CHAPTER VII

POSITION OF THE PARLIAMENT, THE EXECUTIVE AND THE SUPREME COURT UNDER THE WRITTEN CONSTITUTION

Introduction

Constitution of India has very elaborately explained the various provisions making it the world’s longest written Constitution. The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renascence, the core of the commitment to the social revolution lays in Part III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution.

Having independence of Judiciary as the essential feature of the ‘basic structure’ of the Constitution it is the responsibility of the Judiciary to uphold the spirit of the Constitution. The other two organs of the State have the responsibility of making the laws i.e. the Legislature and implementing the laws i.e. the Executive have to work within the limits prescribed by the Constitution. Judicial activism falls in the place when the gaps are left by the Legislature and Executive in their functioning. People hold Judiciary in high esteem and therefore when the representatives of the people fail to protect their rights they seek protection from Judiciary. This has led to severe criticism of ‘Judicial activism’ by both the Legislature and the Executive naming it as mere transgression of their sphere by Judiciary. Judiciary is being criticised for having been enacting
“judicial legislation”, taking on a task that is meant for the Legislature and elected representatives. This trend reached a new high when the Apex Court recently “ordered” the Central Government to distribute food grains, found rotting for want of storage facilities, to the poor and hungry. The Prime Minister Manmohan Singh had to intervene to make it clear that the Court was stepping into the domain of policymaking, an area meant for the Executive.¹

“We the People of India” have completed more than half a Century of our life as a Sovereign Democratic Republic. There have been scores of achievements of which we can be proud most legitimately. On the political plane, our greatest success have been (i) maintenance of the unity and integrity of the Nation and secular character of the polity, (ii) preservation of freedom and Democracy. On the negative side, however, we have not been able to fulfil the vision and dreams of our founding fathers.²

Alexander Hamilton remarks on the importance of the independence of the Judiciary to preserve the Separation of Powers and the rights of the people:

The complete independence of the Court of Justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions 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 through the medium of Court of Justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.\(^3\)

Indian polity today is passing through difficult times. Question marks are being raised about the functioning of the three organs of the State the Executive, the Legislature and the Judiciary. People are fast losing in the quality, integrity and efficiency of most Governmental institutions. Even Judiciary which was the last bastion of hope in our polity has begun to face serious erosion in its credibility. The prevailing scenario is indeed disturbing. A great deal has been written and debated on the weakness of the working of our Legislatures; our political leadership; and our system of public administration all these requiring basic reforms. However, Judiciary has been generally treated as a holy cow in this debate. People have been most reluctant to appraise the working of the Judiciary for ensuring its accountability to the people. It is, high time that questions are asked on who will judge the Judges; and how can we bring Justice to the common person in a credible and people friendly manner.\(^4\)

In the words of Subash C. Kashyap,\(^5\) Indian polity is under severe strain. Faith of the people in the quality, integrity and efficiency of Governmental institutions stands seriously eroded. They turn to the Judiciary as the last bastion of hope. But, of late, even

---

\(^3\) Quoted in *I.R Coelho v. State of Tamil Nadu*, AIR 2007 SC 861 at 876.

\(^4\) *Supra* note 2 at vii.

\(^5\) Former Secretary, General of Lok Sabha.
here things are getting increasingly disturbing and one is unfortunately no more in a position to say that all is well with the Judiciary.6

7.1 Democratic Polity and the Constitution

In a Democracy, Sovereignty must vest in the people and ideally the people should govern themselves. But, with the growing complexities of governance and the size of the nation States, direct Democracy of the type of great city States or the Indian village Republics of ancient times, is no more feasible. Also, except in a primordial or revolution situation Sovereignty in the hands of the people is an abstraction. In order to become exercisable, this Sovereignty has to be institutionalised. The very first and the most fundamental application of their Sovereignty by the people is in giving to the themselves a Constitution.7

The Indian Constitution consist of three main organs of the State i.e. Executive, Legislature, Judiciary and it defines their powers, jurisdiction responsibilities and regulates their relationships with each other and with the people. The principle of Separation of Powers which is implied and under the scheme of checks and balances is followed.8

Sir Thomas Paine has said, “A Constitution is not the Act of a Government, but of a people constituting a Government, and a Government without a Constitution is a power without right”.

7.1.1 Constitutionalism

The word ‘Constitutionalism’ denotes the principle and practice under which a community is governed by a Constitution.

---

6 Supra note 2 at 3.
7 Id. at 4.
8 Ibid.
Constitution, in term, stands for a set of rules and processes — codified or established by long practice— which prescribes the structure and functions of the Government, defining organs of the Government, their powers and mutual relationships as also the limitations under which they are bound to function, so as to ensure that the Government or any organ thereof, is not allowed to function arbitrarily. Constitutionalism, therefore, postulates effective checks on the absolute powers of the Government so that the liberties of the citizens are not curtailed without adequate reason.9

Carl J. Friedrich and Karl Loewenstein, in their Articles in the International Encyclopedia of the Social Sciences (Vol. 3) and Marxism, Communism and Western Society: A Comparative Encyclopaedia (Vol. 2) respectively has sought to elaborate the meaning of Constitutionalism. According to Friedrich, Constitutionalism implies the practice of politics according to “rules of the game” which ensure effective restraints upon Governmental and other political action, and the theory explanatory as well as justificatory of this practice. Karl Lowenstein, attempts to elucidate the concept of Constitutionalism through a suitable definition of Constitution, but he rejects the current definitions as they evade the actual problem by employing synonyms for the term to be defined. Thus Loewenstein’s model of Democratic Constitutional system approximates Friedrich’s model of Constitutional system itself. Both of them postulate two basic conditions to serve the purpose of Constitution.10

10 Id. at 5.
7.2 Beginning of Constitutional Amendments: The First Amendment, 1951

The amending bill introduced in Parliament on May 12, 1951 by Prime Minister Jawaharlal Nehru, contained the provisions regarding freedom of expression and agricultural and commercial/industrial property and most of its final content on special treatment for the disadvantaged (mentioned in detail in chapter 6). Two days earlier, the Government had received the good news that the Uttar Pradesh High Court had lifted the restraining orders of the previous January and had upheld the Constitutionality of the State’s Zamindari Abolition Act. It seems unlikely that the Court’s decision would have caused the Government to change the amending bill even if it’s had come earlier. Speaking on the bill, Nehru described it disarmingly as “neither big nor complicated; yet without it the main purposes of the Constitution may be defeated or delayed and having drafted the Constitution, Parliament was competent to amend it”.

7.2.1 Right of Parliament to Amend

In one vital field, the Supreme Court, having initially given Parliament, in its constituent capacity, a totally free hand to a considerable extent, reconsidered the issue and curbed the power of Parliament. The field is the right of Parliament to amend the Constitution. Its importance can be gauged by the fact that we have, in past years of its history, seen over more than 100 amendments to the Constitution. Many of these amendments have, however been non-controversial. The controversial ones are the First, Fourth,
Seventeenth, Forty Second and Forty Fourth Amendments (discussed in chapter 4 and 6).\textsuperscript{12}

In Shankari Prasad Deo \textit{v.} Union of India,\textsuperscript{13} and Sajjan Singh \textit{v.} State of Rajasthan,\textsuperscript{14} initially the Supreme Court held that there was no limit whatever to the power of amendment. A spate of amendments followed and, in particular, the Amendment, which listed a large number of Acts which were made completely immune from challenge. The Seventeenth Amendment was challenged as unconstitutional and this resulted in the Supreme Court constituting a Bench of 11 Judges in \textit{I.C. Golak Nath v. State of Punjab},\textsuperscript{15} to consider afresh the extent of the amending power of Parliament. By a majority of 6:5, the Court held that the power to amend the Constitution was not unlimited and that Fundamental Rights could not be amended. It however, laid down a concept unknown in Indian law until then, namely the doctrine of prospective overruling, which resulted in the Seventeenth Amendment itself being held valid but any further amendment which curtailed Fundamental Rights being prohibited. This decision aroused much controversy and the Supreme Court subsequently retreated a little. The issue was eventually resolved in \textit{Kesavananda Bharti v. State of Kerala},\textsuperscript{16} where a full bench of 13 Judges by a majority, overruled the \textit{Golak Nath} decision but held that the power to amend the Constitution was limited insomuch as the basic features of the Constitution could not be altered.\textsuperscript{17}

\textsuperscript{13} AIR 1951 SC 458.
\textsuperscript{14} AIR 1965 SC 845.
\textsuperscript{15} AIR 1967 SC 1643.
\textsuperscript{16} AIR 1973 SC 1461.
\textsuperscript{17} Supra note 12 at 78.
7.2.2 Constitutional Amendment regarding the Right to Property

In Kesavanad Bharti judgement there was, however no unanimity on what the ‘basic features’ were, but it was clear that the Fundamental Right to property is not one of them. The abrogation of Articles 19(1) (f) and 31 from the Constitution was therefore valid.

The decision that the right to property is not in any manner protected was probably influenced by the fact that the major issues on which there had been a confrontation between the Judiciary and the Parliament related to this right, as the Supreme Court had struck down numerous laws as infringing Article 31 as it stood at that time. It probably also reflected the prevalent thinking, when ‘Socialism’ was almost the universal mantra and the Judges did not want to be regarded as stooges of vested interests. Whatever the reason, it has led to the most unfortunate result, namely that the citizen of India has no right whatever to hold property and his property can be taken away by the Legislature without any restraint. It is curious to note that when the Seventeenth Amendment was introduced, an exception was carried out to Article 31A to the effect that the State could not acquire land within the limits of the land ceiling law then in force without paying full market value for such land, even the restraint was overlooked when the Supreme Court pronounced unequivocally that no person in India had a protected right to hold property.

The right to hold property is universally recognised, and many other Fundamental Rights which are not curtailed so far cannot be

---

18 The Fundamental Right to acquire own and dispose of property.
19 The right not to be deprived of one’s property without adequate compensation.
20 The Fundamental Right to property was abolished by Janata Government in 1979.
21 Supra note 12 at 79.
22 Ibid.
effectively enjoyed without this right. It would be difficult for the village shopkeeper to carry on his business without owning some property. It would be impossible for any religious institution to effectively practice its religion without holding property. It would be impossible for any minority to exercise its rights if it could not hold property. Many scholars are of the view that freedom is itself in jeopardy if the right to property is not protected by the State.23

The concept of 'basic feature' evolved in Kesavananda Bharti case is flexible and leaves the extent of the amending power uncertain. The net result, however, is, on the whole, a great improvement on the law as originally laid down. Parliament cannot, by resorting to the power to amend, destroy the Constitution. And the very flexibility introduced in Kesavananda Bharti case, while undesirable in principle, gives the opportunity for a future Bench to alter the position of the right to property.24

7.2.3 Basic structure outside the Right to Property

In the use of Basic structure doctrine in the S.R Bommai v. Union of India.25 Here the basic structure concept was resorted to outside its original scope and function. No question of Constitutional amendment was involved in the case. But the Supreme Court held that policies by a State Government directed against an element of the basic structure of the Constitution would be a valid ground for the exercise of the central power under Article 356, i.e. imposition of President Rule. Secularism was held to be such an essential feature of the Constitution and part of its basic structure.26

A State Government then may be dismissed not because it violates any particular provision of the Constitution, but because it

---

23 Ibid.
24 Ibid.
25 (1994)3 SCC1
acts against a vital principle connecting and giving coherence to, a
number of particular provisions (e.g. Articles 14, 15, 25). In S.R
Bommai v. Union of India, the Court clearly based its conclusion
not so much on violation of particular Constitutional provisions but
on this more generalised ground, i.e. evidence of a pattern of action
directed against the principle of secularism. With respect to the
wording of the Constitution the argument could perhaps be
rationalised by the proposition that the Government of a State cannot
be carried on in accordance with the provisions of the Constitution, if
the principles underlying the interplay of these provisions are
obstructed and acted against. This approach is a departure from
earlier rulings of the Supreme Court to the effect that general notions
like the ‘Spirit of the Constitution’ cannot be invoked to read
limitations into Constitutional powers expressly conferred. This
stand has been taken many times in prominent cases, notably the A.K
Gopalan v. State of Madras, case and against the authority even of
Dr. B.R Ambedkar appearing as counsel, in State of Bihar v.
Kameshwar Singh. “Spirit of the Constitution” indeed may have
appeared to be an unduly vague notion. One may note, nevertheless
that the Supreme Court has shed its aversion and has claimed a say of
the Judiciary in the matter of judicial services conditions because it
would be against the spirit of the Constitution to deny any role to the
Judiciary in that behalf. In any case the recognition of amendment
may have led to the insight that there is, beyond, the wording of
particular provisions, systematic principles underlying and
connecting the provisions of the Constitution. These principles give
coherence to the Constitution and make it an organic whole. They are
part of Constitutional law even if they are not expressly stated in the
form of rules. An instance is the principle of reasonableness

