"The maxim that there is no wrong without a remedy', does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal, nor for many kinds of verbal slander, though each may involve ruin... The maxim means only that legal wrong and legal remedy are correlative terms, and it would be more intelligibly and correctly stated, if it were reversed, so as to stand. When there is no legal remedy, there is no legal wrong."

Stephan J

Judicial review in India is based on the assumption that the constitution is the supreme law of the land, and all Governmental organs, which owe their origin to the Constitution and derive their powers from its provisions, must function within the frame work of the Constitution, and must not do anything which is inconsistent with the provisions of the Constitution.

I. Impartial and Independent judiciary

In a federal system it is a necessary consequence to have an impartial and independent judiciary whose basic function is to act as an arbiter in a dispute arising between the centre and the states. One of the unique features of the Constitution is that a person has a fundamental right to approach the Supreme Court. Moreover, wide original and appellate

Bradlaugh V. Gosset (1884) 12 Q.B.D. 271, 285.
jurisdiction has been given to the Supreme Court and High Courts to adjudicate on the Constitutionality of any actions.

The framers of the Indian Constitution, adopted the Parliamentary forms of Government as it obtains in England. But the Union Parliament and state Legislatures, unlike the English Parliament, owe their origin to the Constitution and derive their powers from its provisions, and therefore function within limitations prescribed in the Constitution. There is thus a necessary implication that the Constitution confers on the courts, the power to scrutinise a law made by a legislature and to declare it void. If it is found to be inconsistent with the provisions of the Constitution.

II. Natural Justice

'Natural Justice' is a set of principles which constitute the necessary conditions of justice, we mean that no verdict can be just unless all such principles have been adhered to. Non-adherence to any one of them would disallow the claim that a certain verdict is just. Even a right decision, rendered in violation of any one of these principles, cannot be just.

Justice Black has defined Natural justice as follows:

"Natural justice means no more than justice without any epithet. I take the essentials of justice to mean those desiderata which, in the existing stage of our mental and moral

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2 Eliment judges have at times used the phrase 'The principles of natural justice'. The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice among men. Among most savages there is no such thing as justice in the modern sense. Machlean Vs. Workers' Union (1929)1 CH. 602, 624; See also K. Ravi, 'Justice V. Natural Justice - a Critical Exposition', (1996) p. 2.
development, we regard as essential, in contrast to the many extra-precautions, helpful to justice, but not-indispensable to it, which, by their rules of evidence and procedure, our courts have made obligatory in actual trials before themselves. Many advanced peoples have legal systems which do not insist on all these extra pre-cautions, yet we would hardly say that they disregard the essentials of justice.

III. Finality Clause

Prof Wade has explained that finality clause in a statute must be given narrowest possible construction and observed-

"Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuses to allow it to hamper the operation of judicial review. As will be seen in this and the following sections, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction. Sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. 'Finality is a good thing but justice is a better.'"

The Learned author further said that:

"If a statute says that some decision or order 'shall be final' or 'shall be final and conclusive to all intents and purposes' this is held to mean merely that there is no appeal; judicial control of legality is unimpaired. Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in

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3 William Green V.Isidore (1948) I.R., 242 (Per Justice Black)
If the provisions of the Tenth Schedule are considered in the background of the legislative history, namely, the report of the 'Committee on Defections' as well as the earlier Bills which were moved to curb the evil of defection it would be evident that the main purpose underlying the constitutional amendment and introduction of the Tenth Schedule is to curb the evil of defection which was causing immense mischief in our body politic. The ouster of jurisdiction of courts under Paragraph 7 was incidental to and to lend strength to the main purpose which was to curb the evil of defection.

All the five judges comprising the Constitution Bench were unanimous in holding that paragraph 7 of the Tenth Schedule in terms and in effect makes a change in the operation and effect of Arts. 136, 226 and 227 and, therefore, the Bill needed to be ratified by the Legislatures of not less than one half of the States under the proviso to clause (2) of Art. 368. However, they differed by 3 to 2 as regards the effect of non-ratification of paragraph 7 on the remaining provisions of the Tenth Schedule. While the majority held that paragraph 7 is severable, and the rest of the Tenth Schedule is valid, the minority of Judges held that the doctrine of severability cannot be applied to a Bill making a Constitutional Amendment where any part thereof attracts the proviso to Clause (2) of Art. 368. Consequently, the whole of the Tenth Schedule is ultra vires the Constitution according to the minority. The majority view is preferable as, it salvages substantially the much needed antidefection law.

