CHAPTER IV

EMERGING RELATIONSHIP BETWEEN THE PARLIAMENT AND THE SUPREME COURT OF INDIA

Ever since the unfolding of civilisation and its graduation to modernity, human existence has moved from police state to welfare state. Republican values emanating from concepts like the rule of law, judicial review and independence of the judiciary are cherished in modern democratic polity, wedded to good governance. The doctrine of constitutionalism as enshrined in the constitution of India envisages a welfare state where the state is expected to formulate programmes for providing quality life and social security to its people through legislation and administrative action. Under this doctrine of constitutionalism, the judiciary is empowered to mediate between the demands of the Indian state and the civil society, desperately trying to preserve areas of autonomy from government interference. It is a requirement of the society and the law has to respond to its need.¹

The working relationship of the Parliament and the Supreme Court during the first three decades can be described as an arena of struggle between them in relation to fundamental rights and power of amendment. The period after the emergency, saw yet another development. A divided parliament often seemed incapable of responding to public needs, for example in helping the poor, in curbing pollution and protecting the environment.² The first and the most important change can be seen in 1978 when Supreme Court of India held³ that the right to life and liberty could not be read in isolation. It had to be read with other fundamental rights such as the right to equality in Article 14, which prohibited arbitrariness and unreasonableness in all state actions.⁴ This move of the judiciary is termed as judicial activism. Judicial activism has become a subject of controversy in India. Attempts have been made to curb the power of
courts as well as access to them. In the past, several indirect methods were used to discipline the judiciary, such as supersession of judges or transfers of inconvenient judges. It has often been said that the courts usurped the functions, allotted to the other organs of government. On the other hand, the defenders of judicial activism say that the courts have performed their legitimate function. According to former Chief Justice of India A.M. Ahmadi, “Judicial activism is a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern”.

The supreme court of India has started wielding judicial power in a manner unprecedented in its history of more than thirty years, and through a variety of techniques of judicial activism, it has begun converting much of constitutional litigation into public interest litigation, calculated to bring social justice within the reach of the common man. Wider dimensions are given to fundamental rights. Right to life and personal liberty under Article 21 has been converted into a procedural due process clause. This expanded right has encompassed through a process of judicial interpretation, right to bail, right to speedy trial, right to dignified treatment in custodial institutions and the right to legal aid in criminal proceedings and above all the right to live with basic human dignity.

When one speaks of judicial activism, he immediately reminds of the innovation of Public Interest litigation. Public interest litigation and judicial activism go hand in hand because PIL itself is the result of judicial activism. The innovation of PIL has liberalised the concept of locus standi for those, who, for want of sound economic conditions are deprived to have access to court to seek justice to their just grievances. Any public spirited individual or social action group through the new innovative PIL strategies is allowed to move the court for seeking redressal to the genuine grievances and restituting rights,
claims and entitlements of the poor, down-trodden, ignorant and illiterate. The role of the Indian Supreme Court, especially in recent years, has been one of dynamic activism. It has helped in translating fundamental rights into living realities for the poor, the oppressed and the down-trodden. PIL has been held to be the best method for the vindication of the rights of persons who by reason of poverty, helplessness or disability or socially or economically disadvantageous position unable to seek redress through judicial action. Now any member of the public can approach the courts under Article 32 and Article 226 to seek judicial redress by reason of violation of any legal right. New methods and new strategies have been devised for providing access to justice to large masses of people who are denied of their basic human rights for long and to whom freedom and liberty had no meaning. The court has also succeeded in augmenting and legitimising its moral authority by shifting the focus of judicial review to the humanitarian concept of the protection of the weaker sections of the society.  

In judicial activism, the court has devised new ways and tools in dealing with the cases. The judicial activism has taken through the suo moto initiative by the courts. There are instances when the courts have taken up cases on their own on the basis of newspapers reports. 

The wave of judicial activism and the petitioners of this new kind of litigation brought with them a new kind of lawyering and a novel kind of judging. An activist role had started being performed by some of the judges in India both in Supreme Court and High Courts which was a sign of their independence within the framework of the Constitution.