27 AIR 1994 SC 1918.
28 AIR 1950 SC 27.
29 AIR 1952 SC 252.
connecting Articles 14, 19 and according to Maneka Gandhi v. Union of India,\textsuperscript{30} Article 21. Some of these principles not necessarily all of them may be so important and fundamental, as to qualify as “essential features” or part of the “basic structure” of the Constitution i.e. be not open to amendment. But it is only by linking particular provisions to such overreaching principles that one would be able to distinguish essential from less essential features of the Constitution.\textsuperscript{31}

Applying a note of a caution, the jurisprudence of principles has its own distinct dangers arising out of the flexibility and lack of precision of principles as well as their closeness to rhetorical flourish. This might invite a loosening of judicial discipline in interpreting the explicit provisions of the Constitution. The Indian Supreme Court’s initial hesitance in dealing with vague generalities like “Spirit of the Constitution”, therefore, may have been based on very good grounds of judicial ethics, even if it went too far. Characteristic dangers would also be clearly visible in the S.R Bommai v. Union of India,\textsuperscript{32} decision unless broad Constitutional principles such as Secularism are defined to the possible degree of clarity and unless judicial scrutiny is extended to their application by the Executive. Mere invocation of such principles could lead to a vast expansion of central powers of interference – quite contrary to the tendency of the S.R Bommai ruling. It is submitted therefore, that the inroad into the domain of the Executive’s subjective satisfaction, as indeed it was initiated in the S.R Bommai case, would be a necessary concomitant to the extension of judicial cognizance to Constitutional principles. Tightening of judicial scrutiny would be necessary in order to diminish the dangers of opportunistic use of such principles as mere political catchwords. Some exertions of legal

\textsuperscript{30} AIR 1978 SC 597.
\textsuperscript{31} Supra note 26 at 201.
\textsuperscript{32} Supra note 27.
scholarship may also be called for systematic elaboration of Constitutional principles, careful elucidation of what these principles means in the determinate context of the Constitution, could serve a useful purpose in the interest of sober and dependable legal reasoning. It is only then that a “principled approach” to issue of Constitutional law may be hoped for.  

7.2.4 The power of Constitutional Amendments

The power of Constitutional Amendments in any written Constitution is often vested in a popular, representative body. Such power is necessary to avoid the stagnation of a Constitution. If a Constitution is unchangeable it is bound to become unsuitable for or incapable of satisfying the aspirations of a changing society. The process of Constitutional amendment is essentially counter majoritarian. It prevents sudden and impulsive changes in a Constitution and entrenches certain provisions, making them unamendable. A Constitutional amendment requires special majority, two thirds or three fourths, to be passed. This means that even a minority whose number exceeds one third or one fourth of the total number of members of a legislative house can veto an amendment. The power of Constitutional amendment is considered to be sui juris (which means that it generates its own validity and does not have to meet the test of validity with reference to any higher norm) and its product therefore cannot be subjected to Judicial Review except on the ground that proper procedure for Constitutional amendments as prescribed by the Constitution has not been followed.

The Constitution of India contains a provision for its amendment in Article 368. The Constitution can be amended by Parliament if a bill for such amendment is passed in each of its two

---

33 Supra note 26 at 202.
34 S.P. Sathe, Judicial Activism in India, 63 (2002).
houses with the support of two thirds of its member’s present and voting and absolute majority of the total membership of that house. Provisions of the Constitution that have bearing on its federal structure; however, can be amended only when an amendment Bill being passed by both houses in the above manner is ratified by at least half the Legislatures of the States.

The Constitution being detailed and specific, any change in it required an amendment. That is one reason why there have been many in the last years. The most controversial amendments were those by which Judicial Review in relation to the right to property was restricted. The propertied interests disappointed by such amendments therefore challenged the validity of the amendments that excluded Judicial Review on the ground that they curbed the rights called fundamental by the original Constitution (reference to the Ninth Schedule, discussed in detail in chapter 3, 4 and 6). The main question of debate in this regard has been that: Could Parliament use the power of Constitutional amendment to withdrawn the Fundamental Rights the people of India had conferred upon themselves? The Preamble of the Constitution talks in the name of the people of India. Politically speaking, the question was whether a bill of rights that had been settled after long negotiations between various Sections of society and was based on a consensus reflected in the Constituent Assembly could be altered and abrogated through the process of Constitutional amendment?\textsuperscript{35}

Fundamental Rights are contained in Part III of the Constitution. Before enumerating various Fundamental Rights, a prefatory Article 13, States the legal status of those rights. Article 13 declares that all laws in force in the territory of India before the commencement of the Constitution shall to the extent of their

\textsuperscript{35} Ibid.
repugnancy with the Fundamental Rights be void from the date on which the Constitution comes into force. Clause (2) of that Article further commands that the State shall make no law that takes away or abridges the Fundamental Rights.

The word ‘law’ has been defined in Clause (3) (b) of Article 13. In Shankar Prasad v. Union of India,\(^{36}\) it was argued that a Constitutional amendment was ‘law’ for the purpose of Article 13 and therefore it had to be tested on the anvil of the above Article. If it violated any of the Fundamental Rights, it should be void. Chief Justice Patanjali Shastri, speaking on behalf of a bench of five Judges in a unanimous judgment, rejected that argument outright and held that the word ‘law’ in that Article did not include a Constitutional amendment. That challenge was not renewed for more than a decade. During Nehru’s time, the Constitution went through seventeen amendments. The Seventeenth Amendment which brought Ryotwari estates within the definition of the word ‘estate’ in Article 31(A), became controversial for many reasons. It was however, after Nehru’s death that the challenge to the constituent power of Parliament was renewed. In Sajjan Singh v. State of Rajasthan,\(^{37}\) the Court consisting Bench of five Judges was divided. While Chief Justice Gajendragadkar held on behalf of the majority of three Judges including him that a Constitutional amendment was not covered by the prohibition of Article 13(2), two Judges, Justices Mudholkar and Hidayatullah expressed serious reservations about that interpretation. Justice Hidayatullah observed that if our Fundamental Rights were to be really fundamental, they should not become ‘the plaything of a special majority’. These two dissents opened the door to future attempts to bring the exercise of the power of Constitutional amendment under judicial scrutiny. A thought that persuaded the

\(^{36}\) Supra note 13.  
\(^{37}\) Supra note 14.
majority Justices to stick to the previous ruling of the Court was that since the Court had upheld Parliament’s power to amend the Constitution without any consideration for the Fundamental Right in 1951, and seventeen amendments had been enacted in pursuance of that decision any reversal of judicial view in 1965 would not only surely jeopardise India’s land reforms and other economic programmes but also create problems in reverting to the pre-amendments position in respect of property relations. Professor A.R. Blackshield in one of his path breaking Article had shown how the Supreme Court, if it wanted to change the legal position, could do so without upsetting the previously enacted Constitutional amendments by prospectively overruling the previous decision.  

In the case of Golaknath v. State of Punjab held that an amendment passed in accordance with the procedure laid down by Article 368 was ‘law’ within the meaning of that word as used in Article 13(2) of the Constitution. The Court by a majority with six against five Judges held that Parliament had no power to pass any amendment that would have the effect of abridging or taking away any of the Fundamental Rights guaranteed by the Constitution. The petitioner had challenged the validity of the First, Fourth and Seventeenth Amendment Act, which had foreclosed Judicial Review of the laws pertaining to property. Chief Justice K. Subba Rao speaking on behalf of five Judges invoked the doctrine of prospective overruling to save the existing Constitutional amendments (first, fourth and seventeenth) from infirmity while mandating Parliament not to pass any Constitutional amendment that would take away or abridge any of the Fundamental Rights in future.

The learned Chief Justice promised that the Court would interpret the provisions of the Fundamental Rights liberally so as not

38 Supra note 34 at 65.
39 Supra note 27.
to jeopardise the implementation of the Directive Principles of State Policy. Justice Hidayatullah, in a separate concurring judgment, reached the same result but an independent reasoning. Instead of prospective overruling, he conceived that principle of acquiescence to legitimise the First, Fourth and Seventeenth Amendments. In his view, since the Court had acquiesced in the validity of those Amendment Acts through its previous decisions, it was estopped from declaring them invalid. The doctrine of acquiescence was the doctrine of estoppel against the Court itself. The doctrine of estoppel originated in equity, which means that if a person promises, another to do or not to do an act and in pursuance of such a promise the other person acts and would be put to a several determinant if the promise is not complied with, the promisor is not allowed to resile from his promise.40

In late 1960s, the Golaknath case was an example of judicial activism. It evoked severe reactions from almost all Constitutional pundits. In the context of Court – Parliament confrontation on right to property, the Golaknath case decision appeared to be a judicial onemanship to claim finality to the Court’s decisions. It flow in the face of the theory that a Constitution was grundnorm (highest norm) and did not have to be validated. Its validity was sui juris and Constitutional legislation had been the basis of Judicial Review as originally conceived in Marbury v. Madison.41

7.3 Provision for Constitutional Amendment under Article 368

The life of the nation is not static as the times are not static. Its political, social, economic conditions change continuously. Social morals and ideals change from time to time creating new problems.

---

40 Supra note 34 at 66.
41 Ganch (S.V.S.) 137 (1803).
Therefore, the Constitution drafted in one era may be found inadequate in another era.

If we categorise the methods or modes of adopting the Constitution from time to time to new circumstances may either be informal or formal. First informal methods include judicial interpretation and Conventions; the formal method is the constituent process.42

In Indian Constitution, the informal method includes judicial interpretation, it is a process of slow and gradual metamorphosis of Constitutional principles, and is somewhat invisible, for the change has to be deciphered by an analysis of a body of judicial precedents. In this process, the Court play a dominant role, for it is their function to interpret the Constitution. The other informal method includes Conventions, which is another process of slow metamorphosis, of imperceptible change, where the Constitutional text retains its original form and phraseology, where there is no visible modification on the face, but where, underneath the surface, a change has come about so far as the working and operation of the provision concerned.

On the other side the formal methods of amendment are most significant way of adapting the Constitution to changing circumstances. The judicial interpretation may help to some extent in this respect but it cannot change the wordings of the basic law and certain desired changes may not be attainable without verbal changes in the Constitutional text. Further, the judicial process is slow and a change may be desired early. A formal amending process is as important as the process of Constitution making and so it may rightly be characterised as the ‘constituent’ process. The amending provision in a Constitution is of great importance as it enables the country to

develop peacefully, the alternative to which may be stagnation and revolution.43

7.3.1 United States Constitution

The informal method of judicial interpretation has been used effectively in United States where the Supreme Court has from time to time given a new meaning to phrases and words in the Constitution so as to make the 18th century, laissez faire era. The United States Constitution being skeletal and brief and couched in general language offers a most scope for judicial creativity.

On the other side the formal method in United States of America involves two separate stages i.e. initiation and ratification.

An amendment may be proposed or initiated either: (i) by vote of two-thirds of each House of Congress; or (ii) by a Constitutional convention called together by Congress on the application of the Legislatures of two-thirds of the States. Hitherto, all amendments have been initiated by the first method and the second method has never been employed.

An amendment proposed as above may be ratified either (i) by vote of Legislatures of three fourth of the States; or (ii) by the Constitutional conventions in three-fourths of the States. The choice of the method is wholly within the discretion of the Congress. After ratification, the Constitutional amendment becomes effective.44

A restriction imposed by the Constitution on the amending process is that no State can be deprived of its equal suffrage in the Senate without its consent.