5 ibid, p.720; also see Kithoto Hollohan V.Zachillhu (1992) Supple (2) SCC 651.
The Supreme Court\(^7\) has held that an amendment should not go beyond the scope of the amendment. That is to say, it must not change the basic structures or features of the Constitution. Since the concept of disqualification of a member of a House of Parliament/State legislature was already known to the Constitution in Articles 102 and 191, it cannot be said that the Tenth Schedule introducing a new ground of disqualification, namely by defection is contrary to the basic structures or features of the Constitution. As for excluding the jurisdiction of courts, there are two separate parts of this subject. Para 6 of the Tenth Schedule which makes the decision of the Chairman/Speaker final and which deems the proceedings relating to the disqualification to be proceedings in the House under Articles 122 and 212, the finality is to be construed as being the finality of the decision given with jurisdiction. If the decision is given without jurisdiction then it would not be entitled to be final and the Supreme Court/High Court can decide as to whether the decision was with jurisdiction or not\(^8\). The Supreme Court held that therefore, the Tenth Schedule as an amendment would not be violative of the Constitution\(^9\).

Para 7 of the Tenth Schedule formally excludes the jurisdiction of all courts in respect of any matter connected with the disqualification of the member of a House under Tenth Schedule. This exclusion of all courts includes the Supreme Court and the high courts. Article 368(2) of the Constitution attaches a formality to be undergone for certain types of constitutional amendments. This formality is that if such an amendment seeks to make any changes in Chapter IV of Part V, or in

\(^7\) Kesavanand Bharati v. State of Kerala AIR 1973 SC 1461

\(^8\) Union of India v. Jyoti Prakash Mitter AIR 1971 SC 1093

Chapter V of Part VI which provisions relate to the constitution and powers of the Supreme Court and the High Courts then such constitutional amendment would also have to be ratified by the legislatures of not less than one half of the States before the bill making provision for such constitutional amendment is presented to the President for his assent. This formality was not complied with by the constitutional amendment i.e., Constitution (52nd Amendment) Act of 1985. The question is whether para 7 of the Tenth Schedule should be viewed in the same way as para 6 was viewed above and it should be held that the express exclusion of the jurisdiction of all courts including the Supreme Court and the High Courts should be viewed in the same way as the finality of the decision of the Speaker/Chairman is viewed, namely subject to the jurisdictional review of such orders by these courts. Or, whether the formal exclusion of the jurisdiction of the courts should be regarded as a change in the above-mentioned provisions of the Constitution relating to the Supreme Court and the High Courts? On the one hand, there is no formal amendment of these provisions made by the 1985 Amendment of the Constitution. On the other hand, the constitutional provisions relating to the Supreme Court and the High Courts include their respective jurisdictions\(^\text{10}\) and the 1985 amendment would necessarily mean that para 7 of the Tenth Schedule will have to be read with these provisions relating to the Supreme Court and the High Courts para 7 of the Tenth Schedule would have the effect of changing these provisions relating to the Supreme Court and the high courts. The change will consist of taking away the jurisdictions of these courts in respect of any matter connected with the disqualification of a member of the House under the Tenth Schedule. The majority of the 5 judges Full Bench of the High Court of Punjab and Haryana\(^\text{11}\) have

\(^{10}\) Supra, note 8.

\(^{11}\) Prakash Singh Badal Vs. Union of India AIR 1987 P&H 263; also see Kihoto Hollohan Vs.Zachillhu(1992) Supple (2) SCC 651.
invalidated the amendment contained in para 7 of the Tenth Schedule as being invalid for non compliance with the formality of ratification by one half of the States in terms of the proviso to Clause (2) of Article 368 of the Constitution.

Examining the effect of incorporation of finality clause which is incorporated in a statute, Prof Wade observed:

"The normal effect of finality clause is, therefore, to prevent any appeal. There is no right of appeal in any case unless it is given by statute. But where there is general provision for appeals, for example, from quarter sessions to the High Court by case stated, a subsequent Act making the decision of quarter sessions final on some specific matter will prevent an appeal. But in one case, the Court of Appeal has deprived a finality clause of part even of this modest content, holding that a question which can be resolved by certiorari or declaration can equally well be the subject of a case stated, since this is only a matter of machinery. This does not open the door to appeals generally, but only to appeals by case stated on matters which could equally well be dealt with by certiorari or declaration, i.e., matters subject to judicial review".12

The Learned author further said that :

"A provision for finality may be important in other contexts, for example when the question is whether the finding of one tribunal may be reopened before another, or whether an interlocutory order is open to appeal....."13

The order of the Election Tribunal was made final and conclusive by Section 105 of the Representation of the People Act, 1951.

