CHAPTER VI
JUDICIARY AND PUBLIC POLICY-MAKING IN INDIA

Under the theory of Separation of Powers propounded by Montesquieu, there is a rigid demarcation among the powers of the legislature, the executive, and the judiciary, which are the three organs of the Government. The legislature lays down the laws which are implemented by the executive, while the judiciary adjudicates upon the laws.

In India, the Parliament, the Executive and the Judiciary have been assigned their respective roles under the Constitution and one organ cannot encroach upon the powers of the other. It is the duty of the Courts to see that nothing is done in violation of the Constitution. The Courts for this purpose have been assigned the power of judicial review. It was John Marshall, Chief Justice of the Supreme Court of the U.S., who had propounded the theory of judicial review in Marbury v. Madison in 1803. Judicial review enables the Courts to ensure that the laws made by the legislature and the acts of the executive do not contravene the provisions of the Constitution. The power of judicial review is neither intended to operate as an interference in policy decisions, nor to tell the policy-makers as to what policies they should enunciate, but to ensure that such policy decisions and acts done in pursuance thereof are in conformity with, and not violative of, the provisions of the Constitution and the laws.¹
However, judges also formulate far-reaching judicial policies. As Glendon Schubert has pointed out, 'Judges share with legislators, chief executives, and the heads of major administrative departments, the political power and the responsibility to make policy decisions'.\textsuperscript{2} It is said in defence of the Courts that they must at times take drastic steps to protect the rights of citizens. As against that, critics contend that the judges, instead of interpreting, often make policy decisions that are the province of the chief executive the and law-makers.

The former Additional Solicitor-General of India and leading authority on constitutional law, Devendra Dwivedi said, 'The judiciary is assigned a certain role in our constitutional scheme of things. The apex Court is for conflict resolution and is duty-bound to interpret the Constitution, whereas, policy-making is assigned to the legislature and the executive. The judiciary is not appointed as the monitor of the working of democracy'.\textsuperscript{3}

The Supreme Court of India stands at the apex of a single, integrated judicial system. It is the interpreter and guardian of the Constitution which is the supreme law of the land. The relevance and authority of the judiciary depend entirely on the respect accorded to it by the executive and the legislature.\textsuperscript{4}
In the exercise of its powers, however, the Supreme Court has been at the centre of major controversies concerning the constitutional and political order in India. Two such controversies have been especially persistent and have had broad ramifications. One concerns the efforts by the Court to give priority to the Fundamental Rights (FR) provisions in the Constitution in cases where they have come into conflict with the Directive Principles of State Policy (DPSP), which specify the broad ideological and policy goals of the Indian state and to which the executive and the legislature have often given priority. The second concerns the Court’s powers of judicial review of legislation passed by Parliament and executive orders, which have on numerous occasions led to stalemates that point to a constitutional contradiction between the principle of parliamentary sovereignty and executive supremacy versus judicial review.5

The Fundamental Rights are provided in Part III of the Constitution of India. They are those rights of citizens or those negative obligations of the State that do not encroach on individual liberty. The Directive Principles of State Policy enumerated in Part IV of the Constitution delineate the obligations of a Welfare State. Hence, the scope of Directive Principles of State Policy is very vast. The basic distinction between Fundamental Rights and Directive Principles of State Policy is that the former are justiciable in the sense any
person entitled to these Rights can enforce them in a Court of law, while the latter are not justiciable in the sense that no individual can enforce them in a Court of law. But the Directive Principles of State Policy are fundamental in the governance of the country. The State is duty bound to give them effect. The stress in Part III is upon civil liberties and personal freedoms, while the thrust of Part IV is towards social justice and economic reforms with a view to ushering in an egalitarian order of things. There is no antithesis or antagonism between the two Parts. Both can not only co-exist in harmony, they also lend support and strength to each other. Attempts to extol one at the cost of the other would injure both. For further details, refer Appendix-III.

The legislature and the executive had alleged that the judiciary had been creating hurdles in the way of implementing the Directive Principles of State Policy. This was because of the rigid attitude of the Supreme Court towards the property rights in particular and the Fundamental Rights in general vis-à-vis the Directive Principles of State Policy. So the Constitution was amended a number of times by the Parliament in exercise of its constituent power under Article 368. Some of these amendments curbed the power of judicial review. Though the expression ‘judicial review’ has not been mentioned in the Constitution of India, this power has been derived by the judiciary through various Constitutional provisions. Art 13(2)
suggests that any law contravening the Fundamental Rights would be declared void. Also, Article 32 empowers the Supreme Court and the High Court to issue various types of writs for the enforcement of the Fundamental Rights.