**Emergence of Judicial Activism** : India, for centuries, has been a home of social systems which bred inequality, exploitation and injustice. The disadvantaged, down trodden and depressed classes
which have been named as notified communities, the scheduled castes and tribes, landless labours and such other groups have not only suffered economic exploitation but have undergone and are still being subjected to social indignities of all kinds. The system implies to them bondage for generations and have lived a stigmatized and respective existence, generation after generation. They are socially oppressed and work in primitive and sub-human conditions. Poors are hardly aware of their rights. The urban society suffers from agony of environmental pollution, food and drug adulteration, sanitation, medicare, labour exploitation and misuse of public power and funds. There are serious challenges before the laws of welfare state, such as, sanitary structures, garbage, starvation deaths, discharge of trade effluents into the rivers, failure of drug and educational policy, nepotism in medical education, corruption of ministers and officials, misuse of public money, non enforcement of schemes of rehabilitation of retired army personnel, political abuse of ordinance making power, decline in political morality etc. As a result thereof, Indian courts continued to be governed by the old and archanic concepts of 'Locus standi' and remained accessible only to the rich people. But in the Indian perspective, social justice primarily meant justice to the depressed and the oppressed. In 1976, India has inserted a new Article 39-A in Part IV of the Constitution incorporating a Directive Principle to the effect, “the state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. But even then, the old rules of procedure and the laws relating to 'Locus Standi' continued to be protected and were not materially altered by the courts.

It was for the Supreme Court of India to rise up to the occasion
with activist magnitude and boldly come out of the 'crippling inhibitions' of the old legal order as to access to justice. Justice Bhagwati in *judges' Transfer case*\(^1\) had referred to these rules of procedure, very often created by the courts themselves, requiring satisfaction of and compliance with various intricate and perplexing, pre condition and forensic formalities before a person could be allowed to seek redress in court. In the *Asiad case*\(^1\), the judges said that the time has now come when the courts must become the courts for the poor and the struggling masses of the country and they must shed their character as upholders of the established order and the status quo and they must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. Consumer protection and prevention of environment from pollution were the highest potential areas which could get a new perspective in this type of litigation. The supreme court of India assumed the role of a creator, law reformer, and a savior of the teeming million have-nots and starved. Soon there came a new wave of judicial activism which started changing the face of judiciary. It was in this process that, PIL was born. As an outcome of judicial activism, it is a methodology, an instrument, a process of the court and a system, through which humanitarian concept of protection of weaker section of society is introduced in the administration of justice for giving them preferential treatment. Problems have started coming before the court through PIL.

Mainly, the judicial activism in present days has arisen mainly due to the failure of the executive and legislatures to act and for this thus main culprits have been the politicians. Instead of working for the general welfare of the people, they have been involved in self aggrandisement and corruption. As a result, a vacuum was created in which the governmental machinery seemed to be totally helpless or even connived with the corrupt politicians. The vacuum was filled in
by the judiciary. Many scams came out as a result of a PIL, filed in the Supreme Court. The violation of basic human rights have been another reason for judicial activism. The Parliament did not do anything for the protection of human rights. It was only through the Supreme Court’s interference in many cases. Further, some of the provisions have been misused and abused and there seems to be no remedy. For example, Article 356\textsuperscript{16} of the Constitution, every party has criticised it for its political misuse. But when they came to power, they themselves misused it for their political advantages. As a result, democracy is often denied in the states for the sake of the party or parties in power at the centre. Again the Supreme Court had to intervene\textsuperscript{17} and consequently Article 356 has become justifiable.

PIL may be defined as litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective diffused rights and interests or vindicating public interest.\textsuperscript{18} The power of the Supreme Court of India to enforce fundamental rights is derived from Article 32 of the constitution.\textsuperscript{19} It gives citizens the right to directly approach the Supreme Court for seeking remedies against the violation of these fundamental rights. This entitlement to constitutional remedies is itself a fundamental right and can be enforced in the form of writs evolved in common law such as \textit{habeas corpus, mandamus, quo warranto, prohibition} and \textit{certiorari}. Besides the Supreme Court, the High courts located in the various states are also designated as constitutional courts and Article 226 permits citizens to file similar writs before the High Courts.\textsuperscript{20} With the advent of PIL in recent decades, Article 32 has been creatively interpreted to shape innovative remedies such as 'continuing mandamus' for ensuring that executive agencies comply with judicial directions. In this category of litigation, judges have also imported private law remedies such as injunctions and stay orders into what are essentially public law related matters.\textsuperscript{21} Successful challenges against statutory
provisions result in relief such as the striking down of statutes or even reading down of statues, the latter implying that courts reject a particular approach to the interpretation of a statutory provision rather than rejecting the provision in its entirety.