12 supra note 4; also see Kihoto Hollohan Vs. Zachillhu (1992) Supple (2) SCC 651; p.721.
13 ibid, also see Kihoto Hollohan V.ZSachillhu (1992) Supple (2) SCC 651,721
The issue came before the Supreme Court, the contention was that the finality and conclusiveness clauses barred the jurisdiction of the Supreme Court under Article 136. The contention was repelled by the Supreme Court by observing as follows:

"....But once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any Parliamentary legislation."

The Supreme Court further laid down that:

"....But once that tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised...."

The Supreme Court has observed that:

"..... The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land...."

The Court further said that:

"Section 105 of the Representation of the People Act certainly gives finality to the decision of the Election Tribunal so far as that Act is concerned and does not provide for any further appeal but that cannot in any way cut down or affect the overriding powers which this Court can exercise in the matter of granting special leave under Article 136 of the Constitution."

15. ibid p.522
16. ibid, p.522; also see Kihoto Hollohan V. Zachillhu (1992) Supple (2) SCC 651
17. ibid; also see Kihoto Hollohan V. Zachillhu (1992) Supple(2) SCC 651:
JUDICIAL REVIEW

In England, Parliament is sovereign and there is no written constitution to control or limit that sovereignty and therefore, the courts lack the power to adjudicate upon the constitutionality of the laws of Parliament. Though they may restrict their reach and scope through interpretation in the light of Constitutional principles and now also under EEC laws. Judicial Review in India bears resemblance to that available in the United States where the Supreme Court and other courts have endowed themselves with the power to declare a law unconstitutional, if it is found not to be in conformity with the provisions of the Constitution.

The words "procedure established by law" in Article 21 were distinguished from "due process of law" in the Vth and XIVth Amendments of the U.S. Constitution and were held to be imposing almost no limitation on the legislature. Certain Fundamental rights are guaranteed simultaneously with permissible reasonable restrictions which may be imposed by law on the enjoyment of these rights for certain purposes or in public interest.

The Supreme Court has held that the main and basic test however is, whether the adjudicating power which a particular authority empowered to exercise, has been conferred on it by a statute and can be described as a part of the state's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the state Government exercises under Rule 6(5) and Rule 6 (6) is as part of the State's judicial power. It has been conferred on the state Government by a statutory Rule and it can be exercised in respect of...

\[18\] A.K.Gopalan V.State of Madras AIR 1950 SC 27
\[19\] ibid
disputes between the management and its welfares. There is in that sense, a lis, there is affirmation by one party and denial by another and the disputes necessarily involves the rights and obligations of the parties to it. The order which the state Government ultimately passes is described as its decision and it is made final and binding. Besides it is an order passed on appeal. Having regard to these distinctive features of the power conferred on the State Government by Rule 6(5) and Rule 6 (6). The Supreme Court held that it is a Tribunal within the meaning of Article 136(1).

In *Indira Gandhi V. Raj Narain*, the Supreme Court unanimously upheld the Prime Minister's appeal against the ruling of the Allahabad High Court has held that

"the 1971 Parliamentary election was invalid, but also ruled that clause 4 of Article 329 A of the constitution, which was introduced by the Constitution (39th Amendment) Act and which provided that no previous law relating to election petitions should apply or be deemed ever to have applied to the election to Parliament of, inter alia, the Prime Minister (and that if his election had been declared to be void before the Commencement of the Act it should continue to be valid) - was unconstitutional. Parliament had power to create law and apply the same but in the present case, the constituent power did not have any law to apply because the previous law did not apply and no other law was applied by Clause 4. The validation of the election in the present case was, therefore, not by applying any law and therefore offended the rule of law".

In Additional District Magistrate, Jabalpur V. S.S. Shukla, the Supreme Court, Khanna, J., dissenting, decided that, even though Article 226, under which habeas corpus may be issued, does not form part

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20 Gajendragadkar CJ, (For Majority) in Associated Cement Companies Ltd. Vs. P.N. Sharma AIR 1965 SC 1595, 1606
1 AIR 1975 SC 2299
2 AIR 1976 SC 1207; (1976) Supple. SCR 172
of the chapter on fundamental rights and cannot therefore be suspended under emergency powers, Article 21 was the sole repository of the right of personal liberty, and as a result no person could challenge the legality of a detention order.

