the initiation by the Members of Parliament required for impeaching the judge, as mandated by the Constitution.

Such a mode did work when some years back the then Chief Justice of India posed this alternative to a High Court judge and a Chief Justice and they quietly resigned rather than face impeachment... That is why the idea of a National Judicial Commission has been mooted to deal with appointment of High Court and Supreme Court judges and other connected matters. Of course, the details and the personnel of the judicial commission need to be debated. I am however, convinced that the leader of the Opposition must be a member of the panel. It is to be hoped that a commission will avoid the need for impeachment proceedings. Regarding removal, the Commission would remain a recommending body. Because, notwithstanding all the drawbacks, I am not convinced that removal of a High Court or Supreme Court judge should be through any method other than impeachment. I feel that removal from such high office should be publicly debated by the highest legislature, the representatives of the people, so that an assurance is given to the judge concerned that he is being judged by the people who in a democratic set-up are real sovereigns. If that happens, all this lobbying, etc., will stop because, barring the case of a judge who may have the chance of being the Chief Justice of India, there will normally be no attraction for a High Court judge in
trying into move Delhi, which would involve dislocation of his/her family and normal pattern of life.

3.4 Cases and Discussions Relating to Appointment, transfer, impeachment and salary of judges

India's higher judiciary is possibly the most powerful national judiciary in the world. Internationally respected for its inventive creativity, it is beset with problems. Apart from the huge backlog of cases pending disposal, there is the increasing problem of corruption. India simply does not possess the effective means to deal with corrupt judges. The lower judiciary comes under the superintendence of the High Courts which discipline subordinate judges — not always fairly. But at least some kind of system is in place, along with the corrective of a writ petition to the disciplining High Court and an appeal to the Supreme Court but how is judicial indiscipline, unbecoming conduct and corruption in the higher judiciary, comprising the High Court and Supreme Court judges, to be dealt with? Supreme Court judges are subject only to peer pressure or impeachment. When Justice V. Ramaswamy's case was being processed for impeachment, a small committee of Supreme Court judges reported on November 6, 1990, that it was not necessary that Justice Ramaswamy desist from work. The impeachment failed. The statutory examining committee's finding against the judge was politically defeated by Parliament in 1992.

In Justice Kumar's Case: The appointment of a judge of a High Court is to be made under Article 217 of the Constitution, by the President (which legally, and in fact, means the Union Executive) after consultation with the Chief Justice of India, the Governor of the state and the Chief Justice of the concerned High Court. Assuming that the continuation of an additional judge
was a fresh appointment, as contended by the state, the question was whether there had been an effective consultation between the three constitutional authorities, particularly between the Chief Justice of India and the Chief Justice of the Delhi High Court. The State made a strenuous plea that the documents concerned were privileged documents. This plea was rejected by the Bench of a majority of 6 to 1. The legal position was that consultation between the authorities must be effective consultation—that is, application of mind to identical facts. The question, therefore, was whether the allegations against Justice Kumar had been communicated to the Chief Justice of India, as the State had already disclosed that the Chief Justice of Delhi had advised against Justice Kumar's re-appointment and the Government had preferred the view of the Chief Justice of Delhi to that of the Chief Justice of India. Disclosure of the documents showed that relatively minor allegations against Justice Kumar, i.e. a slow rate of disposal and pronouncing of certain judgements on the original side of the High Court while sitting on the Appellate side, had been communicated to the Chief Justice of India.

He had asked Justice Kumar for this explanation and had been satisfied with it. But there was another letter written by the Chief Justice of Delhi on 7th May, 1981 to the Law Minister, making serious allegations of corruption against Justice Kumar. This letter was never shown to the Chief Justice of India and there was a noting by the Law Minister that the Chief Justice of Delhi had himself requested him not to show this letter to the Chief Justice of India. Accordingly, a letter was addressed by the Law Minister to the Chief Justice of the Delhi High Court informing him that pursuant to his wishes, the letter had not been shown to the Chief Justice of India. Whether this amounted to an effective consultation between the two Chief Justices was one of the important issues to be pronounced upon by the Supreme Court.
Another aspect was Justice Kumar never being apprised of these serious allegations against him, whether his non-continuance was contrary to the principles of natural justice which require a man to be heard before any adverse action is taken against him. Further questions which arose are whether such charges ought not to be dealt with under a proper procedure such as that provided by the Judges (Inquiry) Act, so that unverified and unsubstantiated allegations do not result in the removal of an innocent man. Again, if the two Chief Justices take divergent views, is it open to the Government to choose the views of one as against the other? And lastly, if the non-continuance of Justice Kumar is not found to be in accordance with law, can the Supreme Court issue a Writ of Mandamus to the Union Executive to reappoint him? Related to this were questions such as, whether it is open to the Government to keep a large number of judges as additional judges when the work load requirement of the High Court clearly indicates that a larger number of permanent judges are required. The decision of the Supreme Court on these matters was to be a momentous and crucial one for the independence of the judiciary, as it will determine the scope of control exercised by the Executive on the higher judicial officers.