Right from the beginning, the judiciary took on the role of the custodian and the guarantor of the Fundamental Rights. Describing the relationship between the Fundamental Rights and the Directive Principles of State Policy in the State of Madras v. Mrs. Champakam Dorairajan case, the judiciary held in 1951 that the Directive Principles of State Policy are subordinate to Fundamental Rights. In this case, the Order of the Madras Government allotted seats to various castes and communities in Medical and Engineering Colleges, on the ground that it had been done to protect the interest of the weaker sections of society as mentioned in the Directive Principles of State Policy. This was challenged on the ground that it makes discrimination on the basis of caste and religion and hence, it violates the principle of equality in the Fundamental Rights (Article 14). The Court held invalid the Order of the Madras Government.

Another controversy centred around the property rights. Article 19(1)(f) guaranteed the right to 'acquire, hold and dispose of property' subject only to reasonable restrictions in the public interest. Article 31 stipulated that no property
could be acquired for a public purpose unless the Government paid compensation. The right of individuals to challenge compensation awards in the Court as inadequate (or in violation of the right to equal protection of the laws) was also guaranteed under the general provision of Article 32, confirming the right to appeal to the Supreme Court and/or lower Courts for the enforcement of the Fundamental Rights.

The Congress Party which was in power was committed to the transformation of the feudal structure. It was particularly interested in the abolition of the zamindari. Immediately after the promulgation of the Constitution on January 26, 1950, some of the state legislatures passed Zamindari Abolition Legislation, which was challenged on the grounds that it violated the right to property. Some of the State High Courts upheld the legislation, whereas others including the Patna High Court, in Kamleshwar Singh v. State of Bihar, declared it null and void.

In order to resolve the difficulties created by the Supreme Court judgement in the Champakam Dorairajan case on the one hand, and the judgement of the Patna High Court in the Kamleshwar Singh case on the other hand, the Constitution (First Amendment) Act, 1951 was passed. It introduced Articles 31A and 31B in the Constitution. Article 31A placed all laws enacted for the purpose of abolishing the proprietary and intermediate
interests in agricultural lands above challenge in the Court, on the ground of their alleged inconsistency with any of the Fundamental Rights. Article 31B inserted the Ninth Schedule in the Constitution and provided that none of the acts and regulations mentioned in this Schedule will be void on the ground that they are inconsistent with or take away or abridge any of the Fundamental Rights. This was done to validate certain land laws which abolished zamindari system.

To protect and advance the interests of socially and educationally backward classes of citizens and of the Scheduled Castes and the Scheduled Tribes, a new clause (4) was added in Article 15, which provided that the Government can take special steps for their admission in educational institutions notwithstanding anything contained in Article 29(2) which prevents discrimination in admission to educational institutions maintained by the State or receiving aid out of State funds on the grounds of religion, race, caste or language. The implication of this amendment was that in the first instance seats can be reserved in educational institutions for socially and educationally backward classes of citizens, Scheduled Castes and Scheduled Tribes.

Immediately after the Constitution (First Amendment) Act, the validity of this amendment was questioned in Shankari Prasad v. Union of India on the ground that the amendment was
void under Article 13(2) as it took away or abridged the Fundamental Rights. The Supreme Court held that the word 'law' in Article 13(2) included only the ordinary law and not a constitutional amendment, and therefore the Parliament had the power to amend the Fundamental Rights. This view was again confirmed by the Supreme Court in 1965, while giving its decision in Sajjan Singh V. State of Rajasthan. The Court felt that the framers of the Constitution must have anticipated that in dealing with the socio-economic problems which the legislatures may have to face from time to time, the Parliament would have to make amendments in these Fundamental Rights, so as to meet the challenge of the problems which might arise in future.\(^8\)

After the Constitution (First Amendment) Act was passed, there was some positive change in the attitude of the Supreme Court towards Directive Principles of State Policy vis-a-vis Fundamental Rights, and the laws relating to prohibition, minimum wages, acquisition of land for public purpose, and prohibiting the slaughter of milch cattle were declared valid.

However, as regards property rights, in the Kameshwar and Bela Bannerji's case, the Supreme Court held that compensation meant compensation at market rate. This decision obstructed the passing of the Zamindari Abolition Legislation and hence the Constitution (Fourth Amendment) Act, 1955, was
passed which amended Article 31(2). By this amendment, it was provided that if the State acquires property for a public purpose under a law, it shall not be called in question in any Court on the ground that the compensation provided by law is not adequate. Though the Constitution (Fourth Amendment) Act curtailed the powers of the Courts in determining the quantum of compensation, the Supreme Court's basic approach that the Directive Principles of State Policy are subordinate to the Fundamental Rights did not change.

