CHAPTER III
POWER OF JUDICIAL REVIEW UNDER THE CONSTITUTION OF INDIA

Introduction

In the first chapter the introduction about the topic of the research work is given, which shows the areas which will be covered in the following chapters. This chapter primarily covers the power of Judicial Review under the Indian Constitution which we have borrowed from United States though initially it was not part of the written Constitution of the United States. The framers of Indian Constitution incorporated various features in the Constitution after gathering knowledge and experience from the working of those features in the well known Constitutions of the world. This was done to avoid defects or loopholes in the light of those Constitutions. Fundamental Rights chapter was borrowed from American Constitution and Parliamentary system of Government from the United Kingdom and Directive Principles of State Policy from the Constitution of Ireland, provisions relating to Emergencies from Constitution of German Reich and the Government of India Act of 1935, independence of Judiciary with the power Judicial Review from American Constitution. Power of Judicial Review is a necessary concomitant of ‘Fundamental Rights’, for, it is meaningless to enshrine individual rights in a written Constitution if they are not enforceable, in court of law, against any organ of the State, legislative or Executive. At the same time since the inauguration of the Constitution, various provisions have been inserted into the Constitution by amendments, which have taken out considerable areas from the pale of Judicial Review, e.g., by inserting Articles 31A to 31C (discussed in the next chapter). But Indian Parliament is Sovereign to the extent of legislative powers vested in it through the
Constitution. It means that it has no uncontrolled power to do what it likes. Since Parliament functions under a written Constitution, it has to observe the restriction imposed on it by the Constitution. Similar opinion is with the Executive. A written Constitution may seek to put formal restraints upon the abuse of power. Judicial power of the State exercisable by the court under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution. Indeed harmonisation which our Constitution has effected between Parliamentary Sovereignty and a written Constitution with a provision for Judicial Review is a unique feature of our Constitution.1

### 3.1 Constitutionalism

The concept of Constitutionalism is also equally important as the concept of Constitution is, former denotes antithesis of arbitrary powers and latter confers powers on the various organs of the State and also restrain those powers. Constitutionalism insists upon limitations being placed upon Governmental powers, checks and balances and putting some restrain upon Legislature and Executive not making them arbitrary.2

A written Constitution, Independent Judiciary with powers of Judicial Review, the doctrine of Rule of Law and Separation of Powers, free elections to Legislature, accountable and transparent Democratic Government, and Fundamental Rights of the people, federalism, and decentralisation of power are some of the principles and norms which promote Constitutionalism in a country.3

Plato termed ideal State as ‘Republic’. According to him laws of the State are a pale shadow of an absolute ‘idea’ of perfect laws against which man made laws may be measured. Aristotle believed in

2 Ibid.
3 The natural law philosophers promoted idea of Constitutionalism, like Aquinas, Paine, Locke, Grotius, and Rousseau. It is also in the Magna Carta (1215), *Id.* at 6.
those laws which are based on justice and morality have universal acceptance.

The ideas and concepts relating to Constitutionalism includes the doctrine of Rule of Law as ascribed to Dicey whose writings in 1885 on the British Constitution included the following ideas in Rule of Law:

1) Law is supreme. No man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary court. The Government cannot punish anyone merely by its own fiat. Persons in authority in Britain do not enjoy wide, arbitrary or discretionary powers. Dicey asserted that wherever there is discretion there is room for arbitrariness.

2) Equality before law. Whatever his rank or condition is, he is subject to the ordinary law and jurisdiction of the ordinary court. In Great Britain there is one system of law and one system of court for all i.e., for public officials and private persons.

3) The general principles of the British Constitution, and especially the liberties of the individual, are judge-made, i.e., these are the result of judicial decisions determining the rights of private persons in particular cases brought before the court from time to time.

The Indian Constitution seeks to promote Rule of Law through many of its provisions. For example, Parliament and State Legislatures are democratically elected on the basis of adult

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suffrage. The Constitution makes adequate provisions guarantying independence of the Judiciary. Judicial Review has been guaranteed through several Constitutional provisions. The Supreme Court has characterised Judicial Review as a basic feature of the Constitution. Article 14 of the Constitution now assumed great significance as it is used to control administrative powers.

3.2 Concept of Judicial Review

French jurist Montesquieu wrote in his book, the ‘Spirit of Laws’ in the 18th century that there will be no liberty if the judicial power be not separated from the Legislature and Executive.

By guaranteeing independence of Judiciary as one of the salient features of the Constitution, the founding fathers have tried to maintain balance between the three organs of the State. This doctrine was propounded in the case of Marbury v. Madison, by the U.S Supreme Court. Chief Justice Lord Marshall established the Supremacy of Judiciary over other two organs of the State on the ground that if any act of the Legislature or Executive contravened the provision of the Constitution then the Judges had to declare it void. This case was when federalists lost election of 1800, but before leaving office they created several new judicial posts, to which the retiring federalist’s president John Adams appointed 42 federalists. The appointments were confirmed signed and sealed by Senate. But Adams secretary of State John Marshall failed to deliver certain of them; one of them was William Marbury. He filed petition in the Supreme Court for the issue of writ of mandamus to Secretary Madison ordering him to deliver certain of them. The decision of the Supreme Court made clear that the Constitution is supreme and

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5 Article 326 of the Constitution of India.
6 Chapter IV of the Constitution of India.
7 Article 13 of the Constitution of India.
8 1(cranch)1803 (137-176).
unchangeable by ordinary legislative Acts. The power of Judicial Review comprises of three aspects namely, Judicial Review of administrative action, legislative action and judicial decisions. It is to give supremacy to Fundamental Rights. It declares pre-Constitution laws void to the extent of their inconsistency with part. In Judicial Review of legislative action, whenever any law passed by the Legislature infringes any of Fundamental Rights of the individual then it declared as unconstitutional by the court. In the Judicial Review of administrative action whenever there is arbitrary exercise of discretionary power, the court will declare that action as unconstitutional. Article 13 provides Judicial Review of all legislations in India whether past or future and has conferred this power on the High Court and Supreme Court under Article 32 and 226.

3.2.1 Judicial Review of Laws inconsistent with Fundamental Rights: Article 13

In enacting Fundamental Rights in Part III of our Constitution (Article 12-35) the founding fathers showed that they had the will, and were ready to adopt the means, to confer legally enforceable Fundamental Rights. First, the question arises against whom were Fundamental Rights to be enforced? Broadly speaking against “the State”, not as ordinarily understood but as widely defined by Article 12.⁹

Article 12 in this part unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of States and all local or other authorities within the territory of India or under the control of the Government of India. Therefore, Fundamental Rights become

enforceable against local or other authorities. Secondly, against what activity were Fundamental Rights enforceable? They were enforceable against laws and Executive actions which violated Fundamental Rights.\footnote{Ibid.}

Article 13 is the key provision as it gives teeth to the Fundamental Rights and makes them justiciable.

Article 13(1) declares that all pre-Constitution laws shall be void to the extent of their inconsistency with the Fundamental Rights; it becomes void from 26.01.1950, the date on which the Constitution of India came into force.\footnote{Supra note 1 at 834.}

Article 13(2), the State ‘shall not make any law’ which takes away or abridges the Fundamental Rights; and a law contravening a Fundamental Right is, to the extent of the contravention, void. Article 13(2) is the crucial Constitutional provision which deals with the post-Constitution laws. If any such law violates any Fundamental Right it becomes void \textit{ab initio} i.e. from its inception. The effect of Article 13(2) thus is that no Fundamental Right can be infringed by the State either by legislative or administrative action.\footnote{Id. at 835.}

Article 13 makes the Judiciary and especially the Apex court, as the guardian, protector and the interpreter of the Fundamental Rights. The Supreme Court has figuratively characterised this role of the court as that of a \textit{“sentinel on the quie urve”}. On the whole, not many statutes have been hit by Fundamental Rights. However, Judicial Review of administrative action is somewhat rare persuasive than that of legislative action. The Supreme Court has further bolstered its protecting role under Article 13(2) by laying down the
proposition that Judicial Review is the "basic" feature of the Constitution.

This idea has been conveyed by former Chief Justice of India, Justice Y.V. Chandrachud, in the Minerva Mills v. Union of India,\textsuperscript{13} that it is the paramount duty of the court to declare validity of laws and if court are deprived of this power then the Fundamental Rights will become complete adornment.

Justice H.R. Khanna, has emphasized in Kesavananda Bharti v. Union of India,\textsuperscript{14} that the power of Judicial Review is very important for the existence of Fundamental Rights and being part of the Constitution they need to be protected by Judiciary. Therefore Judicial Review is an important part of the Constitution.

Former Chief Justice of India, Justice A.M. Ahmadi in L. Chandra Kumar v. Union of India,\textsuperscript{15} has observed that the power given in Article 32 and 226 to the Supreme Court and High Court is an integral part of the Constitution. The task of the Supreme Court is to uphold the Constitution.

2.3.1.1 Meaning of Law and State under Article 13

In brief, all laws contravening and/or violating Fundamental Rights were declared to be pro tanto void Article 13(1) and (2). However, Article 13(3)(a) defined 'Law' very widely by not limiting it to a law enacted by the Legislature.\textsuperscript{16}

1) Article 13(3)(a)

"Law" includes any ordinance, order, by-law, rule, regulation, notification of India the force of law. In other words, "Law" includes

\textsuperscript{13} Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789, also see, Waman Rao v. Union of India, AIR 1981 SC 271.

\textsuperscript{14} Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461.

\textsuperscript{15} AIR 1997 SC 1125.

\textsuperscript{16} Supra note 9 at 349.
subordinate delegated legislation. Finally, “Law” includes custom and usage having the force of law, although custom and usage are not the result of any legislative activity.17

By defining “the State” and “Law” very widely, the founding father ensured that Fundamental Rights operated over the widest field. The declaration in Article 13(1) and (2) making laws inconsistent with, or contrary to Fundamental Rights _pro tanto void_ would not, by itself, prevent “the State” from violating Fundamental Rights. To effectively prevent the State from violating Fundamental Rights, the founding fathers created a new Fundamental Right by enacting Article 32, which guaranteed the right to move the Supreme Court for the enforcement of Fundamental Rights. Article 32(2) armed the Supreme Court with power to issue appropriate writs, orders, or directions to prevent a violation of Fundamental Right.

Today’s Government performs a large number of functions because of the prevailing philosophy of a social welfare State. The Government acts through natural persons as well as juridical persons.18

While the Government acting departmentally, or through officials, undoubtedly, falls within the definition of ‘State’ under Article 12, doubts have been cast as regards the character of autonomous bodies. Whether they could be regarded as ‘authorities’ under Article 12 and thus, be subject to Fundamental Rights?

To answer this question, the Supreme Court has developed the concept of an instrumentality of the State. Anybody which can be regarded as an instrumentality of the State falls under Article 12. Any body which can be regarded as an “instrumentality” of the State

17 _Id._ at 350.
18 _Ibid._
falls under Article 12. The reason for adopting such a broad view of Article 12 is that the Constitution should, whenever possible, "be so construed as to apply to arbitrary application of power against individuals by centres of power. The emerging principle appears to be that a public corporation being a creation of the State is subject to the Constitutional limitations as the State itself".¹⁹

Most of the Fundamental Rights are claimed against the State and its instrumentalities and not against private bodies. Article 13(2), as stated above, bars the 'State' from making any 'law' infringing a Fundamental Right. The two important concepts used in this provision are: "State" and "Law". These concepts need some elucidation.²⁰

2) Concept of State

Fundamental Rights are claimed mostly against the 'State'. Article 12 clarifies that the term "State" occurring in Article 13(2), or any other provision concerning Fundamental Rights, has an expensive waning. Article 12, the terms 'State' includes:

1) The Government and Parliament of India;
2) The Government and the Legislature of a State;
3) All local authorities; and
4) Other authorities within the territory of India, or under the control of the Central Government.