43 Id. at 1613.
44 Id. at 1615.
7.3.2 Canada and Australia

To a limited extent, in Canada and Australia also, the Judiciary has adapted the Constitution to the changing circumstances. The formal methods in Canada that portion of the British North America Act relating to the Provincial Constitution only (excepting the office of the (Lieutenant-Governor) could be amended by the Provincial Legislation itself in the ordinary legislative process. There was no provision in the B.N.A. Act for amendment of the other portion before 1982.\(^{45}\)

Being a statute of the British Parliament, it could be amended by the British Parliament itself. The Parliament did not, however, Act in this behalf suo motu: it acted only on the request of the Canadian Government. A convention had grown that the British Parliament would pass an amendment, as a matter of course, if presented to it by a joint address of both Houses of the Canadian Parliament. Another convention which had come into existence was that the Canadian Government consulted the provinces before requesting the British Parliament to amend the B.N.A. Act. In 1949, power was given to Parliament of Canada to amend that portion of the B.N.A. Act which related to matters concerning the Central Government above, e.g., apportionment of seats in the House of Commons. But with respect to that portion of the B.N.A. Act which concerned both the Centre and the Provinces, e.g., the distribution of powers, the amending power still vested in the British Parliament as there was no agreement in Canada on the alternative procedure to be followed for the purpose.\(^{46}\)

In 1982, the British Parliament enacted the Canada Act, 1982, on the request of the Canadian Parliament conferring amending power on the Canadian Parliament and Provincial Assemblies. The

\(^{45}\) *Ibid.*  
\(^{46}\) *Id.* at 1616.
federal portions of the B.N.A. Act can now be amended by resolutions of the Senate and House of Commons plus resolutions of 213 of the Provincial Legislative Assemblies having at least 50% of the population of all the provinces. Each and every resolution is to be passed by a majority of members of each House if the amendment derogates from the legislative powers, proprietary rights or any other rights or privileges of the Legislature or Government of a Province.\(^47\)

In Australia, the process of Constitutional amendment involves two stages: initiation and ratification. An amendment to the Constitution may be proposed by an absolute majority of each House of Parliament, or by an absolute majority of one House in two votes taken at an interval of at least three months. Thereafter, the proposed amendment becomes effective on ratification at a referendum by a majority of electors voting both in a majority of States and in the commonwealth and on receiving the assent of the Governor-General (this, of course, is purely a formal matter).\(^48\)

No amendment diminishing the proportionate representation of a State in either House of the Federal Parliament, or the minimum number of representatives of a State in either House of the Federal Parliament or the Minimum number of representatives of a State in Federal Lower House, or altering the limits of the States, can be adopted unless it is also approved by a majority of elections of the State concerned. The Constitution amending process in Australia has proud to be very rigid in practice. Many amendments deemed essential by the Commonwealth Government have been rejected at the reference. A learned author has said: “Constitutionally speaking, Australia is the foreign continent”.

\(^{47}\) Ibid.
\(^{48}\) Ibid.
7.3.3 Formal Constitutional Amendment in India

Formal process means the constituent process. There is different degree of rigidity attach to different portions of the Constitution, depending on their importance and significance. The Constitution, accordingly, provides for the following three classes of amendments of its provisions:

1) Constitutional provisions of comparatively less significance can be amended by the simple legislative process as is adopted in passing ordinary legislation in Parliament;

2) Those provisions which are material and vital are made relatively stable as these can be amended only by following the rule of special majority as laid down in Article 368;

3) There are certain Constitutional provisions relating to the federal character, which may be characterised as the 'entrenched provisions, which need for their amendment, in addition to the passage of the amending Bill by the special majority in the two Houses of Parliament, ratification by half of the State Legislatures. This procedure is also laid down in Article 368. The more elaborate procedure of referendum or Constitutional convention has been avoided in India. The Constitution makers thus sought to find a via media between the two extremes of flexibility and rigidity so that the Constitution may keep pace with social dynamism in the country.

---

Id. at 1617.

- 411 -
1) Amendment by the Simple Legislative Process

These Articles of Constitution can be amended by simple legislative process and is not to be regarded as a process and is not to be regarded as an amendment of the Constitution and is not subject to the special procedure prescribed in Article 368. These are as follows:50

1) When Parliament admits a new State under Article 2, it can effect consequential amendments in Schedules I and IV defining territory and allocating seats in the Rajya Sabha amongst the various States respectively.

2) Under Article 11, Parliament is empowered to make any provision for acquisition and termination of, and all other matters relating to, citizenship inspite of Articles 5 to 10.

3) Article 73(2) retains certain Executive powers in the States and their officers until Parliament otherwise provides.

4) Articles 59(3), 75(6), 97, 125(2), 148(3), 158(3) and 221(2) permit amendment by Parliament of the second Schedule dealing with salaries and allowances of certain officers created by the Constitution.

5) Article 105(3) prescribes Parliamentary privileges until it is defined by Parliament.

6) Article 24(1) prescribes that Supreme Court shall have a Chief Justice and seven Judges until Parliament increases the strength of the Judges.

50 Ibid.
7) Article 133(3) prohibits an appeal from the judgment of a single judge of a High Court to the Supreme Court unless Parliament provides otherwise.

8) Article 135 confers jurisdiction on the Supreme Court unless Parliament otherwise provides.

9) Under Article 137, Supreme Court’s power to review its own judgments is subject to a law made by Parliament.

10) Article 171(2) States that the composition of the State legislative council as laid down in Article 170(3) shall endure until Parliament makes a law providing otherwise.

11) Article 343(3) provides that Parliament may by law provide for the use of English even after 15 years as prescribed in Article 343(2).

12) Article 348(1) establishes English as the language to be used in the Supreme Court and High Court and of legislation until Parliament provides otherwise.

13) Schedules V and VI deal with administration of Scheduled Areas and Scheduled Tribes and Tribal Areas in Assam which may be amended by Parliament making a law.

There are certain other Articles in the Constitution which make tentative provisions until a law is made by the Parliament by following the ordinary legislative process such as Article 3, 169, 7(6), 164(5), 194(3).
2) Amendment by Special Majority

The process to amend and adapt other provisions of the Indian Constitution is contained in Article 368. The phraseology of Article 368 has been amended twice since the inauguration of the Constitution. However, the basic features of the amending procedure have remained intact in spite of these changes. These basic features are:\n
1) An amendment of the Constitution can be initiated only by introducing a Bill for the purpose in either House of Parliament.

2) After the bill is passed by each House by a majority of its total membership, and a majority of not less than two-thirds of the members of that House present and voting, and after receiving the assent of the President, the Constitution stands amended in accordance with the terms of the Bill.

3) To amend certain Constitutional provisions relating to its federal character characterised as the 'entrenched provision', after the Bill to amend the Constitution is passed by the Houses of Parliament as mentioned above, but before being presented to the President for his assent, it has also to be ratified by the Legislatures of not less than one-half of the States by resolutions.

The ‘entrenched provisions’ which are given this addition safeguards are:

1) The manner of election of the President: Article 54 and 55.

\[51\] Id. at 1618.
2) Extent of the Executive powers of the union and the States: Articles 73 and 162.

3) The Supreme Court and the High Court: Articles 124-147 and 214-231.

4) The scheme of distribution of legislative, taxing and administrative powers between the union and the States: Articles 245-255.

5) Representation of the States in Parliament.

6) Article 368 itself.

In 1976, the following two Clauses were added to Article 368 by the forty-second amendment (which were declared unconstitutional later) of the Constitution:

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

(5) For the removal of doubts it is hereby declared that there shall be no limitation whether on the constituent power of Parliament to amend by way of addition, variation or repeal the provision of this Constitution under this Article.

7.4 Procedure for Amendment of the Constitution Article 368

The Article 368 reads as:

An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either house of Parliament, and when the Bill is passed in each house by a majority

\[\text{Id. at 1620.}\]
of not less than 2/3 of the membership of that house and by a
majority of not less than two-thirds of the members of that house
present and voting, it shall be presented to the President for his
assent and upon such assent being given to the Bill the Constitution
shall stand amended in accordance with the terms of the Bill: provides
that if such amendment seeks to make any changes in:

1) Article 54, 55, 73, 162, 241; or
2) Chapter IV of Part V, Chapter V of Part VI, Chapter 1 of Part XI; or
3) Any of the lists in the Seventh Schedule; or
4) The representation of States in Parliament; or
5) The provisions of this Article, the amendment shall
also require to be ratified by the Legislatures of not
less than on half of the States specified in Parts A
and B of the first Schedule by resolution to that
effect passed by those Legislatures the bill making
provision for such amendment is presented to the
President for assent.\(^5\)

7.4.1 Analysis and Comment

Under Article 368 of the Constitution which is the specific
provision dealing with amendment of the Constitution, Parliament is
the repository of the constituent power of the union. The procedure
for Constitution amendment, as spelt out in this Article, has certain
distinctive features which clearly mark out Parliament’s constituent
capacity from its ordinary role as a Legislature. First, an amendment
of the Constitution can be insisted only by the introduction of a Bill
in either House of Parliament so that the initiative in the matter of

Constitutional amendment has been exclusively reserved for Parliament. Second, for the most part, the provisions of the Constitution can be amended by Parliament by a special majority, namely, a majority of not less than two-thirds of the members of each house present and voting. It is only in the case of a limited category of Constitutional provisions, (i.e., those relating to the Election of the President, Executive power of the Union and the States, Judiciary, the lists in the Seventh Schedule, representation of States in Parliament, provisions of Article 368, etc.) that the amendment bill, having been passed by each House of Parliament with the prescribed special majority, needs to be ratified by the Legislatures of not less than one-half of the States. Third, on a Constitution Amendment Bill, as duly passed/ratified, being presented to the President, the President’s assent is mandatory and, unlike in the case of ordinary legislative Bills, he has no option to withhold his assent or return the Bill to the House for reconsideration. And lastly, it is significant that none of the provisions of the Constitution is amendable in as much as Parliament can in any way amend, alter or repeal any provisions of the Constitution and such amendments cannot be questioned in any Court of law on any ground whatsoever unless they tend to alter or violate what may be considered as the basic features of the Constitution. During the period 1950-1972, the question of the amendability of Fundamental Rights came before the Supreme Court in three different cases, namely, Sankari Prasad Deo v. Union of India, Sajjan Singh v. State of Rajasthan, until the Supreme Court decision in the Golaknath Nath case, the law was as follows:

1) Constitution Amendment Acts are not ordinary laws and are passed by Parliament in exercise of its constituent

---

54 Ibid.
55 Supra note 13.
56 Supra note 14.
powers as contra distinct from ordinary legislative powers. There is no separate constituent body for the purpose of amendment of the Constitution, constituent power also being vested in ‘Parliament’. In *Sasanka v. Union of India*, the Supreme Court in 1981 confirmed that the amending power under Article 368 is a constituent power independent of the scheme of the distribution of legislative powers under the seventh Schedule.

2) There is no limitation placed upon the amending power, that is to say, there is no provision of the Constitution which cannot be amended. The terms of Article 368 are perfectly general and empower Parliament to amend the Constitution without any exception whatever.

3) Fundamental Rights guaranteed under the Constitution (Part III) are subject to Parliament’s power to amend the Constitution.

In *Golaknath Nath case*, the Supreme Court by a 6:5 majority reversed its earlier decision and held that the Fundamental Rights enshrined in the Constitution were transcendental and immutable, that Article 368 of the Constitution laid down only the procedure for amendment and did not give to Parliament any substantive power to amend the Constitution or any constituent power distinct, or separate from its ordinary legislative power, that a Constitution Amendment Act was also law within the meaning of Article 13 and as such Parliament could not take away or abridge the Fundamental Rights.

57 AIR 1981 SC 522.
even though a Constitution Amendment Act passed under Article 368.58

In 1973, in Kesavananda Bharti v. State of Kerala,59 the Supreme Court reviewed the decision in the Golaknath Nath case. Ten of the 13 Judges held that Article 368 itself contained the power to amend the Constitution and that ‘law’ in Article 13(2) did not take in a Constitutional amendment under Article 368. The law declared in Golaknath Nath case was accordingly overruled. On the question whether the amending power under Article 368 is absolute and unlimited seven Judges, constituting a majority, held that the amending power under Article 368 was subject to an implied limitation; a limitation which arose by necessary implication from its being a power to “amend the Constitution”. The Court ruled that the Constitution contains certain basic features which cannot be changed or destroyed. Article 368 does not enable Parliament to alter the ‘basic structure’ or framework of the Constitution. What constituted the ‘basic structure’ was, however, not clearly made out by the majority and remained an open question (discussed in detail in chapter 5).60

7.4.2 Doctrine of Basic structure

While overruling Golaknath case, Kesavananda Bharti case judgement (discussed in chapter 5) introduced the new concept of ‘Basic structure of the Constitution’. While conceding to Parliament the power to amend, the Court circumscribed that power by holding that it could not be exercised so as to alter the basic structure of the Constitution. The Court reserved to itself, the right to aducible upon every future amendment of the Constitution, whether it altered the basic structure or not. Since there are no signposts signalling basic

58 Supra note 53
59 Supra note 16.
60 Ibid.
features of the Constitution, every attempt to discover a basic feature becomes a ‘voyage of discovery’.61

Chief Justice Sikri has not mentioned wherefrom he derived the formula. The formula of ‘Basic structure’ was first voiced by Justice Hidayatullah and Justice Mudholkar in Sajjan Singh and subsequently by Chief Justice Subba Rao in Golaknath. Chief Justice Sikri did not refer to either of them as the source of the formula, as indeed he should have done.62

In 1973, in Kesavananda Bharti case, the Supreme Court reviewed the decision in the Golaknath Nath case. Ten of the 13 Judges held that ‘law’ in Article 13(2) did not take in a Constitutional amendment under Article 368. The law declared in Golaknath case was overruled. On the question, whether the amending power under Article 368 is absolute and unlimited, seven Judges, constituting a majority, held that the amending power under Article 368 was subject to an implied limitation a limitation which arose by necessary implication from its being a power to “amend the Constitution”. The Court ruled that the Constitution contains certain basic features which cannot be changed or destroyed. Article 368 does not enable Parliament to alter the ‘basic structure’ or frameworks of Constitution. What constituted the basic structure was however, not clearly made out by the majority and remained an open question.63 Following this decision in the Kesavananda case, Clauses (4) and (5) were inserted in the Article 368 by the Constitution (42nd Amendment) Act, 1976, to dilute the limitation of ‘basic features’ to the amending powers of Parliament. These Clauses say that (a) there are no limitations, expressed or implied, upon the amending power of Parliament under Article 368 (1), which is a ‘constituent power’, and

---

62 Ibid.
63 Supra note 53 at 2306.
that (b) a Constitution Amendment Act would not, therefore, be subject to Judicial Review on any ground. But the applicability of the doctrine of basic structure was reaffirmed by the Supreme Court in *Indira Gandhi v. Raj Narain*,64 and *Minerva Mills v. Union of India*.65 In the later case, the Court held Clauses (4) and (5) as void, on the ground that this amendment sought to totally exclude Judicial Review, which was a ‘basic feature’ of the Constitution. The Court further said: “Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of the Constitution and, therefore, the limitations on that power cannot be destroyed”. The Court, however, did not show where in the Constitution, the power of amendment had been said to be a qualified or limited power except for the procedural requirements laid down in Article 368.66

Be it as it may, the present State of the doctrine of ‘basic features’ is that so longer the decision in the *Kesavananda Bharti* case is not overturned by another full bench of the Supreme Court, any amendment to the Constitution is liable to be interfered with by the Court on the ground of affecting one or other of the basic features of the Constitution.