The second major question argued was the validity of the circular letter of the Law Minister dated 18th March 1981. In an earlier case, which had come before the Supreme Court, Union of India Vs. S.M. Seth, it had been held that each transfer must be considered individually and on its own merit, and that policy transfers on a wholesale basis were impermissible. It had also been laid down that consultation with the Chief Justice of India on the question of transfer of a particular judge had to be real and effective, with all materials in respect of a proposed transfer being placed before him. If the opinion of the Chief Justice was ignored without any cogent reasons, the validity of such a transfer could be gone into in a court of law.
Circumventing rules: It was argued by the petitioners that the letter of the Law Minister was merely an attempt to circumvent the conditions of transfer laid down by the Supreme Court. An additional Judge or a future appointee, being uncertain of their tenure, could be coerced into giving their consent, and the Executive would be able to present a fait accompli to the Chief Justice of India. It was argued that consent must mean free consent, not consent induced by threat or duress. It was also argued that consent to a transfer could not be given in a vacuum, it must be in a particular fact situation. The tone of the letter, which required such consent to be obtained within a fortnight, and which made it clear that the government would not be committed to honour the preference shown by the judge, did not exhibit a high degree of courtesy for the judges. To select only additional judges and future appointees for this purpose would mean that their consent could be induced on an implicit threat of non-confirmation or non-appointment.

One of the justifications given by the State for the circular was that this was a policy to promote national integration, as the 14th and 80th Law Commissions had recommended that one-third of the Judges on a High Court should as far as possible, be from outside the state. It was argued by the petitioners that the concept of national integration was an amorphous one; if it was to be achieved, it could be done by requesting a particular appointee initially to accept office at another place, instead of keeping the sword of a transfer to which he had already agreed hanging on his head. Another reason given for this policy was that it would combat narrow parochial tendencies bred by caste, kinship and local links. The question was whether the power of transfer could be used by way of punishment and whether if a judge had proved himself unworthy of judicial office he should be inflicted on another High Court.
The Union cabinet is reported to have decided to introduce a new version of the Judges (Inquiry) Amendment Bill. The 2008 Bill is believed to provide for establishing a National Judicial Council to inquire into allegations of "misbehaviour" or "incapacity" the two grounds laid down for the removal of a judge of the Supreme Court or a high court. Action for initiating impeachment proceedings against a judge is being talked about and questions are being asked in regard to the provisions and procedures. Actually, the first thing to be remembered is that despite the widespread myth and use of the term in the media and elsewhere, there is no provision in the Indian Constitution for 'impeachment' of a judge of the Supreme Court or a high court. 'Impeachment' proceedings are provided for only in the case of the president of India and for none else.

There is a fundamental difference between removal procedure and impeachment procedure and between the impact of the adoption of a motion for impeachment and the passing of a motion for presenting an address to the president seeking orders for the removal of a judge. The grounds for the impeachment of the president have to concern "violation of the Constitution" while an address for removal of a judge has to be on the ground of "misbehaviour or incapacity". In case of impeachment, the moment the motion is passed by the two Houses, the president ceases to be president. But in case of the motion for removal, it is for the president to consider issuing necessary orders.

Article 124 of the Constitution in effect provides that a Supreme Court judge can be removed from his office by a presidential order passed after an address by each House of Parliament supported by a majority of not less than two-thirds of the members of the House present and voting is presented to the
president in the same session for such removal on the ground of proved misbehaviour or incapacity. Article 124(5) specifically lays down that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity. In pursuance of Article 124 (5), Parliament passed the Judges (Inquiry) Act, 1968. The Judges (Inquiry) Rules, 1969 lay down the details of procedure for investigation and inquiry into the allegations against a judge. If not less than 100 members of Lok Sabha or 50 members of Rajya Sabha give notice of a motion for the removal of a judge on grounds of some definite allegations of misbehaviour or incapacity, the Speaker/chairman of Lok Sabha/Rajya Sabha, would decide the admissibility of the motion and if the motion is admitted, a committee would be appointed for holding the necessary investigations.