²⁰ Supra note 1 at 836.
The significant expression in Article 12 is “other authorities” which is defined in the Constitution. It is, therefore, for the Supreme Court, as the Apex court, to define the terms.21

3) Other Authorities

This term in Article 12 has caused a good deal of difficulty, and judicial opinion has undergone changes over time.

The development of the law as to “other authorities” which fall within the definition of “the State” in Article must be traced through the cases like in Electricity Board, Rajasthan v. Mohan Lal,22 court held that the expression ‘other authorities’ is wide enough to include all authorities created by the Constitution or statute on whom powers are conferred by law. In Sukhdev Singh v. Bhagatram,23 (Sukhdev’s case) it was held that the statutory corporations ONGC, LIC, IFC are authorities because they have power to make regulations under the statute for regulating the conditions of service of their employees. Later, in the case of R.D. Shetty v. International Airport Authority,24 (The Airport case) a broader approach was adopted by the court that if a body is an agency or instrumentality of the Government it may be an ‘authority’ within the meaning of Article 12 and in Ajay Hasia v. Khalid Majid,25 (Hasia’s Case) held a registered society is an agency of ‘State’. The test is not as to how the juristic person is created but it is that why it has been created.

Justice Mathew adopted a new line of approach in Sukhdev’s case which has been adopted unanimously by 5 Judges in Ajay Hasia’s case. He observed that the concept of “State” had changed radically in recent years and the State could no longer be looked

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21 Ibid
22 (1967) 3 SCR 377.
23 (1975) 3 SCR 619.
24 AIR 1979 SC 1628.
upon simply as "coercive machinery wielding the thunderbolt of authority". The Part IV of the Constitution (Directive Principles) showed the extent of the services which the State was expected to undertake and render for the welfare of the people. Therefore, the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. A State is an abstract entity. It can only Act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State.

Thus, it is now established that not only a department of the Government, but even an instrumentality of the Government falls under Article 12:

1) If the entire share capital of the body is held by the Government, it goes a long way towards indicating that the body is an instrumentality of the Government.

2) Where the financial assistance given by the Government is so large as to meet almost entire expenditure of the body, it way indicate that the body is imp equated with Governmental character.

3) It is a relevant factor if the body enjoys monopoly status which is conferred or protected by the State.

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26 Supra note 9 at 374.
27 Ibid.
4) Existence of deep and pervasive State control may afford an indication that the body is a State instrumentality.

5) If the functions performed by the body are of public importance and closely related to Government functions, it is a relevant factor to treat the body as an instrumentality of the Government.

4) Local Authority

The expression 'local authority' in Article 12 refers to a limit of local self Government like a Municipal Committee or a village panchayat.29

In Premji Bhai Parmar v. Delhi Development Authority,30 reference was made to the definition of 'local authority' given in Section 3(31) of the General Clauses Act which follows as:

'Local authority' shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or a local fund.

2.3.1.2 Whether Judiciary included in the “State” under Article 12?

We must now consider whether the Judiciary is “the State” as defined in Article 12, because if it is, it must conform to Fundamental Rights conferred by Part III of our Constitution. Article 14 (Right to Equality) provides:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

30 AIR 1980 SC 738.
In our Constitution, the italicized words have been borrowed from the 14th Amendment to the U.S Constitution, which provides:

“Not to deny to any person within its jurisdiction the equal protection of the laws. Article 14 is the one Article in which our court have drawn most heavily on the decisions of the United States Supreme Court and the whole doctrine of “classification”, evolved by the United States Supreme Court has very rightly been adopted by our court. In the United States it is well settled that the Judiciary is within the prohibition of the 14th Amendment.31

We must now consider whether the Judiciary is subject to Fundamental Rights. The meaning of “the State” for the purposes of Part III, does not expressly exclude the Judiciary, and though Article 12 does not expressly include the Judiciary, it is submitted that the Judiciary, with the Legislature and the Executive, is included in the ordinary meaning of a “State” as one of the three great departments of a State; and further, that the ordinary meaning is not outside the inclusive definition of the “State” given in Article 12. This conclusion is supported by Article 13, which declares that any law, rule, regulation and the like, which violates Fundamental Rights, is void. The Judiciary in India has rule making powers and if it were not “the State” for the purpose of Part III (Fundamental Rights) rules made by court could not be impugned as violating Fundamental Rights. But the Supreme Court has struck down a rule made by it as violating Fundamental Rights.32 Again, the Chief Justice of the High Court has the power to appoint officers of the High Court and if an appointment discriminates against other applicants on the ground of race, religion, caste or sex it would be void as violating Article 16. It may however be said that these examples only establish that the

31 Supra note 9 at 389
Judiciary, when exercising legislative power, as in making rules, or Executive power, as in making appointments to public offices, is subject to Fundamental Right and those examples do not establish that a judge, acting as a judge, is subject to Fundamental Rights and can be called to account for a violation of Fundamental Rights. Article 32 is by its terms limited to the enforcement of Fundamental Rights and the right to apply to the Supreme Court for the writs mentioned in Article 32 is itself a Fundamental Right. A Writ of Certiorari undoubtedly lies to a court strict sense, though it also lies to bodies or authorities which are not court strict sense but are under an obligation to Act judicially or quasi-judicially. Therefore, if a Writ of Certiorari lies under Article 32 for the enforcement of Fundamental Rights, it must follow that there are some Fundamental Rights which can be violated by a Judge acting judicially in a court strict sense. The referring judgment of Justice Venkatarama Aiyar, in Ujjam Bai's case, records that it was conceded, and it submitted rightly, that there were certain Articles of the Constitution specifically directed to the Judiciary, e.g. Article 20 and that a violation by a court of Article 20 would attract the Writ to Certiorari under Article 32.

Again, the Judiciary wields the judicial power of the State, and Article 144 emphasises the fact that judgments would be worth little if the full authority of the State were not exerted to give effect to them.

In the United States, it was well settled that the Judiciary is within the prohibition of the 14th Amendment. As Article 14 corresponds to the 14th amendment, there is no reason why the cogent judgments of United States Supreme Court should not apply equally

33 Supra note 9 at 393.
34 (1963) 1 SCR 778.
35 Supra note 9 at 394.
to the Judiciary in India. This is all the more so, in view of the fact that the inclusion of the writ of Certiorari in Article 32 clearly shows that some Fundamental Rights can be violated by court strict senses. It may be difficult to prove, but the numerous decisions in the United States show that if proved, “it cannot escape condemnation as an unjust discrimination”. There is nothing to show that the formers of our Constitution when they adopted the very words of the 14th Amendment “the State shall not deny to any person... the equal protection of the laws” intends to exempt the Judiciary in India from a prohibition to which the Judiciary in the United States was subject. On the contrary, in conferring on our Supreme Court the power to issue the writs of certiorari for the enforcement of Fundamental Rights, the framers emphasised the fact that judicial acts violating Fundamental Rights must be quashed by certiorari exactly or legislative and Executive acts violating Fundamental Rights would be struck down by a declaration of invalidity accompanied by an appropriate Writ issued under Article 32.  

2.3.1.3 Doctrine of Ultra-Vires

Article 13 embodies the Doctrine of ultra vires Article 13 has been considered in several cases and has been the subject of conflicting decisions of our Supreme Court. The United States Constitution contains no express provision that a law contravening the Constitution is pro tanto void. But that position was established by Marshall C.J. in Marbury v. Madison. He said that those who framed written Constitutions contemplated them as forming the fundamental and paramount law of the Nation, and the theory of every such Government must be that an act of the legislations repugnant to the Constitution was void.

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36 Ibid.
37 (1803) 1 Cranch 137.
The particular phraseology of the United States Constitution confirmed and strengthened the principle that a law repugnant to the Constitution was void. The principle thus established was familiar to the American colonists, for the colonial court, and an appeal, the Privy Council in England, had the power to declare legislative acts void if in conflict with colonial charters. It is not surprising therefore, that former Chief Justice, Justice Kania said, that:

The inclusion of Article 13(1) and (2) . . . appears to be a rather of abundant caution. Even in their absence, if any of the Fundamental Rights was infringed by any legislative enactment, the court has always the power to declare the enactment, to the extent it transgresses the limits, invalid.38

3.3.1.4 Concept of “Law” under Article 13:

Article 13(3)(a) and (b) provide:

13(3)(a) ‘law’ includes any ordinances, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

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

Article 13(3) (a) defines “Law” very widely by an inclusive definition. It does not expressly include a law enacted by the Legislature, for such an enactment is obviously law. The definition of law includes:

1) An ordinances, because it is made in the exercise of the legislative powers of the Executive;

2) An order, bye-law, rule, regulation and notification having the force of law because ordinarily they fall in the category of subordinate delegated legislation and are not enacted by the Legislature.

3) Custom or usage having the force of law because they are not enacted law at all.

1) Bye Laws

In the United Kingdom, no law enacted by Parliament can be declared invalid or ultra vires. However, subordinate legislation enacted in the exercise of delegated powers can be declared ultra vires and void on a number of grounds. *Kruse v. Johnson,* has been considered as the leading case as to the circumstances in which a bye-law may be struck down as unreasonable and the judgment of Chief Justice Lord Russel of Killowen has been frequently cited. In that case Chief Justice Lord Russel defined a bye-law made by public bodies as:

An ordinance affecting the public, or some portion of the public imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance.

2) ‘Law in force’ and ‘Existing law’

The expression used in Article 13(1) “law in force” and in Article 372 and is defined in identical terms by Article 13(3)(b) and Article 372, explanation (1): Article 366, which contain
“definitions”, does not define “law in force” but defines “existing law” to mean: “any law, ordinances, order bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law ordinance, order, bye-law, rule or regulation.

Article 366(10): The expression existing law is used, for example, in Article 19(2) to (6) and the difference in the definition of “existing law” and “law in force” has been relied upon to support the argument that “existing law” is narrower than “law in force”, for whereas by express definition “law in force” includes a law even if it is not in operation at all, or not in operation in a particular area, a law cannot be said to exist if it is not in operation. The argument was rejected in Bombay v. Heman Alreja, the court holding that notwithstanding the difference of language, the two expression meant the same thing. In Edward Mills Co. Ltd. v. Ajmer, the Supreme Court held that there was no material difference between the two expression “existing law” and “law in force”. It is submitted that the conclusion is correct, and the following historical account given by Chagla C.J. in Alreja’s case supports that conclusion. Sections 292 and 293 of the Government of India Act, 1935, (which correspond to Article 372), used the expression “law in force”, but the marginal note to Section 292 was “existing law of India to continue in force; and Section 293 was “adaptation of existing Indian Laws etc.”. Before the Government of India Act, 1935, came into force on April 1, 1937, it was realised that the use of the expression “law in force” might create difficulties in carrying out the intention of the British Parliament. For though “existing law” would include all law whether it was in actual operation or was capable of being brought into operation under the powers conferred by such law, “law in force” might be taken to near only that port of law which was actually in

42 AIR 1955 SC 25.
operation and not that part of law which was capable of being brought into operation, for, a law cannot be said to be in force when it is not brought into operation at all. Realising this difficulty, the British Parliament enacted on February 18, 1937, the India and Burma (Existing Law) Act, 1937, being an Act “to explain” and amend Sections 292 and 293 of the Government of India Act, 1935. Thus, the British Parliament was not content to leave Sections 292 and 293 to be interpreted in the light of the Marginal notes which spoke of “existing law”, but indicated in the body of the amending Act itself, and in its title, that those Sections dealt with “existing law”. The phraseology of Sections 292 and 293, as amended in 1937, and the marginal notes thereto, were stereotyped in Article 372 and the explanation to that Article was also used in Article 13(3)(b). It is submitted that the above Legislature history clearly shows that previous Constitution acts to sense in our Constitution.