The concept of basic structure was further developed by the Supreme Court and the position that the basic structure was further developed by the Supreme Court and the position that the basic features cannot be altered even by Constitutional amendments was further confirmed and more essential features of the basic structure

---

64 AIR 1975 SC 2299
65 AIR 1980 SC 1789
66 Supra note 53 at 2307.
were added in *Waman Rao case*,67 *Bhim Singhji Case*,68 *Transfer of Judge's case (S.P. Gupta case)*,69 *Samath Kumar's Case*,70 *Kihota Hollohan v. Zachilhu*,71 *L. Chandra Kumar v. Union of India*,72 In *P.V. Narsimha Rao v. State*,73 Justice S.C. Agarwal held that “Parliamentary Democracy” is part of the basic structure of the Constitution. In other cases, features like free and fair elections, Sovereign Democratic, Republican structure were mentioned among the basic features. Alongwith ‘Judicial Review’, ‘Rule of Law’ were also considered as basic features of the Constitution.

In *S.R. Bommai case* regarding the dismissal of BJP Governments in Madhya Pradesh, Himachal Pradesh and Rajasthan, Justice Jeevan Reddy and Justice Ramaswamy reiterated that federalism inter alia was a basic feature of the Constitution. Justice Ramaswamy held that a Democratic form of Government, federal structure, unity and integrity of the nation, secularism, Socialism, social Justice and Judicial Review were among the basic features of the Constitution.74

In some cases, there is difference of opinion among the Judges as regards a particular element forming an element of the basic features. For example, Chief Justice Ray did not find it possible to hold the concept of free and fair elections as a basic feature whereas Justice Khanna, in the same case, found this principle to be an element of the fundamental features of the Constitution. Justice Chandrachud did not subscribe to the view that the Preamble of the

---

68 AIR 1981 SC 234.
69 AIR 1982 SC 149.
70 AIR 1987 SC 663.
71 AIR 1993 SC 412.
72 AIR 1997 SC 1125.
73 AIR 1998 SC 2120.
74 Supra note 53 at 2308.

- 422 -
Constitution holds the key to its basic structure. Justice Beg, on the other hand, found that the Court can find the test primarily in the preamble to the Constitution. The preamble, he believed, furnished the Yardstick to be applied even to Constitutional amendments. It is thus evident that so far there has been no consensus in this regard among the Judges and no majority judgment is available laying blown the features of the Constitution that may be considered 'basic'. The Court has not foreclosed the list of the basic features as suggested by different Judges in different cases. In the Indira Nehru Gandhi case, Justice Chandrachud observed that "the theory of basic structure has to be considered in each individual case, helt in the abstract, but in the context of the concrete problem". The basic features Doctrine of the Supreme Court besides its vagueness and lack of clarity is open to more fundamental objections. Every word of the Constitution should be understood in its normal, natural reaming. In the Court Kesavananda Bharti case itself, the Supreme Court has said that unless otherwise indicated, every word is supposed to have been used in the Constitution in its normal or ordinary connotation and should be given the plain common sense meaning. Unfortunately while interpreting the Constitution and the laws, the Court do not always do that. The purpose of interpretation is to ascertain the intent of the framers from the words used. We must got by what the Constitution says and not by what Judges say it says. He have to first try to said and understand the Constitution and then to critically evaluate what others, including Judges, have to say about it. Unfortunately, too little attention is paid to the text of the

75 Ibid.
Constitution and too much emphasis is laid on the case law and the past verdicts of the Court.\textsuperscript{76}

7.4.3 Inclusion in the Ninth Schedule

It needs to be mentioned here that the question of the unconstitutionality of a statute included in the Ninth Schedule subsequent to the pronouncement of \textit{Kesavananda Bharti} came up for consideration in the case of \textit{Waman Rao v. Union of India}.\textsuperscript{77} In this case, it was held that while all additions to Ninth Schedule up to the date of \textit{Kesavananda Bharti} were open to challenge on the ground that they offended the basic structure of the Constitution. The Constitution bench held that the inclusion of a fresh legislation either by the Centre or by the State in Ninth Schedule was an amendment of the Constitution and would therefore be required to conform to the principle of basic structure of the Constitution.

According to the learned Judges \textit{Kesavananda Bharti} did not protect a law included in the Ninth Schedule subsequent to its pronouncement as \textit{Kesavananda Bharti} was only concerned with a law included in the Ninth Schedule prior to its pronouncement. Their inclusion in the Ninth Schedule was protected from being questioned on the ground that they offended the basic structure of the Constitution. However, any law included in the Ninth Schedule subsequent to \textit{Kesavananda Bharti} had to conform to the rule laid down in \textit{Kesavananda Bharti} that it did not offend the basic structure of the Constitution. Chief Justice Chandrachud who spoke for the Court said:

Thus in so far as the validity of Article 31B read with the Ninth Schedule is concerned, we hold that all acts and regulations included in the Ninth Schedule prior to Twenty Fourth April, 1973

\textsuperscript{76} \textit{Ibid.}

\textsuperscript{77} \textit{Supra} note 67.
will receive full protection of Article 31B. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution Acts and regulations, which are or will after April 24, 1973 will not receive the protection of Article 31B for the plain reason that in the face of the judgement in Kesavananda Bharti, there was no justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. The various Constitutional amendments by which additions were made to the Ninth Schedule on or after April 24, 1973 will be valid only if they do not damage the basic structure of the Constitution.\textsuperscript{78}

7.4.4 Basic structure in I.R. Coelho’s judgment

In 2007, the Supreme Court in the case of I.R. Colho v. State of Tamil Nadu,\textsuperscript{79} has again strongly emphasised and has interpreted widely the importance and meaning of the basic structure doctrine. It has pointed that there is difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in the Parliament under Article 368. Under Article 368, the constituent power to the amending body namely Parliament does not become the original Constituent Assembly. Parliament remains under a controlled Constitution. The limitations of basic structure are applied on Article 368. The objective behind Article 31B is to remove difficulties and to obliterate Part III in its entirety or Judicial Review. The doctrine of basic structure is propounded to save the basic features. The doctrine of basic structure contemplates that there are certain parts on aspects of the Constitution including Article 15, Article 21, 14, 19 which constitute the core values which if abrogated would change the

\textsuperscript{78} Supra note 61 at 58.

\textsuperscript{79} AIR 2007 SC 861-893
nature of the Constitution. Exclusion of Fundamental Rights would result in nullification of the basic structure doctrine. Part III is amendable subject to basic structure doctrine. It is permissible for the Legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31B but subject to right of citizen to assail it on the enlarged Judicial Review concept. The Legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the Court after the enunciation of the basic structure doctrine. The power to grant absolute immunity at will is not compatible with basic structure doctrine and therefore after April 24, 1973 the laws included in the Ninth Schedule would not have absolute immunity. The power of Parliament to amend the Constitution at will, so as to make any kind of laws that excludes Part III including power of Judicial Review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenge has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principle thereunder. Therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the Constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution whether the Constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution. This Court being bound by all the provisions of the Constitution and also by the basic structure doctrine have necessarily to scrutinise the Ninth Schedule laws. It has to examine the terms of the statute, the nature of the rights involved etc. to determine whether in effect and substance the statute violates the essential features of the Constitution. Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional amendments shall be a matter of
Constitutional adjudication by examining the nature and the extent of infraction of a Fundamental Right by a statute, sought to be Constitutional protected, and on the touchstone of the basic structure doctrine is reflected in Article 21 read with Article 14 and Article 19 by application of the ‘rights test’ and the ‘essence of right test’. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such laws will not get the protection of the Ninth Schedule.

Despite Kesavananda, Waman Rao, and Indira Gandhi and paying no need to what had been pronounced by the Court in those cases, Parliament and the Legislatures of the States continued to keep on adding enactment after enactment to Ninth Schedule. For reasons unknown their inclusion in the Ninth Schedule were not questioned until the case of Coelho v. Tamil Nadu. In that case, a Constitution bench consisting of nine Judges led by Sabharwal CJ reviewed the entire question and affirming the views expressed in Waman Rao, Minerva Mills, and Indira Gandhi held that every addition to Ninth Schedule subsequent to Kesavananda had to satisfy the requirement that it did not offend the basic structure of the Constitution. The Constitution bench led by C.J. Sabharwal did no more than what had been decided earlier in Waman Rao, Minerva Mills and Indira Gandhi. Yet there was and there is a furore against the decisions by several lawyers, etc. Some of them have gone so far as to say that the Supreme Court has transgressed into and usurped the functions of Parliament and Legislatures of the States. There can be no doubt that Article 31B, though well intended and meant to some land reform legislations by Jawaharlal Nehru and his colleagues, has subsequently been such misused to include in Ninth Schedule all manner of legislations unconcerned with land reforms. The very of

---

80 Supra note 79.
81 Supra note 61 at 59.
protect against *I.R. Coelho v. State of Tamil Nadu*, if there was any justification for it, should have been when *Kesavananda* was pronounced, but *Kesavananda* was welcomed at that time. The present Constitution bench led by Chief Justice Sabharwal has said nothing more than what was said in *Kesavananda, Minerva Mills, Waman Rao* and *Indira Gandhi*. It appears to be quite far fetched to say that the Constitution Bench has usurped the function of other wings of the State.82

It is worthy of note that even while holding and striking down amendments of the Constitution which were against its basic features, the Court failed to consider whether the introduction of Article 31B and Ninth Schedule of the Constitution were not vital encroachments upon judicial power by the Legislature and, therefore, void.

In the words of Dr. Subhash C. Kashyap,83 since “the Constitution had conferred a limited” power of Judicial Review and of interpreting the Constitution only for “doing complete Justice within it “jurisdiction”, the Supreme Court cannot “under the exercise of that limited power enlarge that very power into an absolute power”.

Indeed, limited Judicial Review “is one of the basic features of our Constitution and, therefore, the limitations on that power cannot be destroyed”. In other words, the Supreme Court, under Articles 32, 141 & 142 cannot expand its power of interpretation so as to acquire for itself the right to amend or prevent amendment to the Constitution on the ground of a self-invented ‘basic features’ doctrine and thereby in effect destroy the most basic feature of Indian polity, namely the primary of the people and Democracy as a

82 Ibid.
83 Supra note 53 at 2309.

- 428 -
Government of the people, by the people and for the people. It is the people and the Constitution framed by their representatives that have given certain limited power to the Supreme Court as to other organs. "The donee of a limited power cannot by exercise of that power convert the limited power into an unlimited one".