In this context, the case of Golak Nath v. State of Punjab came up, where the validity of the First, Fourth and Seventeenth amendments to the Constitution by Parliament under Article 368, and the laws enacted on the authority of such amendments was in issue. The petitioners were sought to be deprived of their property in certain surplus lands by the State with a view to vesting the ownership of such lands in tenants/peasants. This was done under certain laws providing for compensation deemed adequate by the State and enacted as social legislation on the authority of the amendments which are aimed at achieving the aims of Directive Principles of State Policy and which in turn require the State to achieve equitable distribution of wealth and means of production. The petitioners challenged the validity of such laws and amendments as a violation of the Fundamental Right relating to property. The First amendment protected laws providing for nationalisation of
private property, compulsory acquisition of agricultural
estates and rights by the State, and certain laws of agrarian
reform, against any challenge based on infringement of
Fundamental Rights. The Fourth amendment excluded judicial
review of adequacy of compensation in cases of compulsory
acquisition of property. And the Seventeenth amendment
protected certain additional forms of land tenure and specified
laws for agrarian reform against any challenge.\textsuperscript{9}

In the historic judgement of Golak Nath v. State of
Punjab in 1967, the Supreme Court held that the Parliament
cannot amend the Constitution so as to take away or abridge the
Fundamental Rights. The judges felt that, if they were to adopt
an interpretation which gave the power to take away or abridge
the Fundamental Rights to the Parliament, a time might come
when these rights would be completely eroded and that India
would gradually and imperceptibly pass under a totalitarian
rule. The majority held that —

i. The power to amend the Constitution is not to be
found in Article 368 but is part of the plenary
legislative power of Parliament;

ii. Article 368 does not contain the authority for
amending the Constitution so as to take away or
abridge the Fundamental Rights;

iii. The expression 'law' in Article 13(2) includes not
only the law made by Parliament in exercise of its
ordinary legislative power but also an amendment of
the Constitution made in exercise of the constituent
power. Hence an amendment which takes away or
abridges the Fundamental Rights is void.
The Golak Nath judgement reversed the Supreme Court judgement in the earlier Shankari Prasad (1951) and Sajjan Singh (1965) cases. After the Golak Nath judgement, the Fundamental Rights could not be amended. The Fundamental Rights became still more sacrosanct and the Directive Principles of State Policy continued to be subservient to the Fundamental Rights.

Moreover, in the cases of Vajravelu Mudaliar, Metal Corporation and the Bank Nationalisation in 1968, 1969 and 1970 respectively, the Supreme Court held that 'Compensation' meant compensation at market rate. This was done inspite of the fact that the First amendment clearly provided that the acquisition of land for public purpose will not be called in question on the ground of inadequate compensation. All this led to a serious and long-drawn controversy between the protagonists of Fundamental Rights and the advocates of socialism keen on implementation of the Directive Principles of State Policy.

The Government encountered objections from the Supreme Court to two of its most popular measures. In the Bank Nationalisation case, the Court declared invalid, the Banking Companies Act, 1969, under which fourteen banks were nationalised on the ground that the Act violated the Fundamental Rights. In the Privy Purse case, the Presidential Order derecognizing the former rulers of princely states was
struck down on the ground that it was outside the competence of the President to issue such an order. The Court's judgements in the two last-mentioned cases created serious uneasiness in the political circles. The Court in its interpretation of the Constitution had laid heavy emphasis on property rights. The ruling party was not for the total abolition of property rights but for subjecting them to greater social control in order to fulfil the objectives laid down in the Directive Principles of State Policy. This required an amendment to the Constitution.

Congress(R) led by Mrs. Indira Gandhi, with the help of other political parties, attempted to muster adequate strength in support of a constitutional amendment. It secured the passing of the Constitution (Twenty-fourth Amendment) Bill, 1970, in the Lok Sabha seeking to do away with the princely purses and privileges. But the Bill failed to secure the required majority in the Rajya Sabha.

The 1971 mid-term election to the Lok Sabha vindicated the Prime Minister Mrs. Indira Gandhi's stand. Congress(R) secured two-thirds majority in the Lok Sabha. It could thus secure the passing of the Constitutional amendment in the Lok Sabha on its strength, without having to depend on any other political party. The Parliament passed the Twenty-fourth and the Twenty-fifth Constitutional amendments in 1971.
The Twenty-fourth amendment was passed to nullify the decision of the Supreme Court in the Golaknath case which had declared the Fundamental Rights as unamendable. It inserted clause (4) to Article 13 which provided that the provisions of Article 13 will not apply to Constitutional amendments. The Twenty-fifth Constitutional amendment amended Article 31 dealing with the right to property, and deleted the word 'compensation' and inserted the word 'amount' in its place. It also inserted a new Article 31C which made the Fundamental Rights mentioned in Articles 14, 19 and 31 subordinate to clauses (b) and (c) of Article 39 which deals with Directive Principles of State Policy and also curtailed the powers of judicial review. The first part of Article 31C stated that no law giving effect to certain Directive Principles of State Policy (distribution of material resources of the community, and elimination of concentration of wealth and means of production, etc.) should be void on the ground that it took away or abridged certain Fundamental Rights conferred by Articles 14, 19 and 31. The second part of Article 31C stated that such a law containing a declaration that it was for giving effect to such policy would not be called in question in any Court on the ground that it did not do so and thus it curtailed the powers of judicial review. 11
Thus, this provision amounted to a blank charge of power of Parliament. If the Court went to an extreme in insisting on full compensation in property rights, Parliament went to the other extreme of excluding judicial control altogether.