The Constitution (Twenty Ninth Amendment) Act, 1972\(^3\) is one of the amendments which occasioned the great case of *Kesava Nand Bharti v. State of Kerala*\(^4\) It purports to bring two Kerala Land Reforms Acts within the special protection from Judicial scrutiny which is afforded to specified land reform statutes by Article 31 B and the Ninth Schedule, which were upheld retrospectively but declared invalid prospectively (in the sense that future additions to the list of protected statutes would be invalid) by *Golak Nath v state of Punjab*.\(^5\) Golak Nath was expressly overruled, so the twenty Ninth Amendment was expressly upheld in *Kesava Nand Bharati*.\(^6\) The majority laid down that the power of constitutional amendment conferred by Article 368 does not enable Parliament to alter the basic structure or frame work of the Constitution. So article 368 does not authorise any abrogation of "the basic structure or frame work" of the Constitution, any repeal or replacement of the whole, any change from Republic to Monarchy, from democracy to dictatorship, from a secular to a religiously discriminatory state.\(^7\)

In *R.K. Jain Vs. Union of India*\(^8\) the Supreme court has laid down that to instil the confidence of the litigating public in the CEGAT, the Government must make a sincere effort to appoint a sitting Judge of the High Court as a President of the CEGAT in consultation of the chief

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\(^3\) Assented to June 9, 1972  
\(^4\) AIR 1973 SC 1461  
\(^5\) AIR 1967 SC 1643  
\(^6\) Supra, note 4  
\(^7\) ibid  
\(^8\) (1993) 4 SCC 119,133 (Per Ahmadi J (as he then was) for himself and Punchhi J.)
Justice of India and if a sitting judge is not available, the choice must fall on a retired Judge as far as possible.

The tribunals set up under Article 323-A and 323-B of the Constitution or under an Act of legislature are creatures of the Statute and in no case can claim the status of the High Court or parity or as substitutes. However, Judicial Review is the basic and essential feature of the Indian Constitutional scheme entrusted to the judiciary. It cannot be dispensed with by creating a tribunal under Article 323-A and 323-B of the Constitution. Any institutional mechanism or authority in negation of Judicial Review is destructive of basic structure.9

The use of word 'Final' qua any order passed by any authority under a provision of the Constitution or other statutes has always been understood to imply that no appeal, revision or review lies against that order and not that it overrides the power of judicial review either of the High Court under Article 226 or the Supreme Court under Article 136 of the Constitution.

The Supreme Court in - Union of India V. Jyoti Parkash10 has laid down that the:

"President acting under Article 217 (3) performs a judicial function of grave importance under the Scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President, the court has jurisdiction in appropriate case to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive, or it was founded on no evidence. But the Supreme Court will not set in appeal

9 ibid, p.171 per (K.Ramaswamy J)
10 AIR 1971 SC 1093 p.1106
over the judgment of the President, not will the courts determine the weight which should be attached to the evidence".

The Supreme Court further laid down that:

"Appreciation of evidence is entirely left to the President and it is not for the courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion". 

The Supreme Court laid down that the provisions of para 6(1) do not have the effect of excluding the jurisdiction of the High Court under Article 226, or of the Supreme Court under Article 136 of the Constitution.

The Speakers/Chairmen hold a pivotal position in the scheme of Parliamentary democracy and are guardians of the rights and privileges of the House. The Speaker is said to be the very embodiment of propriety and impartiality. He performs wide ranging functions including the performance of important functions of a judicial character.

Paragraph 6(1) of the Tenth Schedule seeks to impart a statutory finality to the decision of the Speaker or the Chairman as the case may be. The normal effect of a finality clause is, therefore, to prevent any appeal. There is no right of appeal in any case unless it is given by statute. But where there is general provision for appeals, for example, from quarter sessions to the High court by case stated, a subsequent Act making the decision of quarter sessions final on some specific matter will prevent an appeal. But in one case the court of appeal has deprived a finality clauses of part even of this modest content, holding that a question which can be

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11 ibid
12 Kihoto Hollohan V. Zachillhu (1992) Supreme (2) SCC 651
13 ibid
resolved by certiorari or declaration can equally well be the subject to a case stated, since this is only a matter of machinery. This does not open the door to appeals generally, but only to appeals by case stated on matters which could equally will be dealt with by certiorari or a declaration, i.e., matters subject to judicial review".  

Paragraph 7 of the Tenth Schedule to the Constitution of India was also incorporated by the (52 Amendment) Act, 1985. The Supreme Court in Kihoto Hollohan Vs. Zachillhu held that the amendment does not bring in any change directly in the language of Articles 136, 226 and 227 of the Constitution, however, in effect, paragraph 7 curtails the operation of those articles in respect of the matters falling under the Tenth Schedule.

The previous Constitution (Thirty second Amendment) Bill, 1973 and the Constitution (Forty eighth Amendment) Bill, 1978 contained similar provisions for disqualifications on grounds of defection, but these Bills do not contain any clause ousting the jurisdiction of the Courts.

Determination of disputed disqualifications was left to the Election Commission as in the case of other disqualifications under Article 102 and 103 in the case of Members of Parliament and Articles 191 and


15 Para 7 of the Tenth Schedule to the Constitution of India reads as follows:- "7. Bar of jurisdiction of Courts - Notwithstanding, anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualifications of a member of a House under this Schedule".