7.5 Supremacy of the Constitution

7.5.1 Post-Kesavananda Bharti: Suppression of Constitution

The political Executive found it immediately unacceptable when Golaknath was overruled by Kesavananda, as the Supreme Court reserved to itself the power to provinces upon the question whether or not an amendment offended the basic structure. The Court had also reserved to itself and denied to Parliament the exclusive authority to determine whether any law was towards securing any of the Directive Principles mentioned in Article 39. The resentment of the political Executive resulted in one of the grossest abuses of Executive power. When the question of appointing a successor to Chief Justice Sikri arose in 1973, soon after the judgment was pronounced in Kesavanada Bharti, three senior Judges, Justice Shelat, Grover and Hegde were superseded and their junior, Justice A.N. Ray was appointed Chief Justice. 84

The year 1973 was indeed a watershed in the Constitutional history of India. Until then, it looked as if Parliament was asserting and consolidating its power as a Democratic institution committed to the goals of abolition of all semblance of feudalism, introduction of land reforms, and the pursuit of the Directive Principles of State Policy mentioned in Article 39(b) and (c). While the earlier Constitutional amendments, that is amendments up to 1973, were aimed at securing to Parliament the power to legislate without

---

84 Supra note 61 at 65.
question in regard to the goals just mentioned, the amendments made subsequently appear, as we shall presently see, to be aimed at securing more and more power to the Executive. The road signpost clearly changed from Democracy to authoritarianism.85

7.5.2 The Indira Gandhi’s Election

A single judge of the Allahabad High Court had set aside Indira Gandhi’s election to Parliament. There was a demand for her resignation and in retaliation, emergency was proclaimed in 1975 under Article 352 of the Constitution and on June 27, 1975 a presidential order was made under Article 359(1) suspending the right of every person to move any Court for the enforcement of any of the Fundamental Rights conferred by Articles 14, 21 and 22 of the Constitution for the period during which the proclamation of Emergency was in force. Opposition leaders were arrested and detained as also several others who were suspected to be opposed to Indira Gandhi’s regime. The Thirty Ninth Amendment was passed making the satisfaction of the President with regard to the existence of circumstances rendering it promulgate an ordinance final, conclusive and non-justiciable. Similarly, the satisfaction of the President in regard to proclamation of Emergency under Article 352 and 360 was also made final, conclusive and non-justiciable. This Constitutional amendment provided that no election to either house or Parliament of any person who held the office of prime minister at the time of such election or who was appointed as prime minister after such election shall be called in question except before the authority or body and in such manner as may be prescribed by law made by Parliament. The election of such person was thus removed from the purview of the Court which had otherwise jurisdiction to adjudicate upon the validity of such election. It was further declared

85 Id. at 66.
that no law made by Parliament before the commencement of the 
Thirty Ninth Amendment in so far as it related to election petitions 
and matters connected there with shall apply or shall be deemed ever 
to have applied to or in relation to the election of any person who 
was prime minister, such elections shall not be deemed to be void 
before such commencement, and notwithstanding any order made by 
any Court such election shall continue to be valid in all respects and 
any findings on which such order was based shall be deemed to have 
always been void and of no effect. The amendment was a blatantly 
perverse and outrageous attempt not merely to override the judgment 
of the Allahabad High Court, but to immunise the election of a single 
individual, namely, Indira Gandhi. Perhaps it was the grossest abuse 
of legislative power in any country claiming to be wedded to 
Parliamentary Democracy.86

7.5.3 Forty – Second Amendment, 1976

The words ‘Socialist’ and ‘secular’ were added in the Preamble 
by the amendment (forty-second amendment, 1976) and also the word 
‘integrity’ to the word ‘unity’ also in the preamble. Article 31C was 
further widened to cover all laws made to secure all or any of the 
Directive Principles of State Policy and not confined to Article 39(b) 
and (c). New Directive Principles Article 39A and 48A, to secure 
equal opportunities for Justice and free legal aid, participation of 
workers in the management of industry, and the protection and 
improvement of environment and the safeguarding of forests and 
wildlife were added. A whole pretentious new chapter, Part IV a 
setting out ‘fundamental duties’ was also added. So much was 
perhaps to the good. But it was all sheer veneer. The rest and indeed 
most of the forty-second amendment was nothing but hard blackness. 
Article 31D was added to provide immunity to all laws made for

86 Id. at 67.
prevention or prohibition of so called anti-national associations. The expressions ‘associations’ and ‘anti-national activity’ were also defined and so widely that any individual or association could be branded as anti-national, all Democratic absent could be suppressed on that ground and sycophancy would be patented as patriotism. The jurisdiction and powers of the Supreme Court and the High Court were severely curtailed. The Supreme Court was barred from adjudicating on the vires of State acts. No legislation could be struck down except by a two thirds majority of the Judges. Article 226 which gave writ jurisdiction to the High Court was totally mutilated. The words ‘for any other purpose’ were deleted making it impossible for a citizen to protect himself against arbitrary acts of the Executive. Opportunities for Justice were to be denied while in the same breath Article 43A was pretentiously introduced as a Directive Principle to provide for easy access to Justice. High Court were barred from pronouncing on the Constitutional validity of central legislations. Article 311 was amended to deny a second opportunity against punishment to a civil servant. Other Articles of the Constitution were amended to give wider power to the Executive in the matter of issuing proclamations of emergency. Finally, the amending provisions of Article 368 was itself amended and it was provided that no amendment of the Constitution shall be called in question in any Court and that there shall no limitations on the constituent power of Parliament to amend the Constitution under that Article.

7.5.4 Ray of Hope: General Elections, 1977

In Indira Gandhi case,87 the majority struck down the Thirty Ninth Amendment Act, giving a ray of hope to survival of spirit of

---

87 Supra note 64.
Constitution. Justice Khanna, Mathew and Chandrachud constituted majority and minority consisted of Chief Justice Ray and Justice Beg.

The people themselves stood up for Democracy and liberty and showed the door to authoritarian forces in the general elections in 1977. The new Parliament by forty-third and the forty-fourth amendments undid to a large extent the mischief of the thirty-ninth and forty-second amendments. In particular regard to proclamation of emergency, several safeguards were additionally provided. One of the safeguard was that no proclamation of Emergency could be issued unless the decision of the union cabinet that such a proclamation may be issued has been communicated to the President in writing. Another important provision was that Fundamental Rights guaranteed by Article 20 and 21 could not be suspended under any circumstances, thus undoing the harm done by Shivkant Shukla’s case. The most significant change brought about by the forty-fourth amendment was the abolition of the right to property as a Fundamental Right and its removal to Part XII of the Constitution.88

7.5.5 Judiciary: Guardian of Constitution

In the words of Granville Austin:

The Judiciary was to be the arm of the social revolution, upholding the quality that Indians had longed for in colonial days but had not gained . . . The Court were also idealised because, as guardians of the Constitution, they would be the expression of new law created by Indians for Indians.89

Judiciary is the guardian of Indian Constitution therefore independence of Judiciary is one of the ‘basic features of the Constitution’. Judicial law making in the context of Indian

88 Supra note 61 at 67
Constitutional Law essentially to obtermine all questions effecting interpretation application, operation and working of the Constitution. For the Supreme Court, where decisions are binding on all Court in the country, is the highest judicial organ in the country charged with the task of authoritatively, though not solely, unifying the Constitutional Law of the country and overruling its earlier decisions if necessary.  

A notable feature of the Constitution is that it accords a dignified and crucial position to the Judiciary. Although the Indian and the American Constitutions are both federal in nature, the Indian judicial system differs from that of the United States of America, inter alia, in one very significant respect, viz., whereas the United States of America has a dual system of Court – a federal Judiciary with the Supreme Court at the top along with a separate and parallel judicial system in each State. India has a unified and not a dual system of Court. The Judiciary in India has been assigned a significant role to play. It has to dispense Justice not only between one person and another but also between the State and the citizens. It interprets the Constitution and acts as its guardian by keeping all authorities – legislative, Executive, administrative, judicial and quasi-judicial within bounds. The Judiciary is entitled to scrutinise any Government action in order to assess whether or not it conforms with the Constitution and the valid laws made thereunder. The Constitutional provisions establishing on Independent Judiciary, having the power of ‘Judicial Review’ go a long way in establishing within the country a Government according to law. as already stated, ‘Judicial Review’ has been declared to be a basic feature of the Indian Constitution. 

---

90 K.B. Agarwal, Comparative Constitutionalism, 1 (2005)  
91 Supra note 42 at 18
The first important reference to a Supreme Court for India appears in the Nehru Report, which, as it envisaged a federal Constitution for an independent notion, proposed several important additions to the existing judicial system. This system, established by the British consisted of inferior Court and High Court, of which the High Court in Calcutta, Madras and Bombay were the most important.92

Our Constitution the world's second longest Constitution and the first largest written Constitution with universal adult franchise, gender legality and age 18, makes India numerically the foremost nation in global Democracy. Part IV of the Constitution, together with Part IV constitutes the conscience of the Indian Nation. Thus, these rights are judicially enforceable and any statutory provision, which violates the Articles of Part III are contrary to the basic structure of the Constitution as Kesavananda Bharti case93 lays down.94

7.5.6 Judicial Activism

Judicial activism is born out of the well recognised doctrine of the independence of Judiciary which places the law above the ruler himself. This position was correctly stated about four hundred years ago by Chief Justice Coke. In 1608, King James I ruled England and Coke had been appointed by him as Chief Justice of England. On a certain day King James I in all his pride and glory entered the royal Court of Justice and claimed that he could take any case he chose, remove it from the Court, and decide it himself personally. Chief Justice Coke assured that he could not do so but the case sought to be determined and adjudged in a Court of Justice according to the law

92 Supra note 89 at 167.
93 Supra note 16.
and custom of England. The king was greatly offended and said ‘this means shall be under law, which is treason to affirm’.\textsuperscript{95}

Judicial activism is nothing more and nothing less than the activity to bring Justice to the doorstep of people particularly in areas not covered by any statute made by a Legislature. It is not a recent discovery, and not an expression invented by Judges. It is an expression invented by jurists and lawyers to describe the creative activity of Judges in fields not covered by existing law. the whole body of law known as the common law of England is nothing but the creative activity of Judges.\textsuperscript{96}

In the process of adjudication, situations may arise to meet which, the Legislature concerned has not made any provision since it is often times not possible to provide for complicated situations which may arise in future what then are the Judges to do? There are also innumerable situations which are deliberately left by the Legislature for the exercise of the discretion of the Judges by making their own rules depending on the demands of the situation. The Constitution has vested in the Supreme Court and the High Court and the power to issue write of various kinds. Though, ordinarily, the jurisdiction of the Supreme Court or the High Court to issue writs is ordinarily to be invoked by aggrieved parties, there are innumerable occasions when such aggrieved persons are unable to move the Court for relief owing to their inability or difficulty to do so.\textsuperscript{97}

7.5.7 Is this Judicial Interference?

There appears to be a tendency among certain critics to complain that judicial activism is nothing but a cloak for interference in matters which are within the exclusive competence of the

\textsuperscript{95} Supra note 61 at 256.
\textsuperscript{96} Id. at 257.
\textsuperscript{97} Id. at 258.
Legislature. The present outcry against judicial activism appears to be protest against the efforts of the Judiciary to find solutions to some social and economic problems in areas not provided for by the Legislatures. The legislators claim that in attempting to find solutions to social and economic problems, the Judiciary is trespassing into areas reserved by the Constitution for the Legislature and the Executive. This complaint does not blame scrutiny if the Constitutional provisions are considered in depth. The preamble of the Constitution assures the people that India is to be a Democracy where its people will be entitled to:

Justice, Social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity;

Fraternity assuring the dignity of the individual and the98 [unity and integrity of the Nation].99

On 21st October 2010, The Supreme Court laid down the conditions for seeking maintenance in live-in relationships. The Supreme Court observed that the Indian society is changing and this change has been reflected and recognised by the Parliament by enacting the Protection of Women from Domestic Violence Act, 2005. In July 2005, the Gujarat High Court passed an order requiring cattle to be moved off the roads within 72 hours. Any reasonable and prudent person knows that this is impossible. Legal experts have always believed that Court should refrain from issuing orders which cannot be executed. Such orders undermine the authority and dignity of Court. The then Chief Justice of India, R.C. Lahoti cautioned his brother and sister Judges about judicial activism,

98 Substituted by the Constitution (Forty-second Amendment) Act, 1976, Section 2, for "Unity of the Nation" (w.e.f. 03.01.1977).
99 Supra note 61 at 259.
“To preserve the sanctity and credibility of the judicial process and to overcome the criticism of judicial activism, it is necessary to practice self restraint while innovating new tools. 100