3) Amendment of the Constitution is not “Law” within Article 13(3)

It may be said at the outset that in Shankari Prasad Singh Deo v. Union, the Supreme Court unanimously held that an amendment of the Constitution under Article 368 was not “Law” within the meaning of Article 13(3)(a). The court distinguished between a law made in the exercise of legislative power. This distinction was affirmed by a majority of 3 to 2 in Sajjan Singh v. Rajasthan, Justice, Hidayatullah and Justice, Mudholkar observing that they wished to consider the matter further before accepting it. These cases were overruled in I.C. Golak Nath v. Punjab, but the Golak Nath was decisively overruled in Kesavanand Bharti v. State of Kerala.

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43 Supra note 9 at 408.
44 AIR 1951 SC 458.
45 AIR 1965 SC 845.
46 AIR 1967 SC 1653.
47 Supra note 14.
and the view that “Law” did not include an amendment of the Constitution was reaffirmed. However, the rather was set at vest by the Constitution (Twenty Fourth Amendment) Act, 1972 which inserted a new sub-Article (4) in Article 13 which expressly excluded an amendment of the Constitution from Article 13.

It has been held that in Article 13 “Law” includes customs or usage having the force of law. Accordingly, in a number of cases, customary laws of pre-emption have been held void as Violating Article 19(1)(f). Again, in Dasaratha Rama Rao v. A.P., it was held that even if there was a custom had been recognised by law with regard to hereditary village officers, that custom had to yield to a Fundamental Right. In Baijnath v. Ram Nath, it was held that assuming that there was a custom under which hereditary yogis could force their ministrations on their Yajmans, such a custom would be void as violating Article 25.

Article 13(3) expressly refers to a notification. In Madhubhai Amathalal Gandhi v. Union, the Supreme Court held that if an Act was a self-contained one, and the notification issued under it only re-stated the provisions of the Act, the notification could not be questioned as violating Fundamental Rights if the validity of the Act was admitted. If however an Act conferred power on the State in general terms and the notification issued under the Act infringed Fundamental Rights, the notification could be impugned as violating Fundamental Rights since a notification issued under the Act is law.

Some propositions emerged from various cases under Article 13 like:

- AIR 1961 SC 564.
- AIR 1951 AP 32.
There is distinction between a law unconstitutional for lack of legislative power and a law unconstitutional because violative of provisions of the Constitution other than those which relate to the distribution of legislative power.  

A law which is unconstitutional for lack of legislative competence is void ab initio: a law which is unconstitutional for violation of Constitutional limitations is unenforceable as long as it continues to violate Constitutional limitations. Such a law, whether pre-Constitution or post-Constitution is not wholly void if it violates Fundamental Rights, it is merely eclipsed by the Fundamental Rights and remains, as it were, in a Moribund condition as long as the shadow of Fundamental Rights falls upon it. When that shadow is renowned the law begins to operate propria vigore from the date of such removal unless it is retrospective.

A law void for lack of legislative competence is not revived if legislative power is subsequently given to the Legislature which enacted it; a law partly void because of violation of Constitutional limitations operates propria when the limitations are removed.

When a court declares a law to be unconstitutional, that declaration does not repeal or amend the law, for to repeal or amend a law is a legislative not a judicial familiar.

The word “void” in Article 13(1) and (2) does not mean “repealed”, nor is a law declared void under Article 13(1) or (2) obliterated from the statute book. Such a law is not wholly void but by the express terms of the Article is void only to the extent of its repugnancy to, or one point needs to be emphasised. A restriction on

51 AIR 1958 SC 468.
52 AIR 1955 SC 123.
53 AIR 1955 SC 781.
54 Supra note 9 at 408.
55 Supra note 52.
a Fundamental Right can be imposed only through a statutes, statutory rule or statutory regulation. A Fundamental Right cannot be put under restraint merely by an administrative direction not having the force of law.\textsuperscript{56}

The object of the definition in Article 13 is to ensure that instruments emanating from any source of law- permanent or temporary, legislative or judgement or any other source- will pay homage to the Constitutional provision relating to Fundamental Rights and Clause 4 ensures that a Constitutional amendment does not fall within the definition of law in Article 13 and its validity cannot be challenged on the ground that it violates a Fundamental Right.

4) Personal Laws

In India, there are many personal laws like Hindu Law, Muslim Law, Parsi Law, Christian Law of marriages and divorce and many of them are non-statutory, and are more concerned with religion. There are several aspects of these systems of laws which are out of time with the modern thinking and even incompatible with some Fundamental Rights. The court have adopted the policy of non-interference keeping in view the susceptibilities of the groups to which these laws apply.\textsuperscript{57}

There are two strategies, one, in some cases the court have ruled that the challenged features of personal laws are not incompatible with the Fundamental Rights. References to this aspect are made in the course of the following discussion on specific Fundamental Rights, especially, under Articles 14, 15, 25 and 26. Two, the court have denied that the personal laws fall within the


\textsuperscript{57} Supra note 1 at 845.
coverage of Article 13 and thus, these laws cannot be challenged under the Fundamental Rights.

After the commencement of the Constitution, several acts have been passed by Parliament and the State Legislatures modifying several aspects of these personal laws. Prima facie, it is difficult to argues that these statutes do not fall within the scope of Article 13(3)(a). But because of the sensitivities of the people and the delicate nature of the issues involved, the court have thought it prudent not to interfere with these laws. On the touchstone of Fundamental Rights and leave it to bring them in conformity with the Fundamental Rights. The only explanation for this judicial stance can be that as a matter of policy the court do not wish to get involved in the delicate task of adjudging these acts vis-à-vis Fundamental Rights. It is left by the court to the wisdom of popular Governments to enact a uniform civil code under Article 44 of the Constitution or to the religious communities to follow their own personal laws.

5) Custom

In *Gazula Dasarotha Rama Rao v. State of Andhra Pradesh*, the Constitution Bench of the Supreme Court expressed the view that Article 13(1) which says that laws in force in India. Before the commencement of the Constitution shall be void if inconsistent with Fundamental Rights “includes custom or usage having the force of law”.

The court observed that:

Therefore, even if there was a custom which has been recognised by law. . . that custom must yield to a Fundamental Right.

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58 *Id.* at 846.
59 *Supra* note 48.
In Sant Ram v. Sabh Singh, the Constitution Bench of the Supreme Court ruled that a customary right of pre-emption by vicinage was void under Article 19(1)(f). The court referred to Article 13(1)(a) which says that ‘law’ includes ‘custom’. The court also ruled that the definition of ‘laws in force’ contained in Article 13(1)(b) “does not in any way restrict the ambit of the word ’law’ in Article 13(1)(a)”.

In Madhu Kishwar v. State of Bihar, Justice Ramaswami, expressed the view that customs of tribal, though elevated to the status of law by Article 13(1)(a), “yet it is essential that the customs inconsistent with or repugnant to Constitutional scheme must always yield place to Fundamental Rights”.

3.3 Unconstitutionality of a Statute

Article 13(1) refers to Pre-Constitution laws while Article 13(2) refers to Post-Constitution Laws. A law is void if inconsistent with a Fundamental Right.

A void statute is unenforceable, non-est, and devoid of any legal force: court take no notice of such a statute, and it is taken to be notionally obliterate for all purposes.

In Behram v. State of Bombay, the Supreme Court has observed on this point:

Where a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it, contracts which depend upon it for their consideration are void, it constitutes a

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60 AIR 1965 SC 314.
61 AIR 1996 SC 18^,
62 Supra note 1 at 847.
63 Id at 848.
64 Supra note 52.
protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made.

The above proposition is not however universally or absolutely there in all situations. It is subject to a few exceptions as follows:

1) Some Fundamental Rights apply to all persons, citizens as well as non-citizens, e.g. Article 14, 21 while some of these rights, such as Article 19, apply to the citizens.65

2) Article 13(1) is prospective and not retrospective. Therefore, a pre-Constitution law inconsistent with Fundamental Rights becomes void only after the commencement of the Constitution. Any substantive right and liabilities occurring under it prior to the enforcement of the Constitution are not nullified. It is ineffective only with respect to the enforcement of rights and liabilities in the Post-Constitution period. A person was being prosecuted under a law before the Constitution came into force. After the Constitution came into force, the law become void under Article 19(1)(a).66 It was held that Article 13(1) could not apply to him as the offence has been committed before the enforcement of the Constitution and, therefore the proceedings against him were not affected.67

But the procedure through which rights and liabilities were being enforced in the pre-Constitution era is a different matter. A discriminatory procedure becomes void after the commencement of the Constitution and so it cannot operate even to enforce the pre-

66 Article 19(1)(a).
Constitution rights and liabilities. A law inconsistent with a Fundamental Right is not void as a whole. It is void only to the extent of inconsistency. This means that the doctrine of severability has to be applied and the offending portion of the law has to be sewed from the valid portion of thereof.

Judiciary has played a commendable role for the enforcement of Fundamental Rights under part III of the Constitution. Any aggrieved person can approach the Supreme Court in case of breach of his Fundamental Right. The court can be approached even through a letter in such a case as held in *S.P Gupta v. Union of India*. After this judgement, it has been open to public minded individual citizens or social organisations to seek judicial relief in the interest of the general public.

### 3.2.1 Doctrine of Eclipse

In 1948 a legal provision was enacted which authorised the State Government to exclude all private motor transport business, became inconsistent with Article 19(1)(g) when the Constitution came into force in 1950. Then in 1951, Article 19(1)(g) was amended to permit the State Government to monopolise any business. Then the question arised regarding the effect of the Constitutional Amendment of 1951 on the law of 1948 and whether the law having become void was dead once for all and so could not be revitalised by a subsequent Constitutional amendment without being re-enacted? Then to solve this problem the Supreme Court enunciated the doctrine of eclipse in *Bhikaji v. State of Madhya Pradesh*.