The judge concerned would be provided with reasonable opportunity for defence. If the committee found the judge not guilty of "any misbehaviour", and not suffering from "any incapacity", then the whole matter would be dropped forthwith. If, however, a verdict of guilty of misbehaviour or of incapacity was returned by the committee, the House would proceed to consider the motion. If the motion was passed by majority of the total membership of each House and more than two-thirds of those present and voting in either case, misbehaviour or incapacity of the judge shall be deemed to have been proved and an address shall be presented to the president during the same session of Parliament for the removal of the judge. History of sorts was perhaps made on May 10, 1993. It was the last day of the last session of the ninth Lok Sabha when for the first time ever a sitting judge of the highest court of the land, Justice V Ramaswami, was arraigned for trial before the Lok Sabha on charges of misuse of funds for purchase of 25 silver maces for brother judges and furniture, furnishings, carpets and electrical
appliances, including air conditioners, in excess of the permissible limit of Rs 38,500, use of the staff car for private trips and paying from the public exchequer heavy telephone bills without separating private calls.

Speaker Rabi Ray admitted the motion and announced a three-member committee. Soon after the announcement, the House was adjourned in the midst of grave disorder. The three-member committee found that certain charges in regard to misuse of funds stood established. Even through the committee held Justice Ramaswami guilty of misconduct, when the matter came up before the Lok Sabha, the motion for presenting an address to the President for his removal was lost for want of the requisite number of votes. It was said that the matter had become highly politicised. The Congress members absented themselves from voting. Justice Ramaswami retired only on his normal scheduled date of retirement on February 15, 1994. It is to be seen whether investigation and inquiry by the now proposed National Judicial Council composed of only persons from the judiciary will prove to be an improvement over the existing procedure of investigation and inquiry by an ad hoc committee appointed by the Lok Sabha or Rajya Sabha.

High Court judges can also be removed from office only by impeachment. However new internal methods and mechanisms have been evolved to deal with errant judges. This is a veiled procedure. In the Bombay Complaint case (1994), the Supreme Court cautioned the Bar and the public against airing allegations in public and to use informal processes of informing the Chief Justice of India. Irrespective of whether the charges were true, there have been cases in which High Court judges have resigned, including the Chief Justice of the Bombay High Court, A.M. Bhattacharjee, the additional judge of the Delhi High Court, Shamit Mukherjee, and the Rajasthan High Court judge, Arun Madan. In 2003, the Chief Justice of India appointed a
panel of High Court judges to assess the credibility of charges against some
High Court judges in Karnataka and Punjab. In 2004, a major crisis occurred
in Punjab as a large number of judges abstained from work to protest certain
actions taken by their Chief Justice. The crisis was defused by Chief Justice
V.N. Khare and his colleagues in the Supreme Court. But when it was
suggested that the Punjab judges be sent to the Northeast, the Bar of those
regions asked incredulously why they should be asked to accept allegedly
tainted judges but using the weapon of transferring judges from one High
Court to another as a disciplinary measure is back in vogue. Contained in
Article 222 of the Constitution of India, the power to transfer High Court
judges has an awkward history.

The States Reorganisation Committee (1955) felt that one-third of the
judges of a High Court should be recruited from outside the State to arrest
parochialism. This principle was accepted by the 14th Report of the Law
Commission (1958) to support national integration but not as a punitive
measure. But the proposal of transferring judges for national integration did
not have general acceptance. In 1965, eight of the 15 High Courts were
against this proposal. An important letter of Chief Justice Subba Rao of
October 6, 1966, added the important caveat that judges should be brought
from the outside at the time of initial recruitment. The theme of national
integration was echoed by a study team for the Administrative Reforms
Commission in 1967. Meanwhile, many transfers were effected from one High
Court to another. Many distinguished Chief Justices of India had the benefit of
serving in many High Courts. But the important element in all these pre-
Emergency transfers was that both the appointment and transfer of High
Court judges from another State were invariably made with the consent of the
judges concerned. During the Emergency (1975-77), the principle of transfer
by consent was given the go-by. High Court judges critical of the Emergency
or who ruled against arbitrary preventive detention were transferred as a punishment. Those were difficult days. Justice H.R. Khanna resigned because the Government superseded him in the appointment of the Chief Justice of India because of his dissenting judgment in the Preventive Detention case (1976). After the Emergency, judges were re-transferred or elevated to the Supreme Court. The principle of transfer by consent was momentarily restored.

The majority led by Justice V.R. Krishna Iyer in the Sheth case (1979) kept the idea of a compulsory transfer without consent legally alive — over the spirited dissent of Justice P.N. Bhagwati. Soon after the Congress returned to power on 18 March 1981, a policy of transferring one-third of High Court judges to some other State was re-promulgated in the name of national integration. This policy was approved in the First Judges case (1981) but once again over the strong dissent of Justice Bhagwati who approved of initial appointments to other High Courts (which naturally require consent), but rightly took the view that a transfer of a High Court judge against his wishes would compromise the independence of the judiciary. From 1981, the one-third policy (with or without consent) was followed unevenly — neither fulfilling the quota of one-third or any national purpose. A semblance of consent was obtained by asking the preferences of High Court judges about where they would like to be transferred. But, preferences were not always honoured with consent. By the 1990s, the formal policy of transferring one-third of the judges from each High Court was abandoned. But the policy to bring in a Chief Justice from outside the State was continued. Even so, the transfer of other judges who were not Chief Justices continued. In most cases, appointment of out-of-State Chief Justices proceeded without too much demur. But there were instances in which both the transfer of the Chief Justice and other
judges were seen as punitive. Nothing was said. No reasons were given. But the transfer was perceived as a reprimand if not punishment.