The Twenty-fourth and Twenty-fifth Constitutional amendments were challenged before the Supreme Court in the case of Kesavananda Bharati v. State of Kerala and other allied petitions in 1973, where issues similar to the Golak Nath case arose. The petitioner was sought to be deprived by the State of his property in land. The State deemed the compensation as adequate under an agrarian reform law enacted on the authority of the previous Constitutional amendments. The Twenty-fourth Constitutional amendment, despite Golak Nath, sought to protect these amendments by expressly empowering Parliament to make any law even if it was in conflict with any provisions of the Constitution including those relating to Fundamental Rights. The petitioner contended that the law and the amendments were unconstitutional. The Supreme Court rejected this contention and held that Golak Nath was wrongly decided. The Court reversed the ruling of the Golak Nath case and upheld the Twenty-Fourth Constitutional amendment dealing with Parliament's power to amend the Constitution including Fundamental Rights. However, the Supreme Court held that the power of amendment under Article 368 is subject to certain implied and inherent limitations and that Parliament cannot
amend those provisions of the Constitution which affect the 'basic structure' or 'framework' or 'features' of the Constitution.

Since judicial review was regarded as a basic feature, the Supreme Court struck down the second part of Article 31C introduced by the Twenty-fifth Constitutional amendment, as it took away the power of judicial review in the name of amending the Constitution, and thus the Supreme Court restored the power of judicial review to the judiciary.\textsuperscript{12}

The Kesavananda decision was delivered on April 24, 1973. Mrs. Gandhi struck back the next day. The Government announced the appointment of Justice A.N. Ray as the Chief Justice of India in preference to three senior judges who had dared to interpret Kesavananda boldly and in the face of open threats from the regime. The supersession of judges provoked volumes of protest from all across the country, but the Government refused to admit that it had compromised the independence of the judiciary by its unprecedented action. On the contrary, the Steel Minister Mohan Kumaramangalam formulated a 'committed judiciary' theory and insisted that it was incumbent on the part of the Government to consider not merely 'judicial integrity' but also the 'philosophy and outlook' of judges.
During the Emergency (1975-77), the Supreme Court survived because it did not confront Mrs. Gandhi head-on. The Court did not formally give up its power of judicial review, but some judges began interpreting the Constitution in light of the new political climate. Justice Krishna Iyer, e.g., granted a quasi-absolute stay to Mrs. Gandhi against the operation of the Allahabad High Court judgement. This judgement, delivered on June 12, 1975, in Indira Gandhi v. Raj Narain, was a verdict on the petition filed by Raj Narain for quashing Mrs. Gandhi's election to the Lok Sabha on the plea that she had employed corrupt methods to win her election. The verdict had been against her.

In these circumstances, the besieged Parliament quickly passed the Constitution (Thirty-ninth) Amendment Act, inserting Article 329A to the Constitution, which not only validated the Prime Minister's election but also placed certain electoral laws beyond the scope of judicial review. The Supreme Court upheld Mrs. Gandhi's election on November 7, 1975, under the retroactively changed electoral laws. However, it struck down Article 329A(4) as ultra vires on the ground that it offended the rule of law which was a part of the basic structure of the Constitution (vide Kesavananda). Thus, the Court accomplished a very difficult task: it provided a welcome relief to Mrs. Gandhi and, at the same time, preserved its own legitimate role by asserting the power of judicial review.¹³
Despite certain pro-regime decisions of the Supreme Court during the Emergency, the Parliament enacted the Constitution (Forty-second) Amendment Act on December 18, 1976. This widened the scope of Article 31C to cover all or any of the Directive Principles of State Policy in place of only Article 39(b) and (c) as envisaged by the Twenty-fourth amendment. Secondly, it amended Article 368 by inserting two new clauses (4) and (5) to provide that there should be no limitation on the power of the Parliament to amend the Constitution and that no amendment of the Constitution shall be called in question in any Court and on any ground. Thus, it established parliamentary supremacy beyond doubt by restricting the scope of judicial review.