Beginning with the first few instances in the late 1970's, the category of PIL has come to be associated with its own 'people friendly procedures. The foremost change came in the form of the dilution of the requirements of 'Locus Standi' for initiating proceedings. Since the intent was to improve access to justice for those who were otherwise too poor to move the courts or were unaware of their legal entitlements. The court allowed actions to be brought on their behalf by social activists and lawyers. In many instances, the Supreme Court took suo-moto cognizance of matters involving the abuse of prisoners, bonded labourer and inmates of mental institutions, through letters addressed to sitting judges. This practice of initiating proceedings on the basis of letters has now been streamlined and has come to be described as epistolary jurisdiction.

Some instances of Judicial activism in India

The Judicial activism has been a technique to prevent legislative tardiness and executive discretion. Through various cases, like Maneka Gandhi\textsuperscript{22}, Sunil Batra\textsuperscript{23}, Bhandhua Mukti Morcha\textsuperscript{24}, Francis coralic cases\textsuperscript{25}, it has shown its firm commitment to participatory justice, immediate access to justice and preventing arbitrary state action. There are some more examples of judicial activism in India.

Environment Pollution: The cases raising questions of environmental degradation were really speaking cases against inaction of the state or wrong action of the state. The court entertained a petition by residents of Bangalore, objecting to the approval of a development scheme that was likely to adversely affect the quality and
quantity of water of river. In another case, the court held that in matter of environment, the burden of proof will lie on the party that wants to change the status quo.

In environmental litigation, the court is at times faced with difficult policy choices. The running of factories may be hazardous to the health of people in the surrounding area but their closure may result in unemployment of the factory workers. In *M.C. Mehta VS Union of India*, the court directed the closure of 168 industries and their relocation to another place. The workers of the industries could either take up employment at the relocated place or be retrenched. If they chose to continue to be employed at relocated place, they were to get their wages during the period of shifting of the industries and one year’s wages as shifting bonus. Those who opted not to continue at the relocated place were to be considered as retrenched within the meaning of section 25 (f) (1) of the Industrial Disputes Act and were to get one year’s wages plus retrenchment compensation as provided under that Act. After relocation, the company could not absorb all the employees by the date specified in the order of the court since the factory had not become fully operational.

The Supreme Court ordered that all vehicles older than fifteen years should be discarded because of the polluting potential. It was, however, argued that such a ban caused harm to the vehicle owners. The court therefore amended the directions and provided a means by which they could be gradually rid of. In another case, the Supreme Court gave directions against hazards of diesel emissions. The Court also held that the manufacturers of diesel vehicles were liable for violation of the right to life of the people caused by air pollution.

**Child Welfare**: In *Lakshmi Kant Pandey VS Union of India*, a writ petition was filed on the basis of a letter complaining of malpractices indulged in by social organisation and voluntary agencies engaged in
the work of offering Indian children in adoption to foreign parents. It was alleged that in the guise of adoption, Indian children of tender age were not only exposed to the long dreadful journey to distant foreign countries at great risk to their lives but in case they survive, they were not provided any shelter and relief homes and in course of time they became beggars or prostitutes for want of proper care. The court laid down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents. With the object of ensuring the welfare of the child, the court directed the government and various agencies dealing with the matter to follow these principles in such cases as it is their constitutional obligation under Articles 15 (3) and 39 (c) and (f) to ensure the welfare of the child.

Supreme Court in Sheela Barse Vs Union of India,\textsuperscript{32} directed the central government to pay to the petitioner, a social worker, Rs. 10,000 for the expenses and to extend all necessary assistance who offered to personally visit different parts of the country to verify whether the information submitted by the authorities regarding children below the age of 18 years, detained in jails in different states of the country, was correct. The court directed that the children’s acts enacted by various states be must brought into force and their provisions be implemented vigorously. It is desirable that parliament should pass a central legislation on the subject.

In Gaurav Jain Vs Union of India,\textsuperscript{33} the court rejected the demand for providing separate schools and hostels for children of prostitutes as it was not in the interest of such children. The application under Article 32 was made through PIL asking for direction to the government for making such provisions for children of prostitutes.

\textbf{Protection of women} : In a significant judgment in Vishaka Vs
the Supreme Court has laid down exhaustive guidelines for preventing sexual harassment of working women in place of their work until a legislation is enacted for this purpose. The court held that it is the duty of the employer or other responsible person in work place and other institution, whether public or private, to prevent sexual harassment of working women. The immediate cause for the filing of this writ petition was the alleged brutal gang rape of a social worker of Rajasthan. The court directed the employers to set up procedure through which working women can make their complaints heard. The court held that the court has the power under Article 32 to lay down such guidelines for effective enforcement of fundamental rights of working women at their work places and declared that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution.