The protest against the transfer-without-consent policy can be found in the Law Commission Report of 1958 and the Justice Satish Chandra Committee report of 1986. A Consultative Paper to the Constitution Commission of 2001 heaved a sigh of relief that the general policy of transferring judges had 'mercifully' been abandoned. The Constitution Commission (2002) rightly recommended that a national commission be set up to examine the complaints against the High Court and Supreme Court judges. But one of the 'punitive' actions which such a proposed commission could take is it to transfer a High Court judge to some other court for "deviant behaviour not amounting to misbehaviour." In the last decade or so, transfer of judges for errant behaviour has become a way of disciplining High Court judges. No doubt under the Judges cases (1993, 1994 and 1998), transfers can be challenged — eventually before the Supreme Court. But this remedy is not regarded as a sufficient corrective. On September 18, 2004 at a seminar on "Envisioning Justice in the 21st Century", Chief Justice R.C. Lahoti expressed his determination to deal with judicial corruption. Prime Minister Manmohan Singh felt that a "mechanism of accountability (should be) conceived and implemented by the judiciary." How is this going to be done? Since 1973, there have been proposals to create a National Judicial Commission for both appointments and disciplining of the higher judiciary. In 1990, The Constitution (67th) Amendment Bill for this purpose was tabled but it lapsed. Time and again, such proposals have been made — including by the Constitution Commission (2002) and through the lapsed Bill No. 41 of 2003. There are always some defects in the Bills; and there is an inevitable lack of consensus.
On October 20, 2004, many appointments and transfers of High Court Chief Justices were reported. It is predicted that other transfers will follow—especially of the Punjab judges who protested against their Chief Justice. Transfers are monitored by a collegium of Supreme Court judges. On transfer, no imputation is made or alleged. All transfers are for administrative convenience. But in the media and elsewhere, speculation continues over the reason for transfers. This is not good for either the judges or the High Court or the rule of law. As long as there is a transfer policy, lobbying in respect of transfers will follow. As between High Courts, the policy of transfer neither blesses them that give or them that takes.

The removal of governments and Prime Ministers so many times, but removal of High Court and Supreme Court judges has not been so far heard after the Constitution of India came into force in 1950. Independent India has, however, witnessed one impeachment, when Justice Shiv Prasad Sinha of Allahabad High Court was removed by the then Governor General of India, C Rajagopalachari in 1949 on the recommendation of the Federal Court. The Chief Justice has given detailed information about Justice Sen’s misconduct when he was appointed receiver by Justice AN Roy in Steel Authority of India versus Shipping Corporation of India case in 1993. The three-Judge panel comprising Madras High Court Chief Justice AP Shah, MP High Court Chief Justice AK Patnaik and Rajasthan High Court Chief Justice RM Lodha inquired into the charges leveled against Justice Sen and found them true. The panel submitted its report in February, 2008. On March 16, the Collegiums of the apex court comprising of Chief Justice BN Agarwal and Justice Asok Bhan asked Justice Sen either to resign or to opt for voluntary retirement. However, with Justice Sen deciding not to comply with either of the two options, the Chief Justice was forced to resort to this unprecedented move. The move is unprecedented, because neither there is any provision in
the constitution about such recommendation nor before this, any Chief Justice has taken such 'extreme step'. In fact Article 124(4) of Indian Constitution provides for removal of High Court and Supreme Court Judges.

The Article says: "A judge of Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total number of membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity."

There is no separate provision for removal of High Court judges and Article 217(1)(b) provides for this and says, "A judge may be removed from his office by the President in the manner provided in clause(4) of Article 124 for the removal of a judge of the Supreme Court." The processes of removal of High Court and Supreme Court judges are the same. The above Article of the Constitution provides for impeachment, whereas; Judges (Inquiry) Act, 1968 determines the process of impeachment. According to this Act, the impeachment of a judge can be done only by Parliament and impeachment can be initiated after a motion addressed to the President of India is signed by at least 100 members of the Lok sabha or 50 members of Rajya Sabha. Such is the process and such is the impunity. Such Judicial impunity has been conferred on Judiciary for the sake of its independence.