Earlier, on 12 August 2010, the Supreme Court had asked the Government to distribute food grains- rotting in Government godowns. It was widely reported in the print and electronic media. According to Hindustan times, the Supreme Court said, “the food grains are rotting. You can look after your own people. As a part of short term measure, distribute it to the hungry for free. The Government counsel was told to communicate it to the minister, which was a bit too much for the minister and the prime minister to swallow. This was expected to be resisted by the Executive and in a couple of days, the de facto chief Executive of the country, the Prime Minister Manmohan Singh, told the apex Court politely but firmly in unambiguous terms that he had respect for the Court’s sentiments but was against the idea of giving away foodgrains for free as it would kill farmers’ incentive to produce, thus creating a difference set of problems. The Prime Minister said that the Supreme Court should not get into policy formation. On numerous occasions, the Judges championing public interest have exhibited exemplary self restraint and considered the ground realities. Socio-economic conditions do not change overnight. Similarly, law and order cannot be improved over night. Sufficient time has to be provided to agencies so that the desired improvement can be attained. Whether it is the running of CNG buses in Delhi or improvement of the Taj corridor. The law can and should be used as a potent tool to bring about positive social change. But for doing so, the requisite time and resources should be earmarked. A knee jerk reaction is not going to work. The Times of India 13 August 2010 reported that the Supreme Court had directed the Government counsel, saying "it was not a suggestion. It is there

100 Supra note 2 at 23
in our order. You tell the minister." A couple of questions need to be answered. Was it necessary for the SC to take such an adventurous and bold step and then retract submissively when the Executive rubbished its stand? Is it proper for the Judiciary to take a step backwards in such a meek manner? Was it a hasty decision made by the SC? Did it anticipate such a strong reaction from the Executive?^{101}

A fine example is the U.S Supreme Court decision in the *Daimler Chrysler case* in 2006. The Court held that taking decisions on spending was the tasks of the Executive and taxpayers have no standing to challenge them and the Court will do well to remain away from the policymaking as it was in the domain of the Legislature. The Court cited an earlier Supreme Court decision- *ASARCO of 1989*^{102}-stating that "the decision of how to allocate any savings is the very epitome of a policy judgment committed to the broad and legitimate discretion" of lawmakers, which "the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the " broad and legitimate discretion" of lawmakers, which " the Court cannot presume either to control or to predict".^{103}

### 7.5.8 Prospective overruling and the Basic structure

When the Supreme Court under the leadership of C.J. Subha Rao decided that Parliament did not possess the power to amend any of the provisions of the Constitution relating to Fundamental Rights, they realised that all earlier amendments of the Constitution would be invalidated and consequently many disastrous consequences would ensue. It was realised that their pronouncement would have the effect of unsettling many settled and completed transactions and therefore they resorted to the principles of ‘prospective overruling’. The

---

^{101} *Ibid*

^{102} *Daimler Chrysler Corp v. Cuno*, 15 May 2006, 547 US 332

invocation of the formula of ‘prospective overruling’ was a clear instance of judicial activism. Again, when *Golaknath*\textsuperscript{104} was overruled by *Kesavananda*\textsuperscript{105} the Court was faced with the question whether Parliament could exercise unbridled power to amend the Constitution. It was realised that the Constitution was result of the deliberations of great Statesman like Jawaharlal Nehru and many experienced administrators and lawyers, and its structural foundation was not meant to be interfered with at the will of the Parliament and it was aimed at securing to the people of India what was emaciated in the preamble. So they invented the every of ‘basic structure’ of the Constitution. This again was a welcome case of judicial activism.

7.5.9 Legitimacy of Judicial Activism

The Supreme Court of India has become the most powerful Apex Court in the world. It can review even a Constitutional amendment and strike it down if it undermine the basic structure of the Constitution. Judicial law making in the realist sense is what the Court does when it expands the meanings of the words ‘personal liberty’ or ‘due process of law’ or ‘freedom of speech and expression’. The basic structure doctrine\textsuperscript{106} or the parameters for reviewing the President’s action under Article 356\textsuperscript{107} or the wider meanings of words ‘life’, ‘liberty’ and ‘procedure established by law’\textsuperscript{108} in Article 21 of the Constitution by the Supreme Court are instances of judicial law making in the realist sense.\textsuperscript{109}

When the Court lays down guidelines for inter country adoption,\textsuperscript{110} against sexual harassment of working women at the

\textsuperscript{104} Supra note 15.
\textsuperscript{105} Supra note 16.
\textsuperscript{106} Ibid.
\textsuperscript{107} Supra note 27.
\textsuperscript{108} *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
\textsuperscript{109} Supra note 34 at 250.
\textsuperscript{110} *Laxmi Kant Pandey v. Union of India*, AIR 1987 SC 232
working place,111 or for abolition of child labour,112 it is not judicial law making in the realist sense but amounts to legislating like a Legislature. In a strict sense there are instances of judicial excessivism that fly in the face of the doctrine of separation of power. Judiciary has undertaken functions that really belonged to either the Legislature or the Executive. Its decisions clearly violated the limits that the doctrine of Separation of Powers had imposed on it. Admitting all these aspects, it is acknowledged that judicial activism is welcomed not only by individuals and social activist who take recourse to it but also by Governments, political parties, civil servants, Constitutional authorities etc. the people in general consider the Government and other authorities bound to abide by the decisions of the Court. The political players as well as the people in general feel that in matters involving conflict between various interests, the Court are better arbiters than the politicians and Court can safeguards the spirit of the Constitution.113

According to Biplab Dasgupta (M.P.):114

During the middle of the nineties judicial activism became a big issue. Some of us felt that Judiciary was often exceeding its jurisdiction and was tilling the balance between three organs of the Constitution in its favour, but decided not to protect against their judicial encroachment. If the Judiciary was over active, we argued that was because the Executive was not acting at all. Somebody had to look after issues like Hawala. If the Executive was not remotely interested, or are culpable, who are we to blame the Judiciary for dealing with something like Jain’s Diary? The people were after all

112 M.C Mehta v. State of Tamil Nadu, AIR 1997 SC 699
113 Supra note 12 at 251.
114 Supra note 2 at 75
happy with Judiciary as they took action after action after several years of inaction by the Executive.

7.6 Recent Controversies

Chief Justice John Marshall has said,

“A Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil”.

In the words of Granville Austin\textsuperscript{115}, Indians have held the reins they have governed themselves successfully against awesome odds. The seamless web woven by the Constituent Assembly into the Constitution for the Nation-establishing the institutions and spirit of Democracy, pursuing a social revolution to better the lot of the mass of Indian, and preserving and enhancing the country's unity and integrity-is intact, having recovered from the terrible distortion of the emergency. The interdependence of its strands is well-understood: none can continue to exist or prosper without the others. Particularly, neither Democracy nor social revolution should be sought at the expense of the other. Particularly, neither Democracy nor social revolution should be sought at the expense of the other. These were so interdependent as to be almost synonymous.

He points out in the words of S.P. Sathe that representative Democracy is popular and firmly established and that the Constitution has become ‘the authentic reference scale for political behaviour’. The country is unified and pleased to be so-the situation in Kashmir being the exception. The social revolution has brought beneficial changes to many citizens, but it has gone nowhere near far enough. The meagre efforts by Government and society's 'haves' to

extend liberty and socio-economic reform to the ‘have-nots’ should be cause for national shame as should the use of elective and appointive office largely for personal advantage. Indians have discovered that their Government, like others, is imperfect and that, like their fellow-humans everywhere, they can be inept at managing their affairs.

Indians have expressed the idea of seamless web in a variety of ways. One is the ‘three pillars’ of ‘Socialism, secularism, and Democracy’. Each term has been given several definitions. But ‘Socialism’ requires special attention due to its broader and narrower meanings. Broadly, it was used synonymously with ‘social revolution’, meaning national social-economic reform with an equitable society as its goal, and tacitly including such ideas as special treatment for disadvantaged citizens. In essence, it meant social egalitarianism and political equality. Narrowly, it had a more classical meaning central Government planning, the dominance of the State sector in the economy, and so on. It was urban rather than rural in connotation, and colloquially at least, it varied as to whether or not it encompassed land reform and zamindari abolition. Both leaders and citizens could use the terms interchangeably without making clear the sense in which they meant them[^116].

The leaders who embraced the new Constitution were confronted with the questions of essence inherent in it; Democracy for whom? Justice for whom? What is Justice? What are the appropriate ways of employing the Constitution’s ‘means’ among citizens and between them and their Government? The framers foresaw some of this, which is why they insisted that neither the Democracy nor the social revolution strand was to be pursued at the expense of the other. Freedom and bread, said Morarji Desai, are not

[^116]: *Id at 634*
incompatible. Neither could they easily be sought together. For this brought the three branches of Government into confrontations that shook the entire structure and could have destroyed it. Parliament in the 1950’s amended the Constitution to get around judicial rulings, acting on the premise that the Constitution had bestowed upon it constituent as well as legislative power. The Supreme Court, first in 1951 in the Shankari Prasad case,117 while exercising its own power of Judicial Review, upheld this view. But the Court later, as we have seen, most significantly in the Kesavanand Bharti case, ruled that Parliament’s constituent power had limits. Fear had caused the change. Fear that Indira Gandhi case intended to end the co-equality of the branches by eliminating Judicial Review of amendments—which Jawaharlal Nehru would not do—on the way to sacrificing Democracy and its Fundamental Rights to authoritarian Socialism. With the basic structure doctrine, a balance, if an uneasy one, had been reached between the responsibilities of Parliament and the Supreme Court for protecting the integrity of the seamless web. It was the unexpected difficulties in keeping harmony among the strands that first startled Prime Minister Jawaharlal Nehru and his Government. The relationships between social revolution and Democracy were the most problematic. On the Democracy side, the Constitution’s Fundamental Rights caused ‘problems’. For example, the Congress party’s and the Government’s pledge, to remove ‘social disabilities’ and ‘man made inequalities’, and the Constitution’s two dozen Articles providing for compensatory treatment for disadvantaged citizens- the heart of the social revolution- came into direct conflict with two Fundamental Rights Articles. One of these broadly prohibited discrimination; another said that no citizens shall be denied admission to a Government- supported educational institution on the grounds of race, caste, and so on. The Supreme

117 Supra note 13.
Court upheld the challenge (in the Champakan Dorairajan case), and Prime Minister Pt. Jawahar Lal Nehru’s Government got round this difficulty by changing the Constitution. The First Amendment provided that nothing in the rights should prevent the enactment of special laws for the educational and social advancement of backward classes. An obstacle easily had been cleared.118

Property issues brought the two strands into conflicts more difficult to overcome. The Constitution guaranteed the individual’s right to own property and to be deprived of it only by a law fixing the amount of compensation or the principles for calculating it. But Congress’s social revolutionary promise to nationalize industry and much commerce and to implement land reform, giving ‘land to the tiller’, meant depriving some individuals of these rights in the cause of fairness. When the High Court struck down several State Zamindari abolition laws-(as in the Kameshwar Singh case)- on the ground that they violated equal treatment under the law or that compensation was inadequate, Pt. Jawahar Lal Nehru was confronted by what he called a ‘peculiar tangle’: if ‘we cannot have equality because in trying to attain equality we came up against principles of equality’. A major reform policy had brought the Government and Judiciary face to face over the fundamental matters of Constitutional interpretation and of ‘law’ as distinct from ‘Justice’- an eternal issue in any society that pretends to fairness. The central Government’s answer was to change the Constitution- again in the First Amendment- to bar judicial scrutiny of such land legislation. Also in this amendment were provisions to overcome a High Court decision, so that Government (in this case the Uttar Pradesh Government) could nationalize private property, a step believed necessary to a Socialist programme. A second tangle joined the dispute in the form of the president’s role in policy making. As Pt. Jawaharlal Nehru was

118 Supra note 115 at 652.
impatient to enact the amendment, President Prasad argued reasonably for patience but he was told that he must act according to the council of ministers’ advice. The collision between the means and goals of the two strands evoked in Pt. Jawahar Lal Nehru’s doubts about reconciling them within the Constitution. The 1951 Cabinet Committee on the Constitution, which he chaired (the first of some five Constitutional reassessments over the years), developed the first Amendment’s devices for pursuing social-economic reform unhindered by the Court. The first was quite evident, as we have just seen: amend the Constitution to get around Supreme Court interpretations of the Constitution obstructing the social revolution. As Pt. Jawaharlal Nehru wrote the chief ministers, the Judiciary’s responsibilities were unchallengeable, but if the Constitution ‘comes in the way... it is time to change the Constitution’. Thus was initiated a precedent for amendment that drew praise for the Constitution’s flexibility and criticism that the document had been reduced to a mere scrap of paper. The second device, even more obvious, was to revise laws to eliminate the portions the Court had found objectionable. The third device was more than a device, for with it Jawaharlal Nehru introduced two fundamental concepts. The first challenged historically-determined conditions as the proper measure, or basis, for Justice. Was it fair, he asked, that the Zamindar retain control of property, while they who had been deprived of it over the centuries, because of their position in the hierarchy, continued to be denied it? You have ‘not just the Justice of today, but the Justice of yesterday’, he said. At the top were the laws above the Constitution, as the fundamental law of the land, because they had been placed in the newly-created Ninth Schedule, beyond judicial reach. This was irrespective of whether or not they were ‘inconsistent with’ the Fundamental Rights. The Court should ‘not decide about high political, social or economic .....Questions’,
Jawaharlal Nehru said, while proposing the amendment. Implicit here was the radical reduction of the three branches of Government to only two, Parliament and the Executive, as hierarchy was the Constitution itself. At the bottom, third tier, subject to the Constitution came the ordinary law. When Congress Governments reviewed and amended the Constitution, in Jawaharlal Nehru’s time and later, they had strong majorities in Parliament, but not a majority of votes in the country. Although this was Constitutional, one may ask if it was sound to change the nation’s founding document without majority support in the country. Jawaharlal Nehru, in the employment of these concepts, did not compromise his belief in the essentiality of an able and Independent Judiciary.\(^{119}\)