The Forty-second amendment was passed at a time when the country was passing through a very critical stage because of the imposition of internal Emergency in the country. It was the time when almost all the leading political leaders of the Opposition and many members of Parliament were in jail. Moreover, there was complete censorship of the press and freedom of speech, expression and holding of meetings was non-existent. Hence, there was no public discussion on the Bill which was rushed through both Houses of Parliament, and 50% state legislatures within 40 days.
The Janata Party which came to power in March 1977 introduced the Forty-fourth Constitution Amendment Bill, to annul the provisions of the Constitution (Forty-second) Amendment Act which inserted many distortions in the Constitution. As much of the conflict between the judiciary and the Parliament was due to the fact that the Right to Property was a Fundamental Right under the Constitution, the Janata Government deleted the same through the Forty-fourth amendment. The Right to Property was retained only as a legal right by inserting a new Article 300A in Part XII of the Constitution, entitled 'Finance, Property and Suits'. However, the Bill had a rough journey through the Congress-dominated Upper House (Rajya Sabha), which passed it only after five of its crucial clauses, dealing inter alia with (a) the primacy of Fundamental Rights over Directive Principles of State Policy; (b) the compulsory use of a referendum to amend the basic structure of the Constitution, were dropped by the Government. The Bill, as enacted in May 1979, while failed to provide for a liberal state, placed considerable restrictions on the Emergency powers of the executive in order to prevent manipulation of the rules of the game in the future. The Janata Government, unlike the Emergency regime, was willing to recognise the correctness of Kesavananda and limit the constituent powers of the Parliament.
In most of the decisions made between 1977 and 1979, the court exhibited a new social awareness of its role in the political system. Besides taking some important initiatives in matters of legal aid, prison reforms, and administration of criminal justice, it oriented its constitutional interpretations to the good of the community.

Mrs. Gandhi's return to power in January 1980 revived the anti-judiciary hysteria of the Emergency period. A few constitutional decisions of the Supreme Court were highly irksome for the ruling party. Some of the provisions of the Forty-second amendment were challenged in the Supreme Court in the Minerva Mills case. Here, the petitioners, whose firms were taken over by the State on the authority of the Sick Textile Undertakings (Nationalisation) Act, 1974 and under an Order made in pursuance of the Industries (Development and Regulation) Act, 1957, challenged the constitutional validity of the Forty-second amendment on the ground that it infringed their right to freedom of business and trade. On July 31, 1980, the Supreme Court struck down the amended Article 31C and the newly inserted clauses (3), (4) and (5) in Article 368 of the Constitution inserted by the Forty-second amendment because they violated the basic structure of the Constitution. After this judgement, the Directive Principles of State Policy again became subordinate to Fundamental Rights. Consequently, the position before the Forty-second amendment was once again restored.
However, the Courts have always not come in the way of implementation of Directive Principles of State Policy. In fact, in many cases, the Supreme Court has not only supported the need for speedy implementation of Directive Principles of State Policy but has itself taken the initiative for the same. The Supreme Court's decision in the Shah Bano case and its entertainment of various public interest litigations to protect the interests of downtrodden in the society are examples in this regard.

In April 1985, the Supreme Court in a judgement in the Md. Ahmed Khan V. Shah Bano case declared that a Muslim husband of sufficient means must provide maintenance to his divorced wife, who is unable to maintain herself. The Court, in the same judgement, also asked the Government to implement the Directive Principles of State Policy, which in this particular content, meant Article 44 to secure for the citizens a uniform civil code throughout the territory of India. In a way it was a unique opportunity for the Government for till then, in general, Courts had been a hindrance in the implementation of Directive Principles of State Policy whereas in this case the Supreme Court itself asked for it. The Government, however, succumbed to the pressure of the fundamentalists who described the judgement of the Supreme Court to be an attack on the Muslim Personal Law itself. It, therefore, brought before the Parliament, The Muslim Women (Protection of rights on Divorce) Bill, which the Parliament passed in the first week of May 1986 to negate the Supreme Court's decision.18
The Supreme Court expanded its judicial power through an activist interpretation of the Constitution. Judicial power has expanded either due to judicial activism or because of the failure of the legislative and executive power to assume responsibility for taking decisions. Judicial power is often exercised to reach decisions of a political nature. With the erosion of the credibility of the political leadership, the people are bound to depend more on the exercise of the judicial power which provides a refuge against the improper exercise of legislative and executive powers. The political establishment of the country has also found in judicial power a way to diffuse difficult political situations and escape the embarrassment of finding political solutions.  

Rajiv Gandhi's was the last absolute majority Government to be voted to power. The Central Government became less and less powerful, symbolised by the start of the Mandal agitation and leading on to the destruction of the Babri Masjid, both of which came for adjudication before the Supreme Court. The Supreme Court acted only after it was clear that the executive was abdicating its responsibility in these two matters. The Supreme Court's task was made easier by the simple fact that neither Mrs. Gandhi nor Rajiv Gandhi nor V.P. Singh even tried to duck a political controversy by asking the judiciary to get involved in political conflict resolution. They behaved as if the moral and political authority of the office of the Prime Minister was sufficient to make various antagonists see reason.
However, it was different when P.V. Narasimha Rao became the Prime Minister. For the first time the country had a Prime Minister who did not enjoy a working majority in the Lok Sabha; added to this fact was Rao's own disinclination to take decisions, especially unpleasant ones. Executive power of the Centre went into a rapid retreat when the then Prime Minister, P.V. Narasimha Rao, hurriedly absolved the Centre of any responsibility for honouring a contract entered into with Enron for the construction of the Dabhol power plant, and began to repeat that this was purely a dispute between Enron and the Maharashtra Government, though the project had been sired by the Centre. In one stroke, the Centre relinquished much of the responsibility for guiding the economic policies of the country that it had enjoyed since Independence. Lacking the requisite moral authority as well as the political elbow room, the Prime Minister found it convenient to steer a few controversial political issues to the Supreme Court's way. In other words, if the political leadership will not find the courage or the wisdom to take hard decisions, the judges would have to do the unpleasant job.