The above provision is similar to the rule prevailing in England, since the Act of Settlement, 1701, to the effect that though judges of the superior courts are appointed by the Crown, they do not hold office during his pleasure, but hold their office on good behaviour and the Crown may remove
them based on a joint address from both the Houses of Parliament. Any way the credit must be given to Chief Justice, who could take such extra-ordinary step, because after all, extra-ordinary situation demands extra-ordinary steps. But unfortunately, the government was sitting over it as it was written two months ago and could only be known to public through media. Before any debate on this issue, it should be clearly borne in mind that above cumbersome procedure of impeachment and other judicial impunities have been enshrined in the Constitution for making Judiciary independent.

Independence of Judiciary: The independence is guaranteed in our Constitution and the concept has been borrowed from the US Constitution. Article III of US Constitution guarantees Independence and Supremacy of Judiciary in the US. Independence of Judiciary is the tenet of democracy and therefore, even Russian Constitution of 1993 (Chapter-7 Section 120-122) also guarantees independence of Judiciary in the country. In fact section 124 of the Russian Constitution says, "Judges shall possess immunity and criminal proceedings may not be brought against a Judge except as provided for by federal law."

In India, this independence and limited Judicial Supremacy are enshrined in the Constitution and are expressed in the methods of appointment of judges; the process of impeachment; and the power of judicial review. Now, if all these provisions of the Constitution are analysed, inference can easily be drawn that the problems lay here themselves and so do solutions.

3.4.1 The Appointment Rules: Articles 124 and 217 provide for appointment of Judges of Supreme Court and High Court respectively. They clearly stipulate that the appointments have to be made by the President in
consultation with the Chief Justice. The word 'consultation' has been always a matter of dissent and controversy. In fact, when AN Ray was appointed as Chief Justice after superseding three senior Judges namely Hegde, Grover and Shelat, there was uproar in Judicial community including the Bar council of the apex court. They argued that judges have been superseded owing to their judgement in Keshavanand case (AIR 1973 Supreme Court) which went against the government. Gradually the direction of Executive in matters of appointment of judges started diminishing. In 1993, a landmark judgment came from Supreme Court in 'Advocates on record versus Union of India' case.

The apex court ruled that the recommendations for appointment of Judges in High Court and Supreme Court will be made by collegiums of three Judges and shall be in a way binding on the government. After a 'presidential reference', the number in the collegiums was increased from three to five. This judgment was a landmark because it took virtually all discretionary powers of the Executive in matters of appointment of judges in higher judiciary. Thus, the word 'consultation' became 'concurrence'. Some people in legal domain argue that it was a dangerous development and was against the principles of the Constitution itself. How can a person or a group of persons appoint themselves which goes against the ideas enshrined in Article 311. They opine that there must be a transparent and justifiable procedure for such appointments. There are instances where persons from one family are becoming Judges for two to three generations. The judicial community of higher Judiciary is becoming an elite club of few 'privileged families'. Candidly, it is not what 'independence' meant for.

3.4.2 Judges Transfer Case I: Though according to the language used in Art. 124 the President is required to "consult" legal experts but prior to the
decision of the Supreme Court on S. C. Advocate-on-Record Association, it has always been interpreted that the President was not bound to act in accordance with such consultation. The meaning of the word 'consultation' came for the consideration of the Supreme Court in the Sankalchand Sheth's case,\textsuperscript{50} which was related to the scope of Article 222 of the Constitution. It was held that the word 'consultation' meant full and effective consultation. For a full and effective consultation it is necessary that the three constitutional functionaries "must have for its consideration full and identical facts" on the basis of which they would be able to take a decision. The President, however, has a right to differ from them and take a contrary view. Consultation does not mean concurrence and the President is not bound by it.

In S.P. Gupta v. Union of India,\textsuperscript{51} popularly known as the Judges Transfer case, the Supreme Court unanimously agreed with the meaning of the term 'consultation' as explained by the majority in Sankalchand Sheth's case. The meaning of the word 'consultation' in Article 124 (2) is the same as the meaning of the word 'consultation' in Article 212 and Article 222 of the Constitution. The only ground on which the decision of the Government can be challenged is that it is based on \textit{mala fide} and irrelevant considerations, that is, when constitutional functionaries expressed an opinion against the appointment.

This means that the ultimate power to appoint judges is vested in the Executive from whose dominance and subordination it was sought to be protected. The Supreme Court had abdicated its power by ruling that constitution functionaries had merely a consultative role and that power of appointment of Judges is "solely and exclusively" vested in the Central Government. It is submitted that the majority judgment of Supreme Court in the

\textsuperscript{50} AIR 1977 SC 2232.

\textsuperscript{51} AIR 1982 SC 149.
judges transfer was bound to have an adverse affect on the independence and impartiality of the judiciary which is the only hope for the citizens in democracy. Bhagwati, J., has, therefore, in his judgment suggested for the appointment of a Judicial Committee for recommending names of persons for appointment as judges of the higher courts. He said, "It is unwise to entrust power in any significant or sensitive area to a single individual however high or important may be the office, which he is occupying."