16 supra note 12, p.691
192 in the case of Members of Legislature of the States. The Constitution (Fifty Second Amendment) Bill for the first time envisaged the investiture of the power to decide disputes on the Speaker or the Chairman. The purpose of the enactment of paragraph 7, as the debates in the House indicate, was to bar the jurisdiction of the courts under Article 136, 226 and 227 of the Constitution of India.

In sub paragraph (1) of paragraph 6, the question as to whether a member of a House has become subject to disqualification under the Schedule is required to be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final under sub-paragraph (2) of paragraph 6, all proceedings under sub-paragraph (1) of paragraph 6 in relation to any question as to disqualification of a member of House under the schedule are to be deemed as proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a state within the meaning of Article 212.

The Supreme Court was unanimous in holding that paragraph 7 completely excludes jurisdiction of all courts including the Supreme Court under Article 136 and High Courts under Article 226 and 227 in respect of any matter connected with the disqualification of the member of a House and the Bill introducing the said amendment required ratification by the State Legislatures under the proviso to Article 368 (2) of the Constitution and that no such ratification was obtained for the Bill.

17 Supra, note 15
18 Prakash Singh Badal Vs. Union of India AIR 1987 P&H 263
19 ibid; also see Kitoto Hollohan V. Zachillhu (1992) Supple(2) SCC 651
20 supra, note 12; Prakash Singh Badal V. Union of India AIR 1987 P&H 263.
judicial power. That authority is called a Tribunal, if it does not have all the trapping of a court.10

The Supreme Court has further examined the issue in relation to the parliamentary immunity and laid down, that apart,

"even after 1986 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to disqualification of members under Article 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House but only before the Speaker as a specially designated authority. The decision under Paragraph 6(1) is not the decision of the House, nor is it subject to approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, no immunity under Article 122 or 212 from judicial scrutiny of the decision of the paragraph 6(1) of the Tenth Schedule."11

The Supreme Court has emphatically laid down that the:

"Speaker or the Chairman acting under paragraph 6(1) is a tribunal "All tribunals are not courts, though all courts are tribunals". The word 'Courts' is used to designate those tribunals which are set up in an organised state for the Administration of Justice."12

"By Administration of Justice is meant the exercise of judicial power of the state to maintain and uphold rights and to punish for "Wrongs" whenever there is an infringement of a right or on injury. The Courts are there to restore the vinculum juris which is disturbed."13

"Justice Hidayatullah (as he then was) has tried to differentiate between Courts and Tribunals and observed-By "Courts" is meant Courts of Civil Judicature and by "tribunals" those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the state is included the power to decide such controversies. This is undoubtedly one of the

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10 Supra, note 1, p.707
11 ibid p.706 (per majority)
12 ibid, p.707
13 ibid
attributes of the state which is aptly called the judicial power of the state. In exercise of this power a clear division is thus noticeable. Broadly speaking certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ, but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that Courts have "an air of detachment". But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have equipped themselves so well and with such detachment as to make this test insufficient.¹⁴

VI. Ratification and Constitution (52nd Amendment) Act

In Sankari Prasad V. Union of India¹⁵ the question was whether the amendment introducing Articles 31-A and 31-B in the Constitution required ratification under the proviso to Article 368(2). Repelling this contention, it was observed:

"It will be seen that these articles do not either in terms or in effect seek to make any change in Article 226 or in Articles 132 and 136. Article 31-A aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Article 13 read with other relevant articles in Part III, while Article 31-B purports to validate certain specified, Acts and regulations already passed, which, but for such a provision, would be liable to be impugned under Article 13. It is not correct to say that the powers of the High Court under Article 226 to issue writs 'for the enforcement of any of the rights conferred by Part III' or of this Court under Article 132 and 136 to entertain appeals from orders issuing or refusing such writs are in any way affected. They remain just the same as they were before: only a certain class of case has been excluded from the purview of Part III and the courts no longer interfere, not because their powers were curtailed in any manner or to any extent, but...because there would be no occasion hereafter for the exercise of their power in such cases."¹⁶

¹⁵ 1952 SCR 89
¹⁶ ibid, p.108
In Sajjan Singh Vs. State of Rajasthan\(^1\) a similar contention was raised against the validity of the Constitution (Seventeenth Amendment) Act, 1964 by which Article 31-A was again amended and 44 statutes were added to the Ninth Schedule of the Constitution. The question was whether the amendment required ratification under proviso to Article 368. The Supreme Court has noticed the question which may be reproduced:

"The question which calls for our decision is: what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Article 226 are likely to be affected\(^{19}\).