Regarding the Ramjanmabhoomi-Babri Masjid issue, the demolition of the Babri Masjid on December 6, 1992 by forces spearheaded by the Hindutva elements, etc., despite an assurance given by them to the Court that they will not do so, was the most formidable challenge to the legitimacy of the
Court. The Court, however, successfully repelled such challenges by its firm but objective decision-making since then. It upheld the dismissal of the three BJP Governments in the states of Madhya Pradesh, Rajasthan and Himachal Pradesh on the ground that their anti-secular stances justified such dismissal. In this verdict in March 1994, the Supreme Court made three important points: that secularism is a basic feature of India's Constitution; that if a State Government violates secularism, it can indeed be dismissed by Delhi; for that to be valid, however, the dismissal would require not only a prior gubernatorial recommendation, but also agreement of both Houses of Parliament, and finally, it would be subject to judicial review. In one judgement, thus, the Supreme Court made it harder for state Governments to allow something like a public destruction of a mosque, and for Delhi to dismiss a state Government at will. The Supreme Court gave another judgement in October 1994. Where Ram was born or whether a temple existed where a mosque stood until December 1992, it argued, were not judicial questions. It said, however, that the judiciary could certainly inquire into the property issues involved, as to who owned the land on which the mosque stood. The Supreme Court thus pulled itself out of a question that could have compromised its jurisprudential integrity.
The Scheduled Castes in India have 15 per cent and the scheduled Tribes have 7.5 per cent reservations. The Mandal Commission had recommended 27 per cent reservation of jobs for the socially and educationally backward classes. V.P. Singh had announced the implementation of the recommendation. This would amount to the total percent of reservation coming to 49.5 per cent. Some states in India, like Karnataka and Tamil Nadu, already had more than 60 per cent reservation. In this context, the Supreme Court held in the Indira Sawhney V. Union of India case in 1993 that the total number of reserved posts in civil services should not exceed 50 per cent of the posts to be filled in at a time, and thus a ceiling of 50 per cent on reservations was set.26

TADA, or the Terrorist and Disruptive Activities (Prevention) Act, came into existence in 1985 during the regime of Rajiv Gandhi. TADA had spurred a country-wide debate that focussed attention on the alleged misuse of the Act by the law enforcement authorities, especially after the bomb-blast conspiracy that rocked Mumbai in 1993. The Supreme Court on September 23, 1994, reinterpreted the law, which helped several detainees get bail under Section 5 of the Act for illegally possessing firearms in notified area.27
In May 1995, the Supreme Court heard the case of a woman, Sarla Mudgal, whose husband had remarried after converting to Islam. Ruling that this was bigamy, the Supreme Court said that a Uniform Civil Code was desirable, and asked the Prime Minister's Office to examine the matter. This judgement produced a furore and five months later, the Supreme Court said that the order was not binding. However, the decision did produce resentment.28

In October 1993, the Centre had passed an Ordinance converting the Election Commission into a multi-member panel and had appointed G.V.G. Krishnamurthy and M.S.Gill as co-Election Commissioners. Subsequently, Parliament passed an Act equating them with the Chief Election Commissioner (CEC). T.N. Seshan, the CEC, challenged the appointments and the Act in the Supreme Court. In his petition, he argued that the appointments were made to clip his wings and the Act was unconstitutional. On July 14, 1995, the Supreme Court unanimously upheld the constitutional validity of the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1994, in entirety and said Seshan had no overriding powers over his colleagues, Gill and Krishnamurthy. The pronouncements of the apex Court constituted the strongest ever judicial indictment of a constitutional appointee.29
In 1995, the Supreme Court sent a secretary-rank Karnataka Indian Administrative Services officer, J. Vasudevan to jail in a contempt petition. A state municipality officer had been denied promotion despite Supreme Court directions and Vasudevan was jailed for a month in consequence. The emergence of this type of judicial assertiveness created somewhat of a complicated turmoil in the country. It was felt that a person who was not totally responsible for the offence had to undergo a sentence. Before convicting an official for contempt of Court for not carrying out a Court order, the administrative difficulties encountered by the official concerned had to be taken into account.