3.4.3 Judges Transfer Case II: In a historic judgment in S. C. Advocate-on-Record Association v. Union of India52 popularly known as Judges Transfer case, a nine judge bench of the Supreme Court by a 7-2 majority overruled its earlier judgment in the Judges Transfer case (S. P. Gupta v. Union of India) and held that in the matter of appointment of the Judges of the Supreme Court and the High Courts the Chief Justice of India should have primacy. The matter was brought before the Court through a Public Interest Litigation writ petition filed by an advocate of the Supreme Court seeking relief of filling up vacancies in the higher judiciary. The appointment of Chief Justice of India shall be on the basis of seniority. The Court has laid down detailed guidelines governing appointment and transfer of Judges and held that the greatest significance should be attached to the view of the Chief Justice of India formed after taking into account the views of two senior most Judges of the Supreme Court. It thus has, reduced to the minimum individual discretion conferred upon the Prime Minister and the Chief Justice of India so as to ensure that neither political bias nor personal favoritism nor animosity should play any part in the appointment of Judges of the Supreme Court and High Courts. 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 exercise of power by the Chief Justice of

52 (1989) 1 SCC 441.
India. Mr. Justice Verma who delivered the majority judgment along with Mr. Justice A. N. Ray, Mr. Justice A. S. Anand and Mr. Justice S. P. Bhurucha observed: "Thus, the executive element in the appointment process has been reduced to minimum and political influence is eliminated. It is for this reason that the word 'consultation' instead of 'concurrence' was used in the Constitution 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".

S. R. Pandian and Kuldip Singh, JJ. agreed with the majority view but delivered their separate judgment while A. M. Ahmadi and M. N. Punchhi, JJ., delivered the dissenting judgments. He said that if primacy is given to the Chief Justice of India the view of other constitutional functionaries would become redundant. The 'majority held that the initiation of proposal for appointment in case of the Supreme Court must be by the Chief Justice of India and in the case of a High Court by the Chief Justice of the High Court, and for a transfer of a judge of the Chief Justice of the High Court the proposal has to be initiated by the Chief Justice of India. No appointment of any judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India. Only in exceptional cases and for strong reasons, the names recommended by the Chief Justice may not be made.

3.4.4 Appointment and Transfer of Judges Case III: In re Presidential Reference a nine-judge-bench of the Supreme Court has unanimously held that the recommendation made by the Chief Justice of India on the appointment of Judges of the Supreme Court and the High Courts without following the consultation process are not binding on the Government. The Court also widened the scope of the Chief Justice's consultation process

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53 AIR 1999 SCI.
upholding the government's stand on consultation process, the Court gave its opinion on the nine questions raised by the President in his reference to the Supreme Court, under Art. 143 of the Constitution. The President had sought the Supreme Court's clarification on the consultation process, as laid down in S.C. Advocates case for the appointment and transfer of Judges following a controversy over the recommendation by former Chief Justice of India M. M. Punchchi. The BJP Government did not agree with his recommendation and referred the matter for the Supreme Court's opinion.

The Court held that the consultation process to be adopted by the Chief Justice of India requires consultation of Plurality of Judges. The expressions "consultation with the Chief Justice of India" in Articles 217 (1) and 222 (1) of the Constitution of India require consultation of with plurality of Judges in the formation of opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles. The majority held that in regard to the appointment of judges to the Supreme Court under Art. 124 (2), the Chief Justice of India should consult "a collegium of four senior most Judges of the Supreme Court" and made it clear that if "two Judges give adverse opinion the Chief Justice should not send the recommendation to the Government." The collegium must include the successor Chief Justice of India. The opinion of the collegium must be in writing and the Chief Justice of India should send the recommendation to the President along with his own recommendations.

The recommendations of the collegium should be based on a consensus and unless the opinion is in conformity with that of the Chief Justice of India, no recommendation is to be made. In regard to the appointment of Judges of the High Courts, the Court held that the collegium should consist of the Chief
Justice of India and any two seniormost Judges of the Supreme Court. In regard to transfer of High Court Judge the Court held that in addition to the collegium of four Judges, the Chief Justice of India is required to consult Chief Justices of the two High Courts (one from which the Judge is being transferred and the other receiving him). The Court held that the appointment of the Judges of higher courts can be challenged only on the ground that the consultation power has not been in conformity with the guidelines laid down in the 1993 judgement and as per opinion given in 1999 decision i.e., without consulting four senior most Judges of the Apex Court. The decision of the Supreme Court has struck a golden rule. It has made the consultation process more democratic and transparent.

The participants were broadly of the view that for the appointment and transfers in the context of the grant of exclusive primacy to the executive as in the First Judges case (1980) or to the judiciary as in the Second Judges case (1993) and affirmed in the Presidential reference (1998), a National Judicial Commission is necessary. In the First Judges Transfer case, M Justice Bhagwati had, in fact, suggested for the appointment of a Judicial Commission on the line of Australian Judicial Commission.