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70 AIR 1982 SC 149.
71 Article 19(1) (g) guarantees to all citizens the right to practices any profession, or to carry on any occupation, trade or business.
72 AIR 1955 SC 781.
The doctrine of eclipse means that a pre-Constitution law inconsistent with a Fundamental Right was not wiped out altogether from the statute book after the commencement of the Constitution as it continued to exist in respect of rights and liabilities which has occurred before the date of the Constitution.73

Therefore, the law in question will be regarded as having been 'eclipsed' for the time being by the relevant Fundamental Right. it was in a dormant or moribund condition for the time being. Such a law was not dead for all purposes. If the relevant Fundamental Right is amended then the effect would be “to remove the shadow and to make the impugned Act free from all blemish or infirmity”.74

The doctrine of eclipse has been held to apply only to the pre-Constitution and not to the post-Constitution laws. The reason is that while a pre-Constitutional law was valid when enacted and, therefore, was not void ab initio, but its voidity supervened when the Constitution came into force, a post-Constitution law infringing a Fundamental Right is unconstitutional and a nullity from its very inception. Therefore, it cannot be vitalised by a subsequent amendment of the Constitution removing the infirmity in the way of passing the law. The Supreme Court has distinguished between Article 13(1) and 13(2). Article 13(2) which applies to the post-Constitution laws prohibits the making of a law abridging Fundamental Rights, while Article 13(1) which applies to the pre-Constitution laws contains no such prohibition.75

An Act declared unconstitutional under Articles 14, 19 and 31(2), was required it is put in the Ninth Schedule.76 The express

73 Supra note 1 at 849.
74 Ibid.
75 Ibid.
76 After the case of I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861. Now all the laws which is in the Ninth Schedule in subject to Judicial Review under Article 13 on the basis of “right test”.
words of Article 31B cure the defect in such an Act with retrospective operation from the date it was put on the statute book. Such an Act even though inoperative when enacted because of its inconsistency with a Fundamental Right, assumed full force and vigour retrospectively as soon as it was included in the Ninth Schedule.77

An Act held invalid under Article 13(2) could not be reviewed merely by amending it but will have to be re-enacted. The same proposition will apply when an Act infringes a Fundamental Right applicable to the citizens only. Such a law will be regarded as 'still born' vis-à-vis the citizens even though it may be operative qua the non-citizens, and so it will have to be reenacted if it is desired to make it valid qua the citizens.78

3.2.2 Doctrine of Severability

According to Article 13 a law is void only “to the extent of the inconsistency or contravention” with the relevant Fundamental Right. The above provision means that an Act may not be void as a whole; only a part of it may be void and if that part is severable from the rest which is valid, then the rest may continue to stand and remain the invalid of the Act is severed and the Act will then be read as if the invalid portion was not there. But, if it is not possible to separate the valid from the invalid portion then the whole of the statute will have to go.79

In the case of R.M.D.C. v. Union of India,80 the Supreme Court has laid down following propositions as regards the doctrine of severability:

77 Supra note 1 at 850.
78 Ibid.
79 Ibid.
80 AIR 1951 SC 628.
1) The intention of the Legislature is the determining factor in determining whether the valid parts of a statute are separable from the invalid parts. It will take into account the history of the legislation, its object, the title and the preamble to it.

2) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety.

3) After striking out the invalid portion, that part which remains is workable becomes in itself a complete code independent of the rest.

4) If the valid and invalid portions all form part of a single scheme as a whole, then the invalidity of a part will result in the failure of the whole.

5) Though the valid and invalid parts of a statute are independent and may not form part of a scheme, but what left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was intended by the Legislature, than also it will be rejected in its entirety.

6) If after the invalid portion is expunged from the statute, what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void.

7) It is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.
In the case of *Supdt. Central Prison v. Dr. Lohia*, the Supreme Court held that when the difference between what is permissible and what is not permissible is not very precise, then the whole provision is to be held void, whether the view taken in the *Romesh Thapper* or the *R.M.D.C. case* is followed.

The higher Judiciary has also been given due respect for the legislative wisdom by applying the doctrine of severability.

### 3.2.3 Can a person waive any of his Fundamental Rights?

In the case of *Behram v. State of Maharashtra*, divided Fundamental Rights into two broad categories:

1. Rights conferring benefits on the individuals, and
2. Those rights conferring benefits on the general public.

The majority on the bench, was not convinced with this argument and repudiated the doctrine of waiver saying that the Fundamental Rights were not put in the Constitution merely for individual benefit and are a matter of public policy. Therefore, the doctrine of waiver could have no application in case of Fundamental Rights. A citizen cannot limits discrimination by telling the State ‘you can discriminate’, or get convicted by waiving the protection given to him under Articles 20 and 21.

The question of waiver of Fundamental Rights has been discussed more fully by the Supreme Court in *Basheshar Nath v. I.T. Commissioner*. The petitioner’s case was referred to the Income Tax Investigation Commission under Section 5(1) of the relevant Act.

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81 AIR 1960 SC 633.
83 Supra note 52.
84 AIR 1959 SC 149.
After the commission had decided upon the amount of concealed income, the petitioner on May 19, 1954 agreed as a settlement to pay in monthly instalments over Rs. 3 lacs by way of tax and penalty. In 1955, the Supreme Court declared Section 5(1) *Ultra vires* Article 14. The petitioner thereupon challenged the settlement between him and the commission, but the plea of waiver was raised against him. The Supreme Court however upheld his contention.

In their judgements, the learned Judges expounded several views regarding waiver of Fundamental Rights viz:

(1) Article 14 cannot be waived for it is an admonition to the State as a matter of public policy with a view to implement its object of ensuring equality. No person can, therefore, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution.

(2) None of the Fundamental Rights can be waived by a person.

A large majority of the people in India are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the State, and therefore, it is duty of the Judiciary to protect their rights against themselves.

(3) The minority Judges took the view that an individually could waive a Fundamental Right which was for his benefit, but he could not waive a right which was for the benefit of the general public.

This was reiteration of the view expressed by Venkataraman, J., in Behram’s case as State above.
In view of the majority decision in Basheshar, it is now an established proposition that an individual cannot waive any of his Fundamental Rights. In Olge Tellis v. Bombay Municipal Corporation, the court asserted that the high purpose which the Constitution seeks to achieve by conferment of Fundamental Rights is not only to benefit the individual but, to secure the larger interests of the community. Therefore, even if a person says, either under mistake of law or otherwise that he would not enforce any particular Fundamental Right, it cannot create an estoppel against him. Such a concession, if enforced, would defeat the purpose of the Constitution.

In Olga Tellis, in a writ proceeding in the High Court, the pavement dweller gave an undertaking that they would not claim any Fundamental Right to put up huts on pavement or public roads and that they could not obstruct the demolition of the huts after a certain date. Later, when the huts were sought to be demolished after the specified date, the pavement dwellers put up the plea that they were protected by Article 21. It was argued that they could not raise any such plea in view of their previous undertaking. The court overruled the objection saying that Fundamental Rights could not be waived. These can be no estoppel against the Constitution which is paramount law of the land. “No individual can barter away the freedoms conferred on him by the Constitution”. Therefore, in spite of their earlier undertaking in the High Court, the pavement dwellers are entitled to raise the plea of Article 21 of the Constitution in their favour.

The doctrine of non-waiver developed by the Supreme Court of India denotes manifestation of its role of protector of the Fundamental Rights. In United States of America, a Fundamental

85 AIR 1986 SC 180.
Right can be waived or contravention of, the provisions of Part III relating to Fundamental Rights.\textsuperscript{86}

Hence, waiver is non-applicable to the Fundamental Rights, because under no circumstance the rights be given secondary consideration.

3.3.4 Judicial Review makes the Constitution Legally binding

In England, the birth of modern Democracy was due to a protest against the absolutism of an autocratic Executive and the English people discovered in Parliamentary Sovereignty an adequate solution of the problem that faced them. The English political system is founded on the unlimited faith of the people in the good sense of their elected representative. Though of late, detractions from its omnipotent authority have taken place because the ancient institution at Westminster has grown incapable of managing myriads of modern problems with the same ease as in Victorian age, nonetheless, never has anybody in England thought of placing limitations on the authority of Parliament so that it might properly behave.\textsuperscript{87}

The American Constitution, on the other hand, had the painful experiences that even a representative body right be tyrannical, particularly when they were concerned with a colonial Empire. Thus, it is that the Declaration of independence recounts the attempts of the British “Legislature to extend in unwarrantable jurisdiction over us” and how the British people had been “deaf of the voice of justice”. At heavy cost had the colonists learnt about the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right (1628) to acknowledge that no tax could be levied without the consent of Parliament, did, in 1765, and the years that followed, insist on taxing the colonies, regardless of

\textsuperscript{86} Supra note 1 at 850.

their right of representation, and attempt to enforce such unDemocratic laws through military rule.88

Hence, while the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law and Parliament as the sole sources of that law, American had to go further and to assert that there is to be a law superior to the Legislature itself and that it was the restraints of this paramount written law that could only save them from the fears of absolution and autocracy which are ingrained in human nature itself.89

The Indian experience of the application of the British Rule of Law in India was not altogether happy and there was a strong feeling that it was not administered with even hands by the foreign rulers in India as in their own land. The “sons of liberty” in India had known to what use the flowers of the English Democratic System, viz., the Sovereignty of Parliament and the Rule of Law, could be put in trampling down the right of man under an imperial rule. So, in 1928, long before the dawn of independence in India, the Motilal Nehru Committee asserted that:90

Our first care could be to love our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances.

Now, Judicial Review is a necessary concomitant of ‘Fundamental Rights’, for, it is meaningless to enshrine individual rights in a written Constitution as ‘Fundamental Rights’ if they are not enforceable, in court of law, against any organ of the State, legislative or Executive. Whatever apprehensions might have been entertained in some quarters in India at the time of the making of the

88 Ibid.
89 Ibid.
90 Id. at 40.
Indian Constitution, there is hardly anybody in India today who is aggrieved because the Supreme Court, each year, invalidates a dozen of statutes and a like number of administrative acts on the ground of violation of the Fundamental Rights.

At the same time, it must be pointed out that since the inauguration of the Constitution, various provisions have been inserted into the Constitution by amendments which have taken out considerable areas from the pale of Judicial Review, e.g. by inserting Articles 31A – 31C; and by 1995 as many as 284 Acts – Central and State, - have been shielded from Judicial Review on the ground of contravention of the Fundamental Rights, by enumerating them under the Ninth Schedule, which relate to Article 31B.