Negativing the challenge to the amendment on the ground of non-ratification, the Supreme Court has laid that:

"...Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio economic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Court's powers prescribed by Article 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Article 226 and it cannot be said that even to have that effect directly or in any appreciable measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained.\(^{19}\)"

\(^{17}\) (1965) 1SCR 933

\(^{18}\) ibid, p.940

\(^{19}\) ibid, 944; also see Kihoto Hollohan Vs. Zachillhu (1992) Supple (2) SCC 651, 691.
Principles of natural justice have been defined to mean "fair play in action." The Supreme Court has laid down that "They constitute the basic elements of a fair hearings, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men."

Prof. Wade has summed up the principles of natural justice as follows:

"The judges anxious as always to preserve some freedom of manoeuvre, emphasise that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject matter. 'The so called rules of natural justice are not engraved on tablets of stone.' Their application resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case. 'In the application of the concept of fair play these must be real flexibility.' There must also have been some real prejudice to the complainant. There is no such thing as a merely technical infringement of natural Justice."

While interpreting Entry 3 of, List II of the Seventh Schedule to the Constitution of India, the Supreme Court has observed:-

"The word "Court" certainly means a place where justice is judicially administered. The appointment of judges and officers on the mere setting apart of a place where the judges are to meet, are not sufficient to constitute a court. A court cannot administer justice unless it is vested with jurisdiction to decide cases and 'the constitution of a court necessarily includes its jurisdiction'."

20 Maneka Gandhi Vs. union of India (1978) 2 SCR 621, 676 (Per Bhagwati J)
1 Infra
2 Union of India Vs. Tulsi Ram Patel (1985) Supple(2) SCR 131, 225.
4 ibid
5 Malik, Surender, 'Supreme Court on words and phrases' (1993), Eastern Book Co.(ed). P.176,
If the power of amendment of the Constitution is co-extensive with the power of the judiciary to invalidate laws, the democratic process and the co-ordinate nature of the great departments of the state are maintained. The democratic process is maintained because the will of the people to secure the necessary power to enact laws by amendment of the Constitution is not defeated.

The Supreme Court has laid down that:

"The democratic process is also respected because when the judiciary strikes down a law on the ground of lack of power or on the ground of violating a limitation on power, it is the duty of the legislature to accept that position, but if it is desired to pass the same law by acquiring the necessary power, an amendment validly enacted enables the legislature to do so and the democratic will to prevail." 6

The Supreme Court further observed:

"This process harmonises with the theory of our Constitution and the three great departments of the State, the legislature, the judiciary and the executive are coordinate and none is superior to the other. The normal interaction of enactment of law by the legislation, of interpretation by the courts, and of the amendment of the Constitution by the legislature go on as they were intended to go on." 7

"The Supreme Court has laid down that the Parliament cannot be denied the power to amend the Constitution as to take away or abridge the fundamental rights by complying with the procedure of article 368 because of any supposed fear or possibility of the abuse of power. The power may be abused furnishes no ground for denial of its

See also, state of Bombay Vs.Narottam Dam Jethabhai, AIR, 1951 SC 69, 88.
Kesava Nand Bharti V.State of Kerala (1973) Supple SCR 1, 422.
ibid
existence. The fact that a prescribed majority of the peoples' representatives is required for bringing about the amendment is itself a guarantee that the power would not be abused or used extravagantly."8

VII Speaker's Decision examine

The Supreme Court9 has examined the disqualification of membership of the Assembly under order of the Speaker dated December 13, 1992 on the ground of defection under paragraph 2(1) (a) and 2(1)(b) of the Tenth Schedule. The petitions that were filed by Ramakant D. Khalap for disqualification of both (Bandekar and Chopdekar who were elected to the Goa Legislative Assembly under the ticket of MGP) who are the appellants in Civil Appeal No.3309 of 1993. The following averments were made with regard to disqualification on ground of defection under paragraph 2(1)(a) of the Tenth Schedule as contained in paragraph 11 of the said petitions:

"The petitioner says and submits that both before the Assembly Session and also after the Assembly session, the respondent has voluntarily accompanied Dr. Luis Proto Barbosa to the Governor and has told the Governor that he does not support the MGP any longer. He had also made it known to the public that he has voluntarily resigned from the membership of the MGP. The respondent has thereby voluntarily given up the membership of the MGP. He has in the circumstances for that reason also incurred disqualification under Article 191(2) read with para 2(1)(a) of the Tenth Schedule of the Constitution of India".10

To the above allegations, the appellants replies as follows:

8 ibid, p.678
10 ibid
"Factually I have not given up the membership of the MGP, voluntarily or otherwise. I still continue to be a member of the said party and in fact no document has been produced by the complainant and nothing has been disclosed to show that I have resigned from the membership of the party."\(^{11}\)

The reply to para 11 is as follows:-

".....the mere fact that I am accompanying Mr. Barbosa does not entail my disqualification which I do not accept that I told His Excellency the Governor that I do not support the Maharastrawadi Gomantak Party and perhaps much more devoted than Mr. Khalap. I also deny emphatically that I made it known to any body that I had voluntarily resigned from the membership of the Maharastrawadi Gomantak Party. You know very well Sir, that I have been allotted a seat as a member of the Maharastrawadi Gomantak Party and I have not asked any change in the seating on account of the fact that I have resigned from the party. In fact the complainant has not produced as he could not produce any documents to establish the fact that I have resigned, resignation from the membership could only be evidenced by a written document. The burden is on the part of the complainant to establish this fact. In the absence of it, the complaint should be summarily dismissed. Contents of para 11 which are not specifically admitted are denied".

The Speaker of the Goa Legislative Assembly in his Judgment and order dated December 13,1990 has observed:-

"Dr. Jalmi produced before me copies of several newspapers showing photos of the two MLAs, with Congress (I) MLA and DR Barbosa etc. when they met the Governor with Dr. Wilfred D'Souza who had taken them to show that he had the support of 20 MLAs. This fact is well known in Goa and the Governor himself has admitted it. Dr. Jhalmi said that both the MLAs have given up the Membership of their political party and said so openly to him and others".

\(^{11}\) ibid
The reply filed by the two MLAs, does not deny the fact that they went to the Governor against the Maharastrawadi Gomantak Party.

The Speaker has observed.

"I am satisfied that by their conduct, actions and speech they have voluntarily given up the membership of the MGP."\(^{14}\)

### VIII Disqualification Rules

The High court of Bombay, Panaji Bench has rejected the contention that the Speakers' order dated December 13, 1990 was passed in breach of the Constitutional mandate for the reason that there was contravention of the Goa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986, hereinafter referred to as "Disqualification Rules" made by the Speaker under paragraph 8 of the Tenth Schedule.

The High court further held that the:

"Disqualification Rules made by the Speaker could not be held to be part of Constitution mandate and that they are only to regulate the procedure and the substantive power or authority is given in paragraph 6 of the Tenth Schedule. According to the High Court violation of Disqualification Rules would only constitute an irregularity in procedure..."\(^{14}\)

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The Advocate appearing for the MLAs said that he wanted to lead evidence. But, although both the MLAs were present before the Speaker, their Advocate did not make them give evidence. They did not deny that they supported Dr. Wilfred D'Souza in his effort to form Congress (I) Government and went with him to the Governor as part of the 20 MLAs. They could not do so because it is a fact of common knowledge all over Goa that these two MLAs have left their political party.
The Supreme Court held that the 'Disqualification Rules' are, therefore procedural in nature and any violation of the same would amount to an irregularity in procedure which is immune from judicial scrutiny in view of sub paragraph (2) of paragraph 6 as construed by the Supreme Court in Kihoto Hollohan case. Moreover, the field of judicial

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Sub Rules (5) and (6) of Rule 6 and sub rules (2) and (3) of Rule 7 of the aforesaid Disqualification rules, 1986 provide as under:-

"6. Reference to be by petitions:-
(5) Every petition:-
(a) shall contain a concise statement of the material facts on which the petitioner relies; and
(b) shall be accompanied by copies of the documentary evidence, if any, on which the petitioner relies and where the petitioner relies on any information furnished to him by any person, a statement containing the names and addresses of such persons and the list of such information as furnished by each such person.
(6) Every petition shall be signed by the petitioner and verified in the manner laid down in code of civil procedure, 1908 (Central Act 5 of 1908) for the verification of pleadings.

7 Procedure-
(2) If the petition does not comply with the requirements of Rule 6, the speaker shall dismiss the petition and intimate the petitioner accordingly.
(3) If the petition complies with the requirements of Rule 6, the Speaker shall cause copies of the petition and of the annexures thereto be forwarded:-
(a) to the member in relation to whom the petition has been made; and
(b) where such member belongs to any legislature party and such petition has not been made by the leader thereof, also to such leader, and such member or leader shall within seven days of the receipt of such copies, within such further period as the speaker may for sufficient cause allow, forward his comments in writing thereon to the speaker".

 supra Kihoto Hollohan V. Zachillhu (1992) Supple (2) SCC 651
review in respect of the orders passed by the Speaker under sub paragraph (1) of paragraph 6 as construed the Supreme court in Kihoto Hollohan case is confined to breaches of the constitutional mandates, malafides, non-compliance with Rules of Natural justice and perversity.