In fact a Bill was introduced in Lok Sabha by the National Front Government for setting up a National Judicial Commission in 1990 by the then Law Minister, Dinesh Goswami empowering the President to constitute a high level Judicial Commission for making recommendation for the appointment of a Judge to the Supreme Court (other than the Chief Justice of India), Chief Justice of High Courts and to the transfer of Judges from one High Court to another. However, the Constitution Amendment Bill lapsed consequent upon the dissolution of the Lok Sabha. In the Indian context the controversy has arisen because the two sides—the Executive and the Judiciary—both trying to assert
themselves in a tug of war for supremacy in the matter. However, both the sides have shown their failings on the matter.

The solution perhaps lie in a practice where neither side enjoys a supremacy. A constitutional body reflecting the aspersions of all sections—should be entrusted with the task of bringing in harmony between the two conflicting wings of the government. As suggested by the Law Commission in 1987, a National Judicial Service Commission should have the final say in matters of selection, promotion and transfer relating to the judiciary. As far as the composition of the Commission is concerned, the Law Commission suggested that the body should be headed by the Chief Justice of India and include three Judges each of the Supreme Court and the High Courts the previous occupants of the office of the Chief Justice, the Attorney General, an outstanding legal academician and a representative of the Ministry of Law and Justice.

3.4.5 The Impeachment: The process of impeachment as discussed in the article above, clearly indicates that it is a cumbersome process. No wonder then, not a single judge could be removed in India since 1949. It may be recalled that in 1991, the impeachment proceedings for removal of Justice V Ramaswami fell flat on its face after members of the Congress party decided to abstain from voting. The process of impeachment is laid down in Judges (Inquiry) Act, 1968 which says that even if the motion is accepted, the presiding officer of the House has to constitute a three judge committee to further inquire into the matter. The process suggests that the motion will be put to voting once again after the submission of the report by the Judges' Committee. However, unlike in the case of a no confidence motion against a government, which requires a simple majority to survive, the impeachment motion against a judge requires a two-third majority.
That is why, it is truly said that it is easier to decide the fate of 100 billion people by way of forming and toppling Governments in India than removing a Judge in the country. It is also but strange that the country which has seen many a ministers and bureaucrats being convicted on charges of corruption does not have a single incidence of a judge being impeached. The Transparency International in its report of 2007 has counted judiciary as the third most corrupt institutions in India, an inference totally in contrary to the common perception that instances of corruption in higher judiciary are not unheard of. The former CJI Y K Sabarwal himself is in the eyes of storm for his judgment pronounced in the a Delhi Sealing Case, which allegedly benefited his son. When a report in this regard appeared in one Newspaper, a suo moto contempt proceeding was initiated and the concerned reporter was sought to be punished.

The Contempt of Court Act, 1971, which itself is not yet codified, is another tool which sometimes is used to gauge the voice of dissent. In another infamous case, the vigilance department of UP Police exposed misappropriation of funds worth Rs 23 crore from the GPF account of Class III and IV employees of Ghaziabad Civil Court. One of the accused arrested in this connection, made startling revelation that he has parted the money both in cash and kind, with one sitting Judge of SC, ten Judges of HC and 23 Judges of lower courts. The investigation is not proceeding as Police cannot interrogate judges without the consent of SC, though such protections are not given in Judges (Inquiry) Act. The matter is still pending with the apex court and the CJI has to convince the nation, whether there is equality before the law or not. Not to forget the matter of the two Haryana High Court Judges whose names have figured in a case in which a law officer from Haryana has alleged to have sent Rs 15 lakh to them. The Matter has been referred to CBI by the apex court.
A Judge may be removed from his office by an order of the President only on grounds of proved misbehaviour or incapacity. The order of the President can only be passed after it has been addressed to both Houses of Parliament in the same session. The address must be supported by a majority of total membership of that House and also by a majority of not less than two-thirds of the members of that House present and voting [Article 124, Clause (4)]. The procedure of the presentation of an address for investigation and proof of the misbehaviour or incapacity of a Judge will be determined by Parliament by law [Article 124 (5)].

The security of tenure of the Supreme Court Judges has been ensured by this provision of the Constitution. In America, the Judges of Supreme Court hold office for life. They can, however, be removed by impeachment in cases of treason, bribery or other high crimes and misdemeanours.