The Supreme Court, in a far-reaching judgement on November 13, 1995, brought the doctors too within the purview of the Consumers Protection Act, 1986. The Supreme Court judgement laid down that patients who receive incompetent service from either doctors or hospitals can claim damages under the Consumer Protection Act in the same way they are entitled to do for negligence. The historic verdict held that service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1)(o) of the Consumer Protection Act.31
In January 1996, the Supreme Court directed the Prime Minister to call a meeting of the Southern Chief Ministers, chiefly Tamil Nadu's Jayalalitha and Karnataka's Deve Gowda, to discuss the Cauvery issue. Such a meeting did occur. And under the combined pressure of the Supreme Court and the Prime Minister, Karnataka released some Cauvery water to Tamil Nadu where crops had withered after a dry spell. Here, judicial review assumed a new role, quite unprecedented, where it directed the chief executive to engage in political negotiation with a sense of urgency. It was charged that judicial review was overstepping its boundaries. However, the Court itself cannot involve in political negotiations. The quantum of water for irrigation, the availability or non-availability of water in storage, the domestic political compulsions to store more for self and give less to the neighbour, the verification of data, the excess claims and misleading pleas and defences, the polishing of the rough edges through cajoling or coercion, and numerous other questions come in the way.32

Hawala trade is a system of bypassing the official foreign exchange channel. The Central Bureau of Investigation (CBI) was in charge of investigating the Rs.65-crore hawala scandal, in which an array of political leaders were alleged to have been involved. The Supreme Court, on January 30, 1996 severely reprimanded the Central Bureau of Investigation (CBI) and other investigating agencies for failing to properly
investigate' the Jain hawala scam and ordered them to prosecute every guilty person 'irrespective of the height at which he is placed in the power set-up'. However, though the investigation by the CBI was carried out under constant monitoring of the Supreme Court, the Delhi High Court in April 1997, quashed the legal proceedings on the ground that the Jain diaries, notebooks and loose sheets cannot be converted into legal evidence. The Delhi Court's verdict raised some disturbing questions about the apex Court's monitoring.

The Supreme Court upheld on February 19, 1996 the powers of the Central Government to grant licences to companies in the private sector to establish and maintain telecommunication systems in the country which cleared the decks for going ahead with its programme for the privatisation of the telecommunication sector. The Court dismissed a bunch of petitions alleging irregularities in the auctioning process by which the Centre awarded licenses to private parties to operate basic telecom services in the country. The judges held the privatisation policy as 'historic' and pointed out that telecommunications are vital for the economic growth of the country. The Court also could not find any basis in the charges of corruption and mala fide intent against the Union telecommunication Minister, Sukh Ram, who was accused by the Opposition in Parliament, of bias in granting licences worth ₹89,000 crore to the little-known company, Himachal
futuristic Communication Limited. By dismissing all the petitions challenging the Government's right to formulate policy and implement it, the Supreme Court also sent out a strong message that the judiciary would not interfere in matters that are best decided by the legislature and the executive.

The Patna High Court had on March 11, 1996 directed the CBI to inquire into the fodder scam in the state of Bihar, lodge cases against people responsible for fraudulent withdrawals from the treasuries and 'take them to the logical end'. The Bihar Government led by the Chief Minister, Laloo Prasad Yadav, moved a petition before the Supreme Court challenging the judgement of the Patna High Court ordering the CBI to probe into the multi-crore fodder scam, on the ground that the High Court, under Article 226 of the Constitution, had no jurisdiction to order the CBI probe without the consent of the state Government. The Supreme Court on March 19, 1996, upheld the Patna High Court Order directing the CBI to carry out an in-depth probe into the nearly Rs.600 crore animal husbandry scam in Bihar. The Supreme Court ordered the CBI to work under the overall directions and supervision of the High Court, thus removing any possibility of the Central Government influencing or interfering with the case.
In the Jharkhand Mukti Morcha MPs bribery case, the Delhi High Court expressed its displeasure over the manner in which the CBI was handling the probe and appointed three officials of the CBI as Officers of the Court to investigate and directly report to the Court.37

The Supreme Court, on December 10, 1996, in a significant movement, aimed at abolition of child labour in occupations specified in the Child Labour (Prohibition and Regulation) Act, 1986, and implementation of the long-dodged constitutional mandate of 'free and compulsory education' for all children until they attained the age of 14 years as prescribed under Article 45 of the Constitution. This represented a new threshold of judicial activism. It signalled a breakthrough in the mental conditioning of policy-makers vis-a-vis child labour by setting out a plan of action for Governments at the Centre and in the states for eliminating a gruelling working life on children. The Supreme Court had directed that in nine industries, already identified as 'hazardous' including the match industry in Sivakasi, the glass industry in Ferozabad and the carpet industry in Mirzapur, child workers were to be replaced by adult labour, while employers who had been engaging child labour in contravention of the Child Labour (Prohibition and Regulation) Act, 1986, would pay a compensation of Rs.20,000 for each such child which would enable the setting up of a 'Child Labour Rehabilitation-
cum-Welfare Fund'. The fund would be augmented by a contribution of Rs.5,000 by the state Government concerned, for each child, in case the state was unable to provide a job to an adult member of the family in question. The income accruing from the corpus would be used to ensure the child's education 'in a suitable institution' with a view to making the child in due course 'a better citizen'. With a strong political will, this directive could provide the child labourers with a new lease of life.