3.4 Right to Constitutional Remedies: Article 32

3.4.1 Enforcement of Fundamental Rights

The history of the struggle for political freedom in India had made a declaration of Fundamental Rights inevitable. In fact, the Indian delegation at the Round Table Conference had pressed for the enactment of Fundamental Rights in the Constitution Act which, it was expected the British Parliament would pass. But at that time the British viewed the declaration of Fundamental Rights with scepticism an attitude which was to change later. Fundamental Rights as enacted in our Constitution not only recognise the dignity of the individual to which the preamble refers, but also recognise their necessity for the full development of the individual and also for preserving the unity of India.91

But mere declaration of rights is worth little without the will or the means to enforce them. The framers of our Constitution had the will, and therefore they adopted the means, for such enforcement

91 Supra note 9 at 155.
to that end, Article 13 expressly declares any law violating Fundamental Rights to be protanto void. Secondly, the Supreme Court was armed under Article 32 with the power to issue the historic writs (of proved efficacy) of habeas corpus, mandamus, prohibition, certiorari, and quo warranto for the enforcement of Fundamental Rights, and Article 32 was itself made a Fundamental Right. further, the High Court were also armed with the power to issue the same writs, not only for the enforcement of Fundamental Rights, but also for any other purpose. 92

A vague general impression prevails in our country that the enactment of Fundamental Rights in the Constitution and the conferment of writ jurisdiction by Articles 32 and 226 somehow distinguishes the Indian Constitution from the British, Canadian and Australian Constitutions, and makes it resemble the U.S. Constitution. This impression is incorrect. No doubt Great Britain has a unitary unwritten Constitution in which Parliament is supreme and Sovereign so that no law passed by Parliament can be declared ultra vires by a court of law. In this respect, the written federal Constitutions of the United States, Canada, Australia and India all differ from the British Constitution. But the doctrine of ultra vires, though not applicable to laws enacted by the British Parliament, was applied by English court to subordinate bodies constituted by statute or charter, by the Privy Council in considering the validity of laws passed by the colonies. The enactment of a Bill of Rights in the Constitution itself no doubt indicates that the Constitution looks upon those rights as important and as rights which cannot be abrogated by ordinary process of legislation. But, in the first place, the very terminology of a Bill of Rights bespeaks its English origin, for the English Bill of Rights, 1689, declares the basic freedoms which Englishmen claimed for themselves. The rights so declared

92 Ibid.
have been enjoyed for centuries and only a cataclysm can sweep them away. Secondly, apart from the procedural advantage conferred by Article 32 for the enforcement of Fundamental Rights, a Fundamental Right is not different from any other right conferred by the Constitution, nor is it necessarily more important than another right which is not so described. For example, the right which is not described. For example, the right to carry on any business, profession, trade or calling is a Fundamental Right conferred by Article 19(1)(g), but it is quite impossible to say that it is more important than the right conferred by Article 301 to carry on trade freely throughout the whole of India. Both rights are Constitutional rights and their violation has precisely the same consequences, namely, that any law, or Executive act, violating those rights is void. Any person whose rights are violated by such a law can obtain assistance of the court in enforcing his rights.\(^93\)

Thirdly, provisions corresponding to those contained in a Bill of Rights are to be found in Constitutions which do not enact such a Bill and therefore differ from such a Bill only as a matter of form. Thus, the 1\(^{st}\) Amendment to the United States Constitution provides that:

Articles 25 to 28 of our Constitution confer Fundamental Rights which secure the freedom of religion. The commonwealth of Australia Act does not enact a Bill of Rights, but Section 116 of the Act secures the right to religious freedom quite as effectively by providing that the commonwealth shall make no law for establishing any religion or for imposing any religious observance or from prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office of public trust for the commonwealth.

\(^93\) Ibid.
Again, the 5th Amendment to the United States Constitution provides that:

... private property shall not be taken for a public use without just compensation. Article 31 of our Constitution (before its repeal) declares a similar Fundamental Right. (Before the amendment of Article 31 it was held that “compensation” and “just compensation” meant the same thing.

However, after the Amendment of Article 31 the adequacy of compensation is not justiciable. Section 51 of the Australian Constitution secures the same right by enacting that Parliament shall have the power to make laws for the “... acquisition of property on just terms from any State or person in respect of which the Parliament has the power to make laws”. It is unnecessary to multiply examples because it is clear that the nature of a right is not altered by the label affixed to it.94

Articles 32 and 226 in terms incorporate the high prerogative writs of English law. The provisions of Articles 32 and 226 have given rise to a strange impression that our Constitution is unique because it embodies Judicial Review in the Constitution itself. We have seen that Judicial Review, meaning thereby, the power of a court to pronounces a law invalid if it violates a Constitutional provision is a concomitant of all written federal Constitutions which follow the English doctrine of ultra vires. Therefore, Articles 32 and 226 introduce no new principles in India; they confer on the Supreme Court and High Court, the power to issue the well-known English writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto. There is nothing peculiar to India in the power to issue these writs, because for centuries the court of Queen’s bench in England has exercised that jurisdiction in order to control all

94 Ibid.
subordinate jurisdictions. The English colonists carried this jurisdiction with them to the United States, and power to issue these writs has been conferred on various courts in the United States. It is submitted, therefore, that Articles 32 and 226 introduce no new jurisdiction in India and our Constitution does not differ in this respect, except as a matter of form, from any other Constitution which has adopted the common law of England.95

3.4.2 Differences between the United States and the Indian Constitution

Our Constitution differs from the United States Constitution in another important respect, namely, that it provides a Constitution both for the federation and for the States, whereas the United States Constitution provides a Constitution only for the federation though it contains a few restraints on the powers of the States all of which have independent Constitution of their own. The 10th Amendment to the United States Constitution gives legal content to the Statement in the preamble to the United States Constitution. “We the people... do ordain and establish this Constitution...” and also gives support to the doctrine underlying the United States Constitution that the Legislatures derive their power by delegation from the people, for the 10th Amendment provides that “the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people”. There is no such provision in our Constitution and ever since R v. Burah,96 it is settled law that the Legislatures established by the British Parliament were in no sense delegates of that Parliament but, within the limits of the power conferred upon them, were as supreme and Sovereign as the British Parliament itself. The Burah’s case has been repeatedly

95 Id. at 162.
96 (1878)QB 3.889.
approved by the Supreme Court and it is the settled law of our Constitution that the Legislatures are not the delegates of the people.

The doctrine of immunities of instrument ability evolved by the United States Supreme Court, the doctrine of police powers and the doctrine of the political question have no place in our Constitution. For our Constitution is a detailed and an elaborate document containing provisions as regards the Executive and the Judiciary, as also for the distribution of legislative powers in three detailed lists on principles described later in this chapter. Judicial legislations, unlike that in the United States, has a limited scope in our Constitution as regards the distribution of legislative powers, and this is true also of the fundamental and other rights conferred by the Constitution, because whereas the United States Constitution is a brief document which declares rights in wide general terms, leaving it to the court to evolve exceptions and qualifications to those rights, our Constitution, in conferring rights expressly mentions the restrictions and limitation to which they are subjected. It is necessary to say this because observations in Supreme Court judgments and experience of arguments in court, show that an impression prevails that our Constitution is based on the American and not the British model; and that they by reason of the enactment of Fundamental Rights and by reason of Articles 32 and 226, somehow different principles of construction apply to our Constitution than are applicable to the Australian or the Canadian Constitution. For reasons already stated, it is submitted that these impressions are wholly unfounded.97

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97 Supra note 9 at 163.
3.4.3 Rights to Constitutional Remedies

Article 32: Remedies for enforcement of right conferred by this part:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by this part.

(3) Without prejudice to the power conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

Article 32A: Constitutional Validity of State Laws not to be considered in proceedings under Article 32. (Rep. by the Constitution (43rd Amendment) Act, 1977, Section 3 (w.e.f. 13.04.1978).

This Article 32A was inserted by the Constitution (42nd Amendment) Act, 1976 Section 6 w.e.f. 01.02.1977. The repealed Clause ran as follows:

6. Insertion of new Article 32A – After Article 32 of the Constitution, the following Article shall by inserted, namely:
32A. Constitutional validity of State laws not to be considered in proceedings under Article 32: Notwithstanding anything in Article 32, the Supreme Court shall not consider the Constitutional validity of any State law in any proceedings under that Article unless the Constitutional validity of any Central law is also in issue in such proceedings.

3.4.4 Enforcement of Judicial Review through Article 32

Abstract declarations of Fundamental Rights in the Constitution are useless, unless there is the means to make them effective. Constitutional experiences in all countries show that the reality of the existence of such rights is tested only in the court. The power of the court to enforce obedience to the Fundamental Rights, again, depends not only upon the impartiality and independence of the Judiciary, but also upon the effectiveness of the instruments available to it to compel such obedience against the Executive or any other authority.

The Indian Constitution lays down the following provisions for the enforcement of the Fundamental Rights guaranteed by the Constitution, in the light of the above experience.98

1) The Fundamental Rights are guaranteed by the Constitution not only against the action of the Executive but also against that of the Legislature (Article 13). The Supreme Court strikes at the arbitrary action of the State. It has jurisdiction to enforce the Fundamental Rights against private bodies and individuals and award compensation for violation of the Fundamental Rights. It can exercise its jurisdiction suo motu or on the basis of PIL.

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98 Supra note 87 at 126.
2) Apart from the power to treat a law as void for being in contravention of the provisions of the Constitution guaranteeing the Fundamental Rights, the Judiciary has been armed with the power to issue the writs mentioned above (habeas corpus, etc.), in order that it may enforce such rights against any authority in the State, at the instance of an individual whose right has been violated.

3) The rights to guaranteed shall not be suspended except during a proclamation of emergency, in the manner laid down by the Constitution (Article 359).

3.4.5 Special Features of the Jurisdiction of the Supreme Court under Article 32

Though a Fundamental Rights may be enforced by other proceedings, such as declaratory suit under the ordinary law or an application under Article 226 or by way of defence to legal proceedings brought against an individual, a proceeding under Article 32 is described by the Constitution as a Constitutional remedy for the enforcement of the Fundamental Rights included in Part III and the right to bring such proceeding before the Supreme Court is itself a Fundamental Right in Part III.99

Article 32 is thus the cornerstone of the entire edifice set up by the Constitution. Commenting on this Article, in the Constituent Assembly, Dr. Dr. B.R Ambedkar said:

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

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99 Ibid.
1) Article 32, thus provides a guaranteed remedy for the enforcement of those rights, and this remedial right is itself made a Fundamental Right, being included in Part III. The Supreme Court is thus constituted the protector and guarantor of Fundamental Rights and it cannot consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such right, on the technical grounds. Thus, though a writ may ordinarily be refused on the ground that the petitioner had another adequate legal remedy open to him, an application under Article 32 cannot be refused merely on this ground where a Fundamental Right appears to have been infringed.

2) The Supreme Court can make any order appropriate to the circumstances, unfettered by the technicalities of the English ‘Prerogative writs’.

On the other hand, the sole object of Article 32 is the enforcement of the Fundamental Rights guaranteed by the Constitution. Whatever other remedies may be open to a person aggrieved, he has no right to complain under Article 32, where no ‘Fundamental Right’ has been infringed. For the same reason, no question other than relating to a Fundamental Right will be determined in proceeding under Article 32.

3.4.6 Prerogative Writs

The expression ‘prerogative writ’ is one of English common law which refers to the extraordinary writs granted by the Sovereign, as fountain of justice, on the ground of inadequacy of ordinary legal remedies. In course of time these writs came to be issued by the High Court of justice as the agency through which the Sovereign exercised his judicial power and these prerogative writs were issued as
extraordinary remedies in cases where there was either no remedy available under the ordinary law or the remedy available was inadequate. These writs are Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo warranto.

3.4.7 Difference between the jurisdiction of the Supreme Court and the High Court to issue Writs

The power of High Court to issue these Writs is wider than that of the Supreme Court in as much as under Article 32 of the Constitution the Supreme Court has the power to issue these writs only for the purpose of enforcement of the Fundamental Rights whereas under Article 226 a High Court can issue these writs not only for the purpose of enforcement of Fundamental Rights but also for the redress of any other injury or illegality, owing to contravention of the ordinary law, provided certain conditions are satisfied. Thus,

1) An application to a High Court under Article 226 will lie not only where a Fundamental Right has been infringed but also where some other limitation imposed by the Constitution, outside Part III, has been violated, e.g., where a State Legislature has imposed a sales tax in contravention of the limitations imposed by Article 286. But an application under Article 32 shall not lie in any case unless the right infringed is a 'Fundamental Right' enumerated in Part III of the Constitution.