The Supreme court expressed its inability in holding that

"the violation of the disqualification Rules amounts to violation of constitutional mandates. The Supreme court laid down that by doing so, would be elevating the rules to the status of the provisions of the Constitution which is impermissible. Since the Disqualification Rules have been framed by the Speaker in exercise of the power conferred under paragraph 8 of the Tenth Schedule. They have a status subordinate to the constitution and cannot be equated with the provisions of the constitution. They can not, therefore, be regarded as constitutional mandates and any violation of the Disqualification Rules does not afford a ground for judicial review of the order of the speaker in view of the clause contained in sub paragraph (1) of paragraph 6 of the Tenth Schedule."

IX. Power of Review

Whether the speaker has power of review under Tenth Schedule

The Supreme Court has analysed in a precedent which says that:

"it is well settled that the power to review is not an inherent power. It must be conferred by Law either specifically or by necessary implication."

The Supreme Court has laid down that:

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18 Supra note 9, p.652; G.Vishwanathan V. The Speaker (1996) 2 SCC 353
19 ibid, p.653; also see Kashi Nath G.Jalmi V. The Speaker (1993) 2 SCC 703
"There is no express provision conferring the power of review on the Speaker in the Tenth Schedule. Power of review in the Speaker cannot be implied from the provisions in the Tenth Schedule and the only remedy available to the aggrieved Member is by judicial Review of the order of disqualification".

The Supreme Court held that the speaker has no power of review under the Tenth Schedule, and an order of disqualification made by him under para 6 is subject to correcting as laid down in *Kihoto Hollohan*. Accordingly the alleged defects would require examination by Judicial Review in the writ petition filed in the High Court challenging the orders of disqualification.

The Supreme Court has observed that:

"There is no scope for reading into the Tenth Schedule any of the powers of the Speaker which he otherwise has while functioning as the Speaker in the House, to cloth him with any such power in his capacity as the statutory authority functioning under the Tenth Schedule of the Constitution. Accordingly, any power of the Speaker, available to him while functioning in the House, is not treated as his power or privilege as the authority under the Tenth Schedule".

The Supreme Court further held that:

"Rule 77 of the rules of Procedure and Conduct of business of the Goa Legislative Assembly regarding breach of privilege which enables the Speaker to consider his earlier decision, and Rule 7 (7) of the Member of the Goa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986 relating to the procedure are not applicable".

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2. (1992) Supple(2) SCC 651
3. ibid, p.719
4. ibid, p.720
5. ibid
X. **Effect of Exclusion**

The Supreme Court has held that the deeming fiction enacted in the Explanation (a) to para 2 (1) of the Tenth Schedule must be given full effect or otherwise the expelled member would escape the rigour of the law which was intended to curb the evil of defections which has polluted our democratic polity.

The Supreme Court has laid down that:

"The legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. It means that the courts must assume that such a state of affair exists as real, and should imagine as real the consequences and incidents which inevitably flow therefrom, give effect to the same. The deeming provision may be intended to enlarge the meaning of a particular word or include matters which otherwise may or may not fall within the main provision".

XI **Effect of Withdrawal of petition**

The Supreme Court has examined the effect of withdrawal of Writ petition before the High Court:

"In the present proceedings since the Petitioner is not questioning the order of the Legislative Assembly, which appeared in Bulletin part II, which was the subject matter of challenge in the earlier civil Rule, he was not debarred from challenging the aforementioned order as an order of the Tribunal under Article 136 of the Constitution".

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7 ibid, P.360
8 Basant Kumar Wangkhem V. Speaker, Manipur Legislative Assembly SLP (c) No.19126 of 1995, Supreme Court of India decided on November 1, 1995.
A preliminary objection has been raised that the petition under Article 136 of the Constitution is not maintainable in view of the withdrawal of Civil rule referred to earlier on 11th August 1995, by which date the petitioner, in any case, was aware of the order impugned in the petition.

It was further contended on behalf of the respondents that since M. Sharma J. passed order dismissing the Civil Rule No.3284/95 (Goa) Civil Rule No.490/95 (Imphal), the very same order of disqualification was not maintainable.

In Sarguja Transport Services Vs. State Transport Appellate Tribunal,

"The petitioner has withdrawn the earlier petition under Article 226/227 of the Constitution without permission of the Court to file a fresh petition. Later, he filed another petition against the very same order and the High Court summarily dismissed it taking the view that no second writ petition lies against the same order":

In Basant Kumar Wang Khem case the earlier petition was withdrawn without permission to file a fresh petition having been obtained. The Supreme court uphold the High court's view under article 136 that a fresh petition was not maintainable.