The principles of Democratic Government also have been ill-served by partisan political and other unwise uses of President’s Rule, justified as necessary to protect unity and the integrity. These uses, along with the extreme over centralization of emergencies and the absolutism of Mrs. Gandhi’s emergency-proclaimed in the names both of unity and the social revolution—threatened faith in the Constitution. The Forty-Fourth Amendment seems to have quieted anxieties about the misuse of the emergency power. Only time and New Delhi’s restraint may wash the taint from President’s Rule. The precedents established in Jawaharlal Nehru’s time during the collisions between the institutions of Democracy and the goals of the social revolution were taken to their logical and extreme conclusions under his daughter’s prime ministry. Democratic radicalism, as discussed above, was overtaken by Socialist authoritarianism. The extreme Socialists had gone to the core of the social revolution, and, in so doing, sacrificed the Fundamental Rights to equality before and equal protection of the law(Article 14) and the ‘freedoms’ of Article 19. These justiciable provisions were made subservient to the non-

\(^{119}\) Supra note 115 at 654.
justiciable Directive Principles that said that ‘the ownership and control of the material resources of the community are so distributed as best to sub serve the common good’, and the principle saying that the operation of the economic system does not result ‘in the concentration of wealth’.

In a nation dedicated to Rule of Law, the Judiciary had great responsibilities and aroused great expectations. The Judiciary therefore has much to be proud of, as it later repelled attempted subversion and direct attacks from its Constitutionally co-equal branches of Government. It has struck down infringements of the Fundamental Rights and unwise changes in other Constitutional provisions, notably using the 1973 basic structure doctrine and subsequent reaffirmations of it. Yet the judicial system has failed in the area of providing speedy access of Justice to the people. Especially the poor suffer from delay. The Supreme Court until 1979 did not give standing to third parties to enable them to assist the poor through public interest litigation. Nor have the Executive and Parliament assisted the Judiciary in fulfilling its responsibilities. Vacancies on the bench have contributed to the slow disposal of cases. Legal aid was not thought about seriously until into the 1970’s, and Parliament did not legislate a legal aid agency until 1987. The Executive has been lax in complying with the Court orders in public interest litigation cases. And the Court have been loath to enforce them by using their contempt power. Nor has the bar played a constructive role. The higher Judiciary and the subordinate systems in the States-bench and bar alike-and the Executive branches at the Centre and in the States share responsibility for the blackest blot on the nation’s record: the lengthy incarceration of individuals awaiting trial. Some 70% of jail inmates in the country are awaiting trial and this number was in 1998 and at present it has increased and not decreased. Many have been prisoners for periods longer than their
sentences would have been had they been tried and convicted for the crimes of which they had been accused. The Indian Prisons Bill is still in the process.120

So, Constitution if we see has served India’s needs. The inadequacies in fulfilling its promise should be assigned to those working it and to conditions and circumstances that have defied greater economic and social reform during the short fifty years since Indians began governing themselves. Conflict between the web’s Democracy and social revolution strands is inevitable. Absence of Government efforts to bring about social-economic reform will engender conflict as the have-lesses, frustrated, struggle for opportunity; so, too, will Government efforts at change result in conflict, for the have-mores will resist them as the have-lesses capitalize upon them. Efforts toward long-term harmony between the strands make short-term conflict inevitable. Democratic behavior and social revolutionary aspirations are destined to conflict. Article 14 of the Fundamental Rights says that ‘the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India’. The words in this Article after the ‘or’ seem to place upon Government the positive responsibility to give the have-lesses access to those rights they previously have been powerless to exercise.121

Today, corruption has weakened the foundation of the three organs of the State. As the framers of the Indian Constitution intended to make Independent Judiciary, it has undoubtedly led to the tussle between the three organs of the State and till date it continues and is always in the news. Separation of Powers cannot be strictly followed because now the State is a ‘welfare State’ and for this all the three organs need to work in coordination within the spirit of our

120 Id at 664.
121 Ibid.
controlled Constitution. The present Indian political scenario is going through turmoil with the news of corruption cases like Commonwealth Games, Radia Tapes, 2G Spectrum, Chief Vigiliance Commissioner Appointment. Such cases have resurrected the term ‘crony capitalism’ which is a big blow to the ideals of our Constitution included in the Preamble. Public money is drained down. Such incidents are undermining not only economic life but Democracy and political accountability too. Judiciary has been a forerunner in the field of protection of rights of the citizens, whenever in the history there was threat to Constitutional principles, it has upheld the sanctity of the spirit of the Constitution. In case of Shankari Prasad case, Kesavananda Bharti case, Indira Gandhi case, Minerva Mills case, Waman Rao case, I.R. Coelho’s case, it has time and again held that the Indian Democracy cannot overrun the ‘basic principles of our Constitution’. The Legislature, Executive cannot usurp the ideals of Constitution.

Judicial activism should be appreciated as there is nothing wrong with it. It is not a new phenomena and not different to Rule of Law and Constitutionalism. It is integral part of interpretative process and quality of creative interpretation that provides dynamism to our Constitution. The only issue is about its limits. Our Constitution embodies Separation of Powers introducing the system of checks and balances. The powers are separately marked for the three organs. But in the process of dispensation of Justice, Judiciary has to decide matters which relate to Executive and Legislature.

So, in the case of I.R. Coelho v. State of Tamil Nadu122, has rightly observed that according to Kesavananda Bharti, Minerva Mills and Waman Rao cases, the contentions regarding Ninth Schedule and the ‘basic structure doctrine’, the Constitution Bench,

122 Supra note 79.
upheld the ‘Basic structure doctrine’ and applied the power of Judicial Review to the laws included in the Ninth Schedule and laid down the underlying principles of Articles 14, 19, 21. The Court asserted that Ninth Schedule cannot be made immune from Judicial Review because Judicial Review is part of the basic structure of the Constitution. Parliament cannot be allowed to change the permanent character of the Constitution.

Granville Austin has rightly said that the Court have the power to decide what are the basic features of the Constitution, and this power would result in a harvest of legal wrangles. On December 10, 2007, the two Judges bench of the Supreme Court consisting of Justice A.K.Mathur and Justice Markandey Katju decried the tendency of “judicial activism” betraying “over reach” that was discernible to them in two earlier pronouncements of the apex Court itself. Their observations created a rippling effect inasmuch as they dissuaded another bench of two Judges manned by Justice S.B Sinha and H.S Bedi to hear a pending PIL on sex workers’ plight and the Delhi High Court a petition on the rehabilitation of beggars and action against a begging racket in the city employing small children. On December 13, 2007 the three judge bench headed by Chief Justice K.G.Balakrishnan (the other Justices being R.V Ravendram and J.M Panchal), brushing aside the observations of the Mathur–Katju bench admitted the PIL on the plight of Brindaban widows. This has given the impression that the Judges of the Apex Court are themselves divided on judicial activism, a mechanism that leads Judges and the Court away into the realm which is certainly not their under the Constitution. This has created an unprecedented predicament for the common man. If the Judges themselves are divided, whom should they turn to find out what is right or wrong? Where has the Justices

Mathur and Katju bench faulted? Aren’t they free to dissent from the holdings of other Benches? They are indeed. However while doing so in the instant case; they have committed unwittingly perhaps, an act of judicial impropriety, which is the cannon to unify Judges and the Judiciary. Bearing in mind that they were strongly opposed to the views expressed earlier by the benches, both equal and greater in strength, they could have appended the note of their disapproval & requested the Chief Justice to constitute a special Constitution Bench to take care of their legitimate concerns. This is the course, for instance, which was followed by the five-judge Constitution bench that wanted certain misgivings about the basic structural doctrine of the Constitution clarified by the larger bench. Accordingly, a nine judge bench of the Supreme Court in *I.R.Coelho case (2007)* authoritatively laid down the ambit of the basic structure doctrine through a unanimous judgment. For rendering Justice, mere denouncing the “overreach” approach is an awfully inadequate response for suggesting a solution to the problem posed. It is one thing to say that the Court cannot arrogate to itself the power to say, “Creation of posts”, but quite another to answer the question, “who will undo the wrong in the case of an Executive inaction or arbitrariness and legislate lapses or dysfunction”? It has been rightly strike by the writer that the burden is to be discharged by the Judiciary by still remaining within the confines of the Constitution. This is what the three judge bench led by the Chief Justice has done: they examined the PIL relating to the Brindaban widow’s plight de novo and admitted it on its own merit without being bothered by the observations of the Justice Mathur and Katju Bench at this stage with which they were not bound at this stage with which they were not bound as such. Apex Court under Article 141 of the Constitution should exercise function showing how the delicate balance envisaged by our Constitution between the three basic institutions could be
maintained. This could easily be done through a Constitution bench in the light of a comprehensive review of the hitherto decided cases, especially the ones that tend to destroy the delicate balance.

The Judicial Accountability Bill 2010 relates to the people’s perception about the Judges and their conduct in administering Justice. This is done for ensuring greater transparency in the functioning of Judiciary. It provides a statutory mechanism to address people’s complaints. Such a measure is missing in the Judges (Inquiry) Act, 1968, which is sought to be repealed and replaced by the bill. As people have profound faith in Judiciary for Justice this shall further strengthen their status. In the bill, the measure of Judges’ accountability is not new. The singular measure of Judges accountability is the judicial the standards adopted by the full Court of the Supreme Court of India on May 7, 1997. The formal adoption of these standards was in the form of the reStatement of values of judicial life. These standards intrinsically reflect and reproduce the universally accepted values of judicial life. The bill seeks to strengthen the institution of Judiciary by making it more accountable in a formal manner by an Act of Parliament, and thereby increasing the faith and confidence of the Indian public in the administration of Justice. However, the singular feature of this exercise is that judicial standards have been made enforceable but without in anyway undermining the independence of Judiciary. This is to be accomplished through the so-called in -house mechanism or institutional arrangement with adequate safeguards. A judge should necessarily be fair, reasonable and impartial in his decision making. For this, he is guaranteed Constitutionally judicial independence thought. It is this independence tat emboldens him to be free from all sorts of extraneous considerations, influences or pressures. Whether from within (from others in the Judiciary) or without(from the Executive). The measure of enforceable accountability articulated by
the bill is to strengthen, rather than weakening, judicial independence\textsuperscript{124}.

We have the glaring example of 1975 incident of Emergency (June 1975-March, 1977),\textsuperscript{125} here we find how the Apex Court committed error by upholding the suspension of Fundamental Rights. In the recent past on May 5, 2009, the Apex Court while delivering a unanimous judgement, argued that the instances of “this Court’s judgment violating the human rights of the citizens may be extremely rare but it cannot be said that such a situation can never happen”. In this context he added: “we can remind ourselves of the majority decision of the Constitution Bench of this Court (in the emergency case). There is no doubt that the majority judgment violated the Fundamental Rights of a large number of people in this country. “The story of the Supreme Court’s conduct during the emergency is chilling. Like the other institutions expected to underpin Democracy, the highest Judiciary also caved in. Chief Justice A.N. Ray had presided over the bench. His elevation was highly controversial because to appoint him as CJI, Prime Minister Indira Gandhi had superseded three of his senior’s colleagues amidst countrywide protests. This had happened in 1973 immediately after the Apex Court’s epoch-making judgment –by a majority of seven to six-ruling that the Parliament could amend any part of the Constitution but could not alter its “basic structure”. The picture was that six Judges, headed by the then Chief Justice S.M. Sikri were against the Government’s contention while the remaining six, of whom Ray was the most senior, were wholly for the Government. Justice H.R.Khanna provided the balance, agreeing with the first set on some points and with the second on others.

\textsuperscript{124} Prof. Virender Kumar, “Making Judges Accountable”, \textit{The Tribune} dated January 2, 2011 at 13.