2) Another point of distinction between the two jurisdictions is that while the Supreme Court can issue a writ against any person or Government within the territory of India, a writ against any person or Government within the territory of India, a High Court can, under Article 226, issue a writ against any person,
Government or other authority only if such person, Government or authority is physically resident or located within the territorial jurisdiction of the High Court, that is within the State to which the territorial jurisdiction of the particular High Court extends or if the cause of action, arises within such jurisdiction.

As stated earlier, the Supreme Court has been assigned by the Constitution a special role as the protector and guarantor of Fundamental Rights by Article 32(1).

3.5 The Supreme Court as the guardian Of Fundamental Rights

Where the infringement of a Fundamental Right has been established, the Supreme Court cannot refuse relief under Article 32 on the ground:

1) That the aggrieved person may have his remedy from some other court or under the ordinary law; or

2) That disputed facts have to be investigated or evidence has to be taken before relief may be given to the petitioner; or

3) That the petitioner has not asked for the proper writ applicable to his case. In such a case, the Supreme Court must grant him the proper writ and, if necessary, modify it to suit the exigencies of the case.

4) Generally, only the person affected may move the court but the Supreme Court has held that in social or public interest actions, any person may move the court. Following the English and American decisions, the Supreme Court has admitted exceptions from the strict rules relating to affidavit locus standi and the like in the
case of a class of litigation classified as 'Public Interest Litigation (PIL) i.e. where the public in general are interested in the vindication of some right as the enforcement of some duty.

Another consequence which results from the guarantee of the Constitutional remedy under Article 32 is this\textsuperscript{100} that not only is this remedy immune from being overridden by legislation but any law which renders nugatory or illusory the Supreme Court's power to grant this remedy shall be void. This was illustrated in the leading case of \textit{Gopalan v. State of Madras},\textsuperscript{101} where the Supreme Court invalidated Section 14 of the Preventive Detention Act, 1950, as it originally stood. The Supreme Court struck down the above provision on the ground that it contravened Article 32 by way of preventing the Supreme Court from effectively exercising its power under Article 32. The following observations of Justice Mahajan, are illuminating:

The detenue has been given a right to make a representation (vide Article 22(5), yet Section 14 prohibits the disclosure of the grounds furnished to him or the contents of the representation made by him in a court of law. In this contingency it is the right of the detained person under Article 32 to move to this court for enforcing the right under Article 22(5) that he be given the real grounds on which the detention order is based. This court would be disabled from exercising its functions under Article 32 and adjudicating on the point that the grounds given satisfy the requirements of the sub Clause if it is not open to it to see the grounds that have been furnished. It is guaranteed right to the person detained to have the very grounds which are the basis of the order of detention. This court would be entitled to examine the matter and to see whether the

\textsuperscript{100} Ibid.
\textsuperscript{101} (1950) S.C.R. 88.
grounds furnished are the grounds on the basis of which he has been detained or they contain some other vague or irrelevant material.

In the case of Romesh Thapar v. State of Madras, the court has emphasised that this court is thus constituted the protector and guarantor of the Fundamental Rights, and it cannot consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights.

In the case of Hindi Hitrashak Samiti v. Union of India, the Supreme Court has laid emphasis on Article 32 as:

It is well settled that, the jurisdiction conferred on the Supreme Court Article 32 is an important and integral part of the Indian Constitution but violation of a Fundamental Right is the sine qua non for seeking enforcement of those rights by the Supreme Court. In order to establish the violation of a Fundamental Right, the court has to consider the direct and inevitable consequences of the action which is sought to be remedied or the guarantee of which is sought to be enforced.

3.5.1 Alternative Remedy

Article 32 is in itself a Fundamental Right and, therefore, the existence of an alternative remedy is no bar to the Supreme Court entertaining a petition under Article 32 for the enforcement of a Fundamental Right.

When once the court is satisfied that the petitioners’s Fundamental Right has been infringed, it is not only its right but also its duty to afford relief to the petitioner, and he need not establish either that he has no other adequate remedy, or that he has exhausted

\[\text{Supra note 82.}\]
\[\text{AIR 1990 SC 851.}\]
\[\text{Supra note 1 at 1310}\]
all remedies provided by law, but has not obtained proper redress. When the petitioner establishes infringement of his Fundamental Rights, the court has no discretion but to issue an appropriate writ in his favour.105

3.5.2 Article 226 and 227

The first decision of the High Court on a petition under Article 226 or 227 is by a single judge. Writ proceedings under Article 226 fall on the original side of the High Court and therefore, an intra-court appeal is possible from a single judge to a division bench. Not so in case of Article 227, for proceedings there under do not fall on the original side. The Supreme Court has ruled that where the fact justifies a party filing a petition either under Article 226 or 227, and a party chooses to file the petition under both the Articles, in fairness to the petition concerned, the court should treat the petition as having filed under Article 226 as this will protect petitioners right to file an intra-court appeal from the single judge to the division bench.106

3.5.3 Relationship between Article 32 and 226

No action lies in the Supreme Court under Article 32 unless there is an infringement of a Fundamental Right. As the Supreme Court has emphasised, the violation of a Fundamental Right is the sine qua non of the exercise of the right conferred by Article 32.

Article 32 differs from Article 226 in the sense that the words “for any other purpose” found in Article 226 (but not in Article 32) enable a High Court to take cognizance of any matter even if no Fundamental Right is involved. It may, however, be pointed out that there have been a few exceptional cases where the Supreme Court has entertain writ petitions under Article 32 although no question of

105 Ibid.
106 Id. at 400.
Fundamental Right was involved. This approach of the court is justifiable on the ground that in these cases questions of great Constitutional significance were raised, there was no forum except the Supreme Court where these questions could be authoritatively decided, and there was no other mechanism, except Article 32, to bring such matters within the cognizance of the Supreme Court, these matters inter alia are:

1) Misuse of the ordinance making power by the State of Bihar,\textsuperscript{107}

2) Appointment of the Judges of the High Court and the Supreme Court,\textsuperscript{108}

3) Issues related with the procedure to remove a Supreme Court Judge.\textsuperscript{109}

Referring to \textit{Tamil Nadu Cauvery NVVNUP Sangam v. Union of India,}\textsuperscript{110} in which the society named a writ petition under Article 32 in the Supreme Court for a direction to the Government of India to refer to Cauvery water dispute to a tribunal. The petition remained pending with the court for more than seven years. An objection was raised against the maintainability of the petition. Rejecting the objection, the court ruled that to throw out the petition after seven years by accepting the objection against its maintainability “would be ignoring the actual State of affairs, would be too technical an approach and in our view would be wholly unfair and unjust”\textsuperscript{111}

\textsuperscript{107} \textit{D.C. Wadhwa v. State of Bihar,} AIR 1987 SC 579.

\textsuperscript{108} \textit{Supreme court Advocates-on-record Ass. v. Union of India,} AIR 1994 SC 268.

\textsuperscript{109} \textit{Sarojini Ramaswami v. Union of India,} AIR 1992 SC 2219.

\textsuperscript{110} AIR 1990 SC 1316.

\textsuperscript{111} Supra note 1 at 1311.
The Supreme Court and the High Court enjoy concurrent jurisdiction in the matter of enforcement of Fundamental Rights.\footnote{Ibid.}

There comes a question whether petition seeking to enforce his Fundamental Rights can go straight to the Supreme Court under Article 32, or should be first go to a High Court under Article 226. In 1950 in Romesh Thappar v. State of Madras, the Supreme Court ruled that such a petitioner can come straight to the Supreme Court without going to the High Court first. The court started that unlike Article 226, Article 32 confers a Fundamental Right on the individual and imposes an obligation on the Supreme Court which it must discharge when a person complains of infringement of a Fundamental Right.

This continued to be the position till 1987 when a two judge bench of the Supreme Court ruled out in Kanubhai Brahmbhatt v. State of Gujarat,\footnote{AIR 1987 SC 1159.} that a petitioner complaining of infraction of his Fundamental Right should approach the High Court first rather than the Supreme Court in the first instance. The reason given for this view was the there was a huge backing of cases pending before the Supreme Court.

Since it is the view expressed by a two judge bench, it can not be regarded as an authoritative pronouncement on an important Constitutional issue, viz., inter relationship between Articles 32 and 226. Such a vital pronouncement could be made only by the Constitution Bench consisting at least of five Judges, especially, when the long established position is sought to be overturned.\footnote{Supra note 1 at 1311.}

The ruling in Kanubhai case seeks to negate what the Supreme Court has itself said in a number of cases during the last four decades.
emphasising upon the significance of Article 32, and the role assigned to its thereunder.

In practice, it seems that the Kanubhai case pronouncement has had no effect on the existing practice and the writ petitions continue to be filed in the Supreme Court under Article 32 without first going to the High Court under Article 226.

1) **Res Judicata**

1. The principle of res judicata has been applied to judgments pronounced on petitions under Article 32,\(^\text{115}\) so that in the absence of new circumstances arising since the dismissal of petition under Article 32, the same matter cannot be reagitated by a fresh petition.\(^\text{116}\) In short, the petitioner has no right to move the Supreme Court under Article 32 more than once on the same facts.\(^\text{117}\) But new issues or points may be taken in a fresh petition.\(^\text{118}\)

2. Where a petition under Article 32 has been dismissed on the merits by a speaking order, it would constitute res judicata even though the order was made ex parte, i.e., without issuing notice to the other side.\(^\text{119}\)

3. But the doctrine of constructive res judicata would not generally be applied to writ petitions under Article 32 or 226, or at least to a petition for habeas corpus.\(^\text{120}\)

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\(^{\text{118}}\) Amalgamated Coalfields v. Janpada Sabha, AIR 1964 SC 1013.


\(^{\text{120}}\) Kirti v. Union of India, AIR 1981 SC 1621.
4. The decision in a proceeding for tax relating to a previous period would not, accordingly, operate as res judicata in a proceeding for a subsequent period except where a basic and general issue, e.g., as to the validity of the taxing statute, has been decided in the previous proceeding.\textsuperscript{121}

If the doctrine of res judicata were not applied to writ proceedings, then a party could take one proceeding after another and urge new grounds every time in respect of one and the same cause of action. This would plainly be inconsistent with considerations of public policy. Accordingly, a person cannot move successive petitions under Article 32 for the same cause of action.

The Supreme Court has ruled in \textit{Lallubhai v. Union of India},\textsuperscript{122} that the doctrine of constructive res judicata is applied only to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 on fresh grounds not taken in the earlier petition challenging an order of detention is dismissed by the court, a second petition can be filed on fresh, additional grounds to challenge the legality of the contained detention of the defence and the subsequent petition is not barred by res judicata.

In \textit{Daryao v. State of U.P.},\textsuperscript{123} the Supreme Court dismissed a writ petition moved under Article 32 because earlier the petitioner had move in the High Court a writ petition under Article 226 on the same facts and the High Court had rejected the same. In \textit{Har Swarup v. General Manager, Central Railways},\textsuperscript{124} the petitioner filed a writ

\textsuperscript{121} \textit{Amalgamated Coalfields v. Janpad Sabha}, AIR 1964 SC 1013.
\textsuperscript{122} AIR 1981 SC 728.
\textsuperscript{123} AIR 1961 SC 1457.
\textsuperscript{124} AIR 1975 SC 202.
petition under Article 226. The High Court dismissed the petition and also refused leave to appeal to the Supreme Court. Thereafter, he filed a writ petition in the Supreme Court under Article 32 claiming exactly the same reliefs as he had claimed in the High Court and on identical grounds. In the circumstances, the Supreme Court dismissed the writ petition on the basis of the principle of res judicata.