In a historic judgment in *K. Veeraswami v. Union of India*, a five Judge bench of the Supreme Court by a majority of 4-1 has held that a Judge of the Supreme Court and High Court can be prosecuted and convicted for criminal misconduct. Mr. Veeraswami was the Chief Justice of the Madras High Court in 1969. In 1976 the CBI registered a case against him charging him with amassing wealth disproportionate to his known income and had thus committed an offence under the Prevention of Corruption Act. When he came to know these developments he proceeded on leave from March 9, 1976 and subsequently retired on April 8, 1976. The appellant filed a petition in the High Court for quashing the FIR filed by CBI which was dismissed. He went to Supreme Court by way of special leave petition. The Supreme Court dismissed the appeal against the Madras High Court and ordered his prosecution. The expression "misbehaviour" in Article 124 (5) includes criminal misconduct defined in the Prevention of Corruption Act. The expression

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3.4.6 Impeachment of Justice V. Ramaswami.—the impeachment proceeding initiated against Mr. Justice V. Ramaswami a sitting Judge of the Supreme Court of India is the first case after the present Constitution came into force. Justice Ramaswami was appointed as a Judge of the Madras High Court on November 12, 1967 and he was transferred from the Madras High Court as Chief Justice of Punjab and Haryana High Court before being elevated to the Supreme Court on October 6, 1989. He got into lime light when reports appeared in newspapers about audit objections to the purchase of furniture, carpets and air-conditioners far in excess of the limits prescribed for Judges, when he was Chief Justice of Punjab and Haryana High Court. He was charged with having exceeded limits on telephone expenses and misuse of official cars. A motion sponsored by 108 MPs of the Ninth Lok Sabha for his impeachment was admitted by the then Speaker, Mr. Rabi Ray on March 12, 1990 and he constituted a three Judge Committee of the Supreme Court Judges to inquire into the allegations of “financial irregularities” against him under the Judges Inquiry Committee Act. The Ninth Lok Sabha was dissolved when Mr. V. P. Singh Government fell due to withdrawal of the support by the BJP. When the Tenth Lok Sabha was constituted after the parliamentary elections it took up for consideration of the impeachment motion. Justice Ramaswami filed a petition in Supreme Court requesting it to issue a direction that the impeachment motion was lapsed on the dissolution of the Ninth Lok Sabha and the new Lok Sabha cannot take it up for consideration. The Court, however, held that the motion admitted by the Speaker of previous Lok Sabha for his impeachment had not lapsed on its dissolution and the three Judge Committee could probe into the matter under the Judges Inquiry Act. He again filed a petition through his wife challenging the procedure and authority of the Committee and also refused to appear before it. At this stage the Supreme Court held that he has no right to challenge the findings of the Inquiry Committee. The Committee came to the
conclusion that there was "wilful and gross misuse of office, purposeful and persistent negligence in the discharge of his duties, intentional and habitual extravagance at the cost of the public exchequer and moral turpitude by using public funds for private purposes in diverse ways." The Committee held that these 'acts' constituted 'misbehaviour' within the meaning of the Article 124 (4) of the Constitution. The impeachment motion was, however, defeated in the Lok Sabha as it failed to get the support of the two-thirds majority of the members present and voting. The Congress party abstained from voting. The result was that there was 176 votes in favour of the impeachment but none against.

The defeat of the motion for impeachment of Justice Ramaswami in the Lok Sabha has created new imperative for Parliament to amend the Constitutional provisions relating to the procedure for "removal" from office of the Supreme Court Judge on "grounds of proved misbehaviour": The belated resignation of Justice Ramaswami does not alter the urgency of an amendment. It is to be noted that the impeachment motion was not 'negated' by Lok Sabha. There was not a single vote against the motion. It was defeated only because the whole lot of Congress MPs abstained from voting. The ruling party adopted a negative approach. It did not suffer the defeat on the ground of merit. This is indeed an irony. The fathers of the Constitution had provided the safeguard in Article 124 (4) essentially to keep judiciary independent of the executive. The requirement of a two-thirds majority in Parliament could not have been conceived to provide safeguard to a Judge whose conduct was under a cloud. The biggest victim of his conduct has been the judiciary. This demonstrates that not all was well with the highest court of the Country. Secondly, it also shows that there is no mechanism in the Constitution to punish a guilty Judge.

The Courts have gone way beyond ensuring that the laws are implemented. Gone are those days when the Supreme Court simply ordered
the executive to ensure that the laws are implemented. Now, the Supreme Court has created its own executive and legislative wing. It has invented its own laws, rules, and methods of implementation, and has used contempt of court as a threat for disobedience of its orders. The question remains, whether the courts have come too far and undermined its own established principle of Basic structure, including separation of Power and buried the rule of law. India is a democracy and it has to be and should be governed by elected representatives and not merely judges, amicus curiae or committees and commissions that are accountable to the Supreme Court. Let there be a check, a Judge’s (Inquiry) Bill, 2008 to be interpreted by the judiciary again. After all a Constitutional responsibility flows from a democratically elected legislature and a Judicial Dictatorship is not better than any other kind.