\textsuperscript{125} Inder Malhotra, “Emergency, Judiciary and polity”, \textit{The Tribune} dated January 7, 2011 at 10.
Justice Khanna was on the bench when three years later the Apex Court heard arguments on the legality of the suspension of Fundamental Rights under the emergency proclamation. All the Judges except Justice H.R Khanna were inclined to uphold the Governments view. At one stage, the dissenting judge asked Attorney- General Niren Dey, whether there was remedy if a policeman told a citizen that he was going to be shot for no rhyme or reason. Dey replied: “my conscience revolts, my lords, but under the law there is no remedy”. There was eerie silence in the Court’s chamber. Later, when CJI Ray was to retire, Justice H.R.Khanna was the most senior of the possible successors. Needless to add that he was passed over and Justice M.H. Beg, appointed CJI. Justice Khanna resigned of course. The crowning irony is that his dissenting judgment of 1973 is today the law of the land. For, the 44th Constitution Amendment has made sure that any future declaration of the emergency cannot interfere with Fundamental Rights to life and liberty under Articles 20 and 21. Premier sociologist Andre Beitelle, eminent historian Bipan Chandra and prominent Scholar Ramchandra Guha are agreed that the emergency was “scripted jointly by Indira and Jayaprakash Narayan”.176

At present news are rocked with cases of corruption against ministers and the Supreme Court is supervising the high level CBI probe into the charges levelled against those Ministers like in 2G Spectrum telecom fraud, Radia Tapes leaks, Chief Vigilance Commissioner Appointment, Black money in foreign banks, Commonwealth Games fraud inquiry, Karnataka C.M. Yeddyruppa accused of misuse of his office to benefit his family,. In these cases when Supreme Court is looking into these matters then the Government seems to be pretty satisfied with the supervision of the Supreme Court. In these cases public money is dwindled by the

176 Ibid
representatives of the people and our Judiciary is doing a good job in asking them about their actions when the Executive and Legislature are not able to question their colleagues in the ministry and the Parliament.

In the words of former Chief Justice of Delhi High Court, Justice Rajinder Sachar,\textsuperscript{127} "all the organs of the State must show humility and it needs repeated reaffirmation that the mandate in the preamble to the Constitution, "we the people", empowers both the Legislature and the Judiciary equally. According to him the scenario of the Judiciary overstepping its power of review and the sensitivity of the Executive in having its actions interfered with by the Judiciary was again brought out sharply with the comment of Prime Minister Manmohan Singh while inaugurating the 17\textsuperscript{th} commonwealth law conference at Hyderabad. His sharpness this time was expressed strongly when he cautioned, "while the power of Judicial Review must be used to enforce accountability, it must never be used to erode the legitimate role assigned to the other branches of the Government".

This is so notwithstanding the fact that the Government itself is quite happy to let the Supreme Court supervise the CBI investigation in the 2G spectrum scam, hoping that this will deflect the demand for JPC (Joint Parliamentary Committee) probe. Similarly, the Government is not opposing the matter of foreign accounts of Indians being enquired into by the apex Court so that it can avoid having to disclose their names to the public.

Recently, the uneven a sharp attack on the Executive by a sitting judge of the Supreme Court (Justice Ganguly) while attending a conference of lawyers on "gender concern in conflict zone". He

\textsuperscript{127} Justice Rajinder Sachar, "Avoidable Misunderstanding," The Tribune dated February 15, 2011 at 8
said, “it was shocking to see how the Government allows and appreciate such ministers. Not only that, and also gives them a Cabinet post. It is not a dignified act. I would rather call it a shameless act”. The background seems to have been that in December a two-judge Bench of the Supreme Court (of which Justice Ganguly was a member) had strongly castigated the action of the then Chief Minister of Maharashtra, Mr Dehsmukh (now a Minister at the Centre), in having stopped the police from registering an FIR against a money lender, a relation of a Congress legislator. This action of Mr. Deshmukh was certainly condemnable, and the Mumbai High Court had called it gross interference by the Executive in shielding a private money lender belonging to the ruling party. The Supreme Court had justifiably in its judgment rebuked Mr. Deshmukh, saying that Chief Minister should not have interfered with the criminal Justice system, and this act was unconstitutional. The Court imposed a fine of Rs 10 lakh on the State Government. Though it would have been more appropriate if the fine was imposed on Mr. Deshmukh personally rather than on the State because it was the individual unconditional action of the chief Minister- the State is a different personality. In this Article he has rightly pointed some words of Lord Atkin in which he gave a friendly warning- “wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness, and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct”.128

Also, the Judiciary could, with some embarrassment be reminded of its own conduct that the Judges against whom allegations of corruption are being enquired into are being inquired

128 Ibid
two and half years after the cash at judge’s door scam rocked the Punjab and Haryana High Court, the CBI filed a 25 page chargesheet against Justice Nirmal Yadav and four other accused in the case. It is for the first time in the region that a member of the higher Judiciary has been charged in a case of corruption. On March 1, CBI had obtained prosecution sanction from President Pratibha Patil to chargesheet Justice Nirmal yadav.

Also like to highlight the news regarding CJI(former) K.G.Balakrishnan whose family has been under cloud of doubt after revelation by the income tax department which is looking into allegations of amassment of wealth against three of his relatives, have found black money in their possession.

But that is no reason why the great instrument of Judicial Review should be downgraded. Judicial Review is inherent in a written Constitution. Wherever there is a written Constitution the supreme law is the law of the Constitution and for even Parliament to accept that its powers are limited by the written Constitution is not in any manner to derogate from its Sovereignty, like the Sovereignty of the Executive and the Judiciary, is limited by the written Constitution.

Politicians seem to think that the Court ought to give to all decisions of Parliament their seal of approval automatically. But that would mean being untrue to the Oath taken by the Judge, who can only uphold the lawful decisions, and cannot keep silent in the face of illegality. Recently Prime Minister Manmohan Singh said “he respect the Supreme Court’s judgment invalidating his (P.J.Thomas CVC) appointment. “I have already said that I respect the SC

---

129 The Tribune dated March 5, 2011
130 The Tribune dated February 26, 2011
131 The Tribune dated March 4, 2011

- 458 -
judgment. The highest Court of the land has announced the verdict and I accept my responsibility. I think it is our responsibility to ensure that such things don’t happen in future”.

The Supreme Court has given a commendable decision while disposing of two PIL’S challenging the appointment of P.J. Thomas, saying: “we are concerned with the institution and its integrity, including institutional competence and functioning and not the desireabiliy of the candidate alone who is going to be the CVC, though personal integrity is an important quality”.

The honourable Court further made clear that “the Government is not accountable to the Court in respect of policy decisions. However, they are accountable for the legality of such decisions. On September 3, 2010, the high powered committee (HPC), duly constituted under the proviso to Section 4(1) of the 2003 Act, had recommended the name of P.J.Thomas for appointment to the post of CVC (Chief Vigilance Comissioner). The validity of this recommendation falls for judicial scrutiny in this case. Present Law Minister M.Veerappa Moily, said that “this is a failure of a system in the Government and we need to address that and move forward”.

In the words of Former Chief Justice of Delhi High Court, Justice Rajinder Sachar, it is rightly submitted that “it needs repeated reaffirmation that the mandate in the preamble to the Constitution “we the people”, empowers both the Legislature and the Judiciary equally. The transit Legislature elected for a particular period cannot arrogate to assume the mandate of Sovereignty of the people exclusively to itself. Humility in all three instrumentalities of the State and of recognition of their respective limited Sovereignty will make it easier for the country to avoid any unnecessary collision.

---

132 The Tribune dated March 3, 2011
So, the Executive and the Legislature should focus on governance because host of important policy decisions remain on the table. They need to be pushed through quickly to combat institutional corruption and ensure probity in governance.

Kuldip Nayar in his Article asserted that “when the Government said the Supreme Court could not examine the suitability of Mr. P.J. Thomas once he was appointed CVC. This time the Court had the upper hand when it asserted the power of Judicial Review”. The tug of war between the Executive and the Judiciary is nothing new. It was there even during the time of India’s first Prime Minister Jawahar Lal Nehru. He was furious when the Supreme Court declared Zamindari Abolition Act ultra virus. Not long ago, then Speaker Somnath Chatterjee refused to accept the Supreme Court notice. He said that the Court had no right to examine the issue that fall in the Parliament jurisdiction.

Parliament represented the people, but independence of Judiciary cannot be diluted in a Democratic society. The Government has the tendency to arbitrariness. If the two pillars of Democracy, Legislature and Executive are tolerating corruption among their ranks, the Judiciary can intervene and remind the Government to be careful for the sake of true Democracy. Out of 543 M.Ps in the present Lok Sabha, 153 M.Ps are facing criminal charges.134

According to Former Chief Justice of India, R.S. Pathak, law and Justice are fundamental features of a modern Democratic polity. They constitute the quintessence of our conception of the State and are involved in its very definitions. But law and Justice also pass

---

133 The Tribune dated February 23, 2011
134 The Tribune dated February 13, 2011
135 Supra note 114 at 81

- 460 -
beyond the political organisation to the personal quality of human living. They possess an elemental quality in sustaining human relations within a civilised community. They underline the aspiration and expectations within which the human psyche exists and operates. Judicial activism occupies now a fair measure of the time of the superior Court. It cannot be disputed that public interest litigation has come to stay. Several issues ranging far and wide over the spectrum of daily living are being covered by such litigation. They are prompted generally by the inability or inaction of Executive agencies. As it happens, while in most cases public interest litigation has been treated with an appropriate exercise of jurisdiction and has resulted in a resource of substantial public benefit.

So, there is no doubt in saying that the judicial activism has brought relief to the citizens in the matters where the Legislature and Executive were inactive. But this does not mean that Judiciary has overshadowed the other two organs of the State. No State can run without a powerful Executive machinery and Legislature. Judiciary suffers from one biggest problem that is “Delay in dispensing Justice”. The citizen wants that the time taken for dispensing Justice should be very short and that the delays should be accorded. Unfortunately, these delays are very agonising.

Mr. Shivraj V. Patil\(^\text{136}\) in his Article\(^\text{137}\) has rightly pointed that he is disappointed with the delay in dispensing Justice to the citizens and unfortunately, the number of the Court and the number of Judges in the Court are not increased proportionately. This mismatch is one of the most important causes of undue delays in doing Justice.

\(^{136}\) At present Governor of Punjab.

\(^{137}\) Supra note 114 at 85.
The glaring example is present in the Bhopal gas tragedy verdict (2010). The Judiciary can compel the Executive to perform its duties but it should not issue Executive orders as such. There is a difference between issuing Executive orders and ensuring that the Executive performs its duties. The five distinctions between these two should be very clearly understood. Interpreting the law is the responsibility of the Judiciary and that interpretation of law is binding on the Executive, Legislature and all other bodies also. Judiciary is independent and should remain independent.

It is up to the Court to remain away from policy formulation by exercising self-restraint. A fine example is the U.S Supreme Court decision in the Daimler Chrysler case\(^{138}\) in 2006.

The noted lawyer Fali S Nariman\(^{139}\) wrote in 2007,

> Like it or not, the balance of Constitutional power will remain in favour of the Court- but only so long as our Judges are perceived to be persons of exceptional competence and of high moral integrity. If that perception changes (god forbid!), the Constitutional system as it now operates will break down. Sixty years after independence the people have come to trust the Court: but the people’s trust rests in confidence- sometimes rudely shaken by gossip, rumour and lack of transparency. In this 60\(^{th}\) year of independence, then there is much to be done by the higher Judiciary to maintain its bright image”.\(^{140}\)

\(^{138}\) Daimler Chrysler Corp v. Cuno, 15 May 2006, 547 US 332


\(^{140}\) Supra note 2 at p.24
We can say that Judiciary is the guardian of the Constitution and therefore being the guardian of the supreme law of the land, it acquires a special position among the three organs of the State which today is interpreted as Supremacy of Judiciary. People of India have given to themselves the Constitution and therefore they have rested profound faith in the Judiciary for protection of their Rights and upholding the 'Spirit of the Constitution'. The question of Supremacy of Judiciary over Legislature and Executive should and with the thought that the Constitution is Supreme and basic structure of the Constitution in no situation can be abrogated and this has been made clear by the Supreme Court in the judgment of I.R. Coelho’s case again in 2007. Neither the Parliament nor the Executive and nor the Judiciary is supreme from each other; they perform only those functions which are entrusted by the Constitution. Truth lies in the fact that Sovereignty lies with the people of India and therefore if there any threat to the Sovereignty of India the mandate of the will of the people of India will answer the doubts of such times.

The Judiciary has done a commendable job in interpreting Fundamental Rights and protecting them from infringement. Many Directive Principles have been interpreted as Fundamental Rights where the State has failed to implement them. We need to note that the individual rights have been more effectively implemented than the group rights for e.g. Article 17 which prohibits untouchability, but still it exists in our society. It can be effectively enforced only when the Directive Principles are truly implemented by the State. So, Part IV can help in the effective enforcement of Part III of the Constitution.