Article 32 is not available to assail the correctness of a decision rendered by the Supreme Court on merits or to claim its reconsideration by the court.125

2) Quasi Judicial Bodies

The Supreme Court had diluted the efficiency of Article 32 as a technique to challenge a decision by quasi judicial body. In Ujjam Bai v. State of Uttar Pradesh,126 the court has held that an assessment of sales tax by a quasi judicial authority, acting within its jurisdiction and under an intra vires law, could not be challenged under Article 32 on the ground that it has misconstrued or misinterpreted the law, because no breach of any Fundamental Right was involved in such a situation. Such an error can be corrected by way of appeal to the Supreme Court.

3) Article 32 is, however, available when a Fundamental Right is violated

1. By a quasi-judicial authority acting under an ultra vires law; or

2. when the assessing authority seeks to impose a tax against a Constitutional prohibition;127

126 AIR 1962 SC 1621.
3. Where the statute is intra vires but the authority acts under it without jurisdiction or wrongly assumes jurisdiction;\textsuperscript{128} or

4. Where the action taken is procedurally ultra vires, for example, when principles of natural justice are infringed.\textsuperscript{129}

The above mentioned cases bring out the difficulties of challenging quasi-judicial decisions on the ground of infringement of Fundamental Rights through Article 32 petitions. The law has become rather technical. It is always a difficult question to decide whether an authority is acting without jurisdiction, or within jurisdiction but taking a wrong view of factor law. Article 32 is available in the first case but not in the second. Similarly, if a quasi-judicial authority acting within jurisdiction, misinterprets a Constitutional provision, rather than an ordinary law, acting within jurisdiction, misinterprets a Constitutional provision, rather than an ordinary law, Article 32 may be available. On the whole, therefore, it is a hazardous task to challenge a quasi-judicial decision under Article 32 the effect of this is to encourage people to take recourse to the High Court under Article 226 which is broader in scope than Article 32. This position, in a way appears to be anomalous for, while Article 32 is a guaranteed right, Article 226 is not so.\textsuperscript{130}

4) Disputed Questions of Fact

As stated clearly by the court in the case of \textit{Kochunni Moppil Nayar v. State of Madras},\textsuperscript{131} that the court has power to decide

\textsuperscript{128} \textit{S.T.C. v. Mysore, AIR 1963 SC 558.}
\textsuperscript{129} \textit{Coffee Board v. It. Commercial Tax Officer, AIR 1971 SC 870: (1969) 3 SCC 349.}
\textsuperscript{130} \textit{Supra note 1 at 1317.}
\textsuperscript{131} \textit{AIR 1959 SC 725.}
disputed questions of fact arising in a suit petition if it is desires. The court observed:

But we do not countenance the proposition that, on an application under Article 32 this court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or any other ground. If we were to accede to the aforesaid contention of learned counsel, we would be failing in our duty as the custodian and protector of the Fundamental Rights. Further, questions of facts can and very often are dealt with an affidavit.

The court has observed in this connection:

We must make it clear that in a petition under Article 32 of the Constitution, it is not our province to go into facts.

The court may, however, make an exception in this regard in any specific case.

5) Laches

Laches or inordinate delay on the part of the petitioner may disentitle him to move a writ petition under Article 32 to enforce his Fundamental Right. The court refuses relief to the petitioner. On the ground of laches because of several considerations, e.g. it is not desirable to allow State claims to be canvassed before the court; that there should be finality to litigation; that rights which have accrued to others by reason of the delay in filing the petition should not be disturbed unless there is reasonable explanation for the delay. The

133 Laxmi Shankar Pandey v. Union of India, AIR 1991 SC 1070.
aggrieved party should therefore, file the petition at the earliest possible time.

6) **Issue Directions having the effect of laws**

   Article 32 has much more wider purpose than that, viz., to lay down general guidelines having the effect of law to fill the vacuum till such time the Legislature steps in to fill in the gap by making the necessary law. The court derives such a power by reading Article 32 with Article 142 and Article 141. Article 144 mandates all authorities to Act in aid of the court orders.\(^{134}\)

   As in the case of *Visakha v. State of Rajasthan*,\(^{135}\) the court has stated that it is the duty of the Executive to fill the vacuum by Executive orders. And where even the Executive does not act, the Judiciary must step in, in exercise of its Constitutional obligation under the abovementioned Constitutional provisions to provide a solution till the Legislature acts to perform its role by enacting a proper legislation to cover the field.

   In *Union of India v. Association for Democratic Reforms*,\(^{136}\) the Supreme Court issued certain directions to the Election Commission. If necessary the court can issue directions, in an appropriate case, even to private persons for the enforcement of the petitioner’s Fundamental Rights.\(^{137}\)

   The court has issued guidelines and directions in quite a few cases. Some of these cases are:

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\(^{134}\) *Supra* note 1 at 1325.

\(^{135}\) AIR 1997 SC 3011.


\(^{137}\) *Consumer Education Research Centre v. Union of India*, AIR 1995 SC 922.
(1) *Lakshmi Kant Pandey v. Union of India*,\(^{138}\) where guidelines for adoption of minor children by foreigners were laid down.

(2) *Supreme court Advocated on-Record Association v. Union of India*,\(^{139}\) where the Supreme Court laid down guidelines and norms for the appointment and transfer of High Court Judges.

(3) *Vishakha v. State of Rajasthan*,\(^{140}\) where elaborate guidelines have been laid down to discourage sexual harassment of women in work places.

(4) *Vineet Narain v. Union of India*,\(^{141}\) where the court has laid down directions to ensure the independence of the Vigilance Commission and to reduce corruption among Government servants. This has been done to implement the Rule of Law "wherein the concept of equality enshrined in Article 14 is embedded". The court has done so as no legislation has been enacted covering the said filed to ensure proper implementation of the Rule of Law.

(5) *Common Cause v. Union of India*,\(^{142}\) where the Supreme Court issued directions for revamping the system of blood banks in the country.

(6) *Vishwa Jagriti Mission v. Central Government*,\(^{143}\) where the court has issued guidelines against ragging in educational institutions.

139 AIR 1994 SC 265.
140 AIR 1997 SC 3011.
141 AIR 1998 SC 889.
142 AIR 1996 SC 929.
The directions issued by the Supreme Court, under Article 32 have the force of law. These directions remain in force till the Legislature enacts a suitable law. The general directions issued by the court are, thus, quasi-legislative in nature for they bind not only the parties to the specific dispute before the court but even others breach of these directions amounts to contempt of court. These cases impart a much broader dimension to Article 32.

3.6 Public Interest Litigation

A PIL writ petition can be filed in the Supreme Court under Article 32 only if a question concerning the enforcement of a Fundamental Right is involved. The Supreme Court has entertained a number of petition under Article 32 complaining of infraction of Fundamental Rights of individuals, or of weak or oppressed groups who are unable themselves to take the initiative to indicate their own rights. The Supreme Court has ruled that to exercise its jurisdiction under Article 32, it is not necessary that the affected person should personally approach the court. The court can itself take cognizance of the matter and proceed suo motu or on a petition of any public spirited individual or body.

The Supreme Court has liberalised the doctrine of locus standi by holding that though ordinarily a person cannot maintain a petition, under Article 32 or 226 unless he has been personally affected by infringement of his right by the law or order complained of, in a matter concerning social or public interest, the court would allow any member of an organisation having a special interest in the subject

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143 JT 2001 (6) SC 151.
145 Supra note at 1 at 1326
146 Ibid.
matter, to bring such petition. Such cases have been labelled as Public Interest Litigation.

In such a case, the court may even award costs to the petitioner who may be fighting for other people's case. In cases of grave public importance, the court may not insist on every technicality in the procedural law. But this jurisdiction cannot be used for settling dispute between individual parties (e.g. concerning mis-management of a public trust) but to remedy goes violation of human rights by the Government and its officers. The object is to make justice available to downtrodden, depraved and illiterate having regard to concept of human rights.

The petitioner in a Public Interest litigation cannot withdraw the petition at his sweet will. Once the court satisfies itself that a proper investigation has been carried out, it would not go further and take over functions the Magistrate or pass any order which would interfere with the judicial functions.

1) Loss of Locus Standi

A person who seeks to enforce a Fundamental Right will not be entitled to maintain a petition under Article 32 if he had lost his right

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147 Supra note 115 at 203.
to the business\textsuperscript{155} by an order or decisions under the general law which had become final before the institution of the petition, but not where there has been no decision at all on the question of title.\textsuperscript{156}

2) \textbf{Certiorari Jurisdiction over Judicial or Quasi-judicial decisions}

1. The High Court is not subject to the certiorari jurisdiction of the Supreme Court.\textsuperscript{157} Hence, no decision of the High Court can be challenged in an application under Article 32.\textsuperscript{158}

2. Inferior civil court of competent jurisdiction have been equated with the High Court for purposes of the certiorari jurisdiction under Article 32.\textsuperscript{159} The decisions of these court can, therefore be challenges only on appeal, even if they may affect Fundamental Rights\textsuperscript{160} of a party thereto or a third party.\textsuperscript{161}

3. The order of an inferior quasi-judicial authority cannot be quashed under Article 32 where the order is within its jurisdiction under a valid law, though erroneous;\textsuperscript{162} but it may be quashed:

1) Where the order is without jurisdiction;

\textsuperscript{155} Kalyan Singh \textit{v.} State of H.P., AIR 1962 SC 1183.
\textsuperscript{156} Joseph \textit{v.} State of Kerala, (1965) SCC 893.
\textsuperscript{157} Naresh \textit{v.} State of Maharashtra, AIR 1967 SC 1.
\textsuperscript{158} Supra note 115 at 204.
\textsuperscript{159} Supra note 126.
\textsuperscript{160} Supra note 157.
\textsuperscript{161} Supra note 115 at 204.
\textsuperscript{162} Supra note 126.
2) Where the action taken is procedurally *ultra vires*, e.g. in violation of the principles of natural justice;\(^{163}\)

3) Where the action is taken under a statute which is *ultra vires* the Constitution;\(^{164}\)

4) Where the authority has given itself jurisdiction by trying a collateral fact wrongly\(^{165}\) provided of course, such order affects a Fundamental Right;\(^{166}\)

5) Where the law under which the tribunal has made the decision is itself violative of a Fundamental Right;\(^{167}\)

6) Where the law is valid but impugned decision of the quasi-judicial authority itself is violative of a Fundamental Right, e.g., Article 14.\(^{168}\)

4. It follows that a petition under Article 32 is not maintainable against the order of a quasi-judicial authority merely on the ground that the authority has misapplied or violated the law, where there is no challenge to the Constitutionality of the law or the impugned order on the ground of contravention of a Fundamental Right.\(^{169}\)

\(^{163}\) Supra note 115 at 204.

\(^{164}\) Supra note 126.


\(^{166}\) Supra note 126.

\(^{167}\) Express Newspapers v. Union of India, AIR 1958 SC 578.