In December 1996, by pronouncing authoritatively that 'telephone tapping' constituted an 'invasion' of one's privacy and unless resorted to under a procedure established by law, would infringe upon a citizen's Fundamental Rights guaranteed by the Constitution, the Supreme Court struck a blow against the pervasive practice of using the device to serve the narrow political ends of those in power.

In 1996, the Supreme Court ordered a CBI probe into out-of-turn allotments of over 8,700 Government houses made between 1989 and 1994. This arose from hearings into allotment of bungalows and flats to those either not entitled to them or where the size exceeded the entitlement. Many senior politicians and other functionaries were in threat of losing their Government accommodations. In the course of this hearing, the Supreme Court received as many as 200 complaints against
officials who were taking bribes to allot houses to other officials. Depending on the house type, bribes ranged from Rs.10,000 to Rs.50,000. The Urban Development Ministry, responsible for these allotments, was headed in 1994 by Sheila Kaul with P.K.Thungon as her junior minister. Kaul had the discretion to make out-of-turn allotments of Type V to Type VIII flats and Thungon of Type I to Type IV flats. It was in these discretionary allotments that bribes were asked for. The Supreme Court, in December 1996, imposed a heavy fine on Sheila Kaul for the indiscretion that she had committed. To prevent any further misuse of the discretionary facility, the Supreme Court directed that strict guidelines should be prepared. Freedom fighters, artistes and social workers who are not eligible for Government quarters had also been enjoying this privilege of Government accommodation. It was left to the free will of the Minister or some top functionary to decide who among them should be given this favour. The Court's directive that even if this practice continues, the total discretionary quota should not exceed five per cent, automatically limited the number of such persons enjoying this facility, and this had a salutary effect on its misuse.

Environmental protection had also occupied the Supreme Court's attention. A Public Interest Litigation (PIL) petition had sought the Supreme Court's suitable directions to preserve the cultural heritage of Taj Mahal, four world-heritage sites
and about 255 other historical and protected monuments of national importance located in the 'Trapezium Zone' (TTZ) from 'air pollution' caused by the industries in the region, besides protecting the ecology of the area and health of lakhs of residents in the region. The TTZ comprising Agra, Mathura, part of Bharatpur and Ferozabad is spread over an area of about 10,400 sq.km. The Supreme Court, on December 30, 1996, directed that the specified industries located in the TTZ which were using coke-coal as fuel should either switch over to natural gas (as fuel) or opt for suitable relocation outside the TTZ by specified dates.42

A PIL writ petition from the Research Foundation for Science, averred that hundreds of hazardous industrial units were being allowed to operate in various parts of the country to the detriment of the health of lakhs of citizens and permissible level of environment. The Supreme Court, on February 12, 1997, directed the Union Ministry for Environment to take the requisite steps to implement the relevant laws banning the use and dumping of hazardous and noxious substances by industrial units throughout the country. The Court also indicated that if top officers concerned did not measure up to their duties and enforce the provisions of the Environment Protection Act, the Court would be constrained to record a 'judicial finding of failure to perform their duties against them', and that the Court would also ensure that the judicial finding was recorded in their service books.43
Thus, we find that the power of judicial review sets itself no limits — it punishes officials such as Vasudevan and demoralises the bureaucracy as a class, pulls up and injuncts the Election Commissioner of India, monitors the quantum of rainfall and irrigation waters, orders the closure of fume-emitting factories and measures up pollution levels, calls up data on deforestation, decrees CBI inquiry into scandals, crimes, and so on.

It should be conceded that the judiciary must know its own limitations. It must realise that it cannot trespass into the field entrusted by the Constitution to the executive. It cannot indulge in policy-making. But where the executive, in discharge of its functions, violates the basic human rights of the citizen or perverts the rule of law or exercises its power not for the public good but for party or individual benefit, and where constitutional and legal principles are involved, it is the solemn duty of the Courts to inhibit and quash or set aside the improper and unlawful exercise of power and to compel action to be taken by the executive in the performance of its constitutional and legal obligations.

What is required is to ensure that the judiciary exercises its large power of judicial review in public interest litigation cases wisely and with circumspection and for the purpose of redressing the public injury and ensuring the public good.44
The commitment of the judiciary has to be only to the constitution and the laws, and in the discharge of its functions it cannot allow itself to be influenced by any extraneous considerations. Yet it must be admitted that the court is not entirely free from the influence of environment; the society in which it functions affects its views in a subtle manner.45

A judge is a member of his society and a product of its cultural synthesis and as such the social and cultural framework of his age will often supply him the rationales of decision. Some of the modern laws had been gradually moulded by judicial legislation in an effort to adopt them to the needs felt in a new type of industrial and welfare-minded society.

In public policy cases, no evidence is given as to what is for the public benefit and a judge must use his knowledge of the world as best as he can do it. The rulings of the Court reveal that the conception of public policy would be based on the interests of the whole public. The judiciary has to strike a balance in express terms between community interests and sectional interests.
END NOTES