3) **Applicability of Prohibition**

When a quasi-judicial authority proceeds to act in contravention of a Fundamental Right, as in the foregoing manner, the writ of prohibition would issue under Article 32 to prevent it from proceeding further.\(^170\)

4) **Applicability of Mandamus**

The writ of mandamus would issue under Article 32 to cancel an order of an administrative or statutory public authority or the Government itself where it violates a Fundamental Right, e.g., Articles 14,\(^171\) 16,\(^172\) and 19\(^173\) or to prevent the enforcement of a statute, effecting the petitioner, which offends against a Fundamental Right;\(^174\) seeking ancillary reliefs.\(^175\)

5) **Applicability of Habeas Corpus**

1. Subject to the exception contained in Article 31B, habeas corpus would issue under Article 32, to secure the release of a person where the order or the law under which the detention has been made violates a Fundamental Right, e.g. Article 14,\(^176\) 21\(^177\) or 22.\(^178\)

2. Taking Article 21 into aid, a proceeding for habeas corpus has been resorted to seek the interferences of the

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\(^170\) Supra note 157.
\(^171\) Ram Krishna v. Tandolkar, AIR 1958 SC 538.
\(^175\) Union of India v. Ramkumar, AIR 1962 SC 247.
\(^177\) Hamdard Dawakhana v. Union of India, AIR 1960 SC 554; Shyam v. Union of India, AIR 1980 SC 789.
court in cases of torture or ill-treatment in prisons of convicts as well as under trial prisoners.

3. The court may act on an informal communication and may not insist on strict compliance with rules of pleading.

4. The burden of showing that the detention is in accordance with the procedure established by law is always upon the detaining authority.

5. Buthabeas corpus would not be available to assail detention under the judgment of conviction of a criminal court which has become final.

6) Applicability of Quo-Warranto

The Writ calls upon the holder of a public office to show to the court under what authority he is holding that office. The court may oust a person from an office to which he is not entitled. It is issued against the usurper of an office and the appointing authority is not a party. The writ lies only in respect of a substantive public office.

7) Delay and Acquiescence: grounds for refusing relief under Article 32

Though delay, acquiescence and the like do not take away the jurisdiction of the Supreme Court under Article 32, the court may refuse to grant relief in the exercise of its jurisdiction where delay affects the merits of the petitioner’s claim or where the rights of

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181 Ibid.
183 Ibid.
185 Supra note 1 at 420.
third parties have accrued in the meantime, and there is no reasonable explanation for the delay. Where the petitioner submitted to the jurisdiction of the inferior tribunal, he is not entitled to invoke the jurisdiction of the Supreme Court under Article 32. The court cannot, under Article 32, give relief to a person who has given up his right by a voluntary settlement.

On the other hand, where an order under a statute violates a persons’ Fundamental Right he cannot be said to have lost his right to challenge the Constitutionality of the statute merely on the ground that he had applied for an order in his favour under that statute.

8) Other discretionary grounds for refusing relief

Though not barring jurisdiction, the Supreme Court has refused to interfere on other general grounds which govern its ordinary jurisdiction, e.g.:

1) Vague pleading;
2) Point not specifically taken in pleading.
3) The petition becoming infructuous since the same relief has been obtained by him in another proceeding.

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190 Sarajmal v. Viseswanatha, AIR 1953 SC 545; Gopal Das v. Union of India. (1955) 1 SCR 773 (774).
9) **Res Judicata**

1. The principle of res judicata has been applied to judgments pronounced on petitions under Article 32, so that, in the absence of new circumstances arising since the dismissal of petition under Article 32, the same matter cannot be reagitated by a fresh petition. In short, the petitioner has no right to move the Supreme Court under Article 32 more than once on the same facts. But new issues or points may be taken in a fresh petition.

2. Where a petition under Article 32 has been dismissed on the merits by a speaking order, it would constitute res judicata even though the order was made exparte, i.e. without issuing notice to the other side.

3. But the doctrine of constructive res judicata would not generally be applied to writ petitions under Article 32 or 226, or at least to a petition for habeas corpus.

4. The decision in a proceeding for case relating to a provisions period would not, according, operate as res judicata in a proceeding for a subsequent period except where a basic and general issue, e.g., as to the validity of the taxing statute, has been decided in the previous proceeding.

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5. When a petition under Article 226 has been dismissed the remedy should be appeal under Article 136, and not another petition under Article 32.\textsuperscript{203}

6. In a PIL, alleging non-compliance of anti-pollution laws in costal area and challenging the amendments, to the notification on the ground that the same defeated the instant of the notification issued under Environmental Rules, the Supreme Court directed to contentions to be raised before the respective High Court, they being better acquainted with the local conditions.\textsuperscript{204}

7. Judicial Review: Order passed by a minister in exercise of Executive instruction is amenable to judicial scrutiny.\textsuperscript{205}

Interferences in administrative decision regarding disciplinary proceedings under Industrial Disputes Act should not be made unless punishment imposed was shocking by disproportionate.\textsuperscript{206}

The Speaker, while exercising power to disqualify Member of Assembly acts as a Tribunal. The scope of Judicial Review in respect of the proceedings before such tribunal is limited.\textsuperscript{207}

The jurisdiction conferred on Supreme Court by Article 13 is an important and integral part of the basic structure of the Constitution and no Act of Parliament can abrogate it or take it away.\textsuperscript{208}

\textsuperscript{203} Satish v. Registrar, (1994) 4 SCC 332.
\textsuperscript{205} Common cause, a registered society v. Union of India, AIR 1999 SC 2979.
\textsuperscript{206} Domoh Panna Sagar Rural Regional Bank v. Munna Lal Jain, AIR 2005 SC 584.
\textsuperscript{207} Jagjit Singh v. State of Haryana, AIR 2007 SC 90.
\textsuperscript{208} I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861.
10) **Exceptions to Fundamental Rights**

After discussing Articles 13, 32, 226, there are certain areas which need to be mentioned here though they are discussed in detail in the next chapters. By some Constitutional amendments certain exceptions were introduced namely Articles 31A, 31B, 31C, 31D. This started with the First Constitutional Amendment of 1951 (discussed in the next chapter). Of these 31A, 31C are exceptions to the Fundamental Rights enumerated in Articles 14 and 19: this means that any law falling under the ambit of Article 31A (e.g. a law for agrarian reform), or Article 31C (a law for the implementation of any of the Directive Principles of State Policy in part IV of the Constitution), cannot be invalidated by any court on the ground that it contravenes any of the Fundamental Rights guaranteed by Article 14 (equality before law); Article 19 (freedom of speech and expression, assembly, etc.). Article 31B however offers almost complete exception to all the Fundamental Rights enumerated in part III. If any enactment is included in the Ninth Schedule, which is to be read along with Article 31B, then such enactment shall be immune from Judicial Review from Constitution invalidity on the ground of contravention of any of the Fundamental Rights. But shall be open to challenge on the ground of damage to the basic structure of the Constitution subsequent to 24-4-1973 (date of *Kesavanand Bharti's case*, discussed in detail in chapter V). No part of the Constitution can be changed by ordinary legislation unless so authorised by the Constitution itself (e.g., Article 4); all parts except the 'basic features' can be amended by an amendment act passed under Article 368, including the Fundamental Rights. This proposition has been established after a history of Constitutional
cases (discussed in chapter IV and V) involving the question of violation of Fundamental Rights.\textsuperscript{209}

The provisions of Part III of our Constitution which enumerates the Fundamental Rights are more elaborate than those of any other existing written Constitution relating to Fundamental Rights, and cover a wide range of topics. The Constitution classifies the Fundamental Rights under seven groups as follows:\textsuperscript{210}

(a) Right to equality.
(b) Right to particular freedoms.
(c) Right against exploitation.
(d) Right to freedom of religion.
(e) Cultural and Educational Rights.
(f) Right to property. (Eliminated by Forty Fourth Amendment Act 1978)
(g) Right to Constitutional remedies.

So, all the above rights are available against the State as we have already discussed in this chapter referring to Article 12 and 13. The rights which are guaranteed by Articles 19 and 21 are guaranteed against State action as distinguished from violation of such rights by individuals, the ordinary legal remedies may be available but not the Constitutional remedies. ‘State action’, in this context, must, however, be understood in a wider sense. For interpreting the words ‘State’ wherever it occurs in the part on Fundamental Rights, a definition has been given Article 12 which says that, unless the context otherwise requires, ‘the State’ will include not only the

\textsuperscript{209} Supra note 87 at 82.
\textsuperscript{210} Id. at 87.
Executive and legislative organs of the union and the States, but also local bodies (such as municipal authorities) as well as 'other authorities'. This latter expression refers to any authority or body of persons exercising the power to issue orders, rules, bye-laws or regulations having the force of law.211

3.7 Judicial Review makes Constitution Dynamic

The role of the Judiciary has over the years of its working, undergone a transformation that has witnessed its emergence as a dynamic institution playing an active role in expanding the scope and content of individual and collective rights of citizens, in the civil and political spheres as well as in the economic, social and cultural spheres.

As Judiciary is the ultimate authority to interpret the Constitution, it intervenes whenever the Parliament misuses its Legislative competence to enact new laws or amend the present ones which may be violative of the basic spirit of the Constitution and when the Executive is to discharge its duties in a way that again is contrary to the Constitutional mandate. The Judiciary has the right and duty to intervene and correct the course of the Executive action.

The developments like:

The declaration of the indivisibility of the Fundamental Rights on the one hand and the Directive Principles of the State policy on the other. It was said that “in building up a just social order it is sometimes imperative that the Fundamental Rights should be subordinated to the Directive Principles” and that both were complementary, “neither part being superior to the other”.

211 Ibid.
Equality, Rule of Law, Judicial Review and Separation of Powers forms part of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no Rule of Law, if there is no equality before law. These would be meaningless if the violation was not subject to the Judicial Review. All these would be redundant if the legislative, Executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the Judiciary. Realising that it is necessary to secure the enforcement of the Fundamental Rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Court.

So, the Constitution of India has embodied a number of Fundamental Rights in Part III of the Constitution, which are to act as limitations not only upon the powers of the Executive but also upon the powers of the Legislature. Though the model has been taken from the Constitution of the United States, the Indian Constitution does not go so far, and rather affects a compromise between the doctrines of Parliamentary Sovereignty and judicial supremacy.

Judicial Review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in part III and other parts of the Constitution. It may be noted that the mere fact that equality which is a part of the basic structure of the Constitution can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure-Rule of Law, Separation of Powers- the fact that limited exceptions
are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of basic structure.212

In 1928, long before the dawn of independence in India, the Moti Lal Nehru Committee asserted that “our first care could be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances”. Such a commitment by our leaders really shows the importance of Fundamental Rights and protection of these rights is not possible without the power of Judicial Review with the Independence of Judiciary.

Judicial Review is justified by combination of the principle of Separation of Powers, Rule of Law, the principle of Constitutionality and the reach of Judicial Review.213

The Supreme Court of India plays a pivotal role in the Indian political economy. In a society, which is fractured and polarized on communal lines, and where ideology has reached a vanishing point, the Supreme Court, despite occasional failures and not measuring up to the expectations of various Sections, has become an institution on whose legitimacy there seems to be a national consensus.214

The power of Judicial Review is the armour of the Judiciary for the protection of the Constitution from legislative overreach, Executive overreach and implements the Rule of Law.

212 Id. at 887.
213 Id. at 889.