Next, in a significant judgment in *Gaurav Jain Vs Union of India*, the Supreme Court has issued a number of directions to the government and all social organisations to take upon appropriate measures for prevention of women in various forms of prostitution and to rescue them from falling them again into the trap of red light areas and to rehabilitate their children through various welfare measures so as to provide them with dignity of person means of livelihood and socio economic improvement. The court also held that under Article 32 of the Constitution the court has power to adopt such procedure as is expedient in a given fact and situation and deal with the matter appropriately therefore, the rigours of the pleading or the relief’s sought for on adversial litigation has been soften, new methods tools and procedures have been evolved to meet out justice and to enforce fundamental rights.

**Enlargement in The Scope of Fundamental Rights**: Article 12 to 32 of the Indian Constitution pertain to fundamental rights of the
citizens. It may be appreciated that declaration of fundamental rights in the Constitution cannot be of much avail if no machinery is provided for their enforcement. The Constitution confers this protective role to the Supreme Court and the High Courts. While performing this duty, the Supreme Court has given new dimension to Fundamental Rights. According to Articles 32 and 226, the Supreme Court and the High Courts can issue various writs, orders and directions for the enforcement of these fundamental rights by virtue of Article 32 and 226.

In the early 1950s and 1960s, the emphasis was more on Property Rights and Land Rights. But today, the Supreme Court takes human suffering seriously. The orders and directions issued by the Supreme Court have resulted translating fundamental rights from dry and parchmat promises into a living reality. For instance, right to life is a fundamental right. The Supreme Court has interpreted 'Life' not merely to mean physical existence but to include quality of life and the right to live with dignity. This means, the right of every citizen to get pollution free air and pollution free water. The Supreme Court, while deciding the cases related with the fundamental rights has broadened the fundamental rights so as to make them more effective and realistic, such as:

(i) **Protection of Life and Liberty**: Under Article 21, the Supreme Court of India, initially, followed a policy of adhering to a narrow doctrine and tended to shy away from the development of the law. In 1950, in *A. K. Gopalan 's Vs State of Madras case*, where the validity of the Preventive Detention Act, 1950 was challenged, Supreme Court gave a rather narrow and limited interpretation upon Article 21 of the Constitution. It was held in the case that the procedure established by law means 'procedure established by law made by the state' and therefore
the court refused to infuse in that procedure, the principles of natural Justice. The judgment was mainly based on the language of the Constitution. But the doctrine of exclusivity of Fundamental Rights as evolved in Gopalans case was changed by the same Supreme Court in *Haradhan Saha Vs State of West Bengal case*. The Supreme Court observed while reviewing the rationality of the Maintenance of Internal Security Act, 1971, that a detention order passed during the pendency of the prosecution would not be invalid.

The *Maneka Gandhi Vs Union of India case* shows how liberal tendencies have influenced the Supreme Court in the matter of interpreting Fundamental Rights, particularly, Article 21. In this case, petitioner Maneka Gandhi’s passport was impounded in public interest under section 10 (3)C of the Passport Act, 1967. Maneka Gandhi filed a writ petition challenging the Fundamental Rights under Article 21. A great change has come about in the judiciary's attitude towards the protection of personal liberty after the traumatic experiences during the emergency (1975-77). The Supreme Court in *Maneka Gandhi’s case* held that the procedure contemplated by Article 21 must be ‘right, just and fair’ and not arbitrary. The path from Gopalan to Maneka Gandhi was covered by an attempt of the Judiciary to mould and shape the law to respond to the society's desire that liberty must be effectively protected.

The Supreme Court in *Unni Krishnan Vs State of Andhra Pradesh case* has asserted that Article 21 is the heart of the Fundamental Rights. The Supreme Court of India has come to impose positive obligation upon the state to take steps for ensuring to an individual, a better enjoyment of his life and dignity under following cases:

(a) **Quality of Life**: An important judgment was given by the
Court in expanding the scope of Article 21 in *Frances Coralie Vs Administrator, Union Territory of Delhi* case upholding the right of a detenu to have interviews with her friends and family members. It observed that life in Article 21 does not mean merely animal existence but living with human dignity.

In another case which was regarding the regulation of employees and is known as *D.T.C. Vs D.T.C. Mazdoor Congress case*, the Supreme Court observed that "the right to life includes right to livelihood."

(b) **Right to Medical aid**: The Supreme Court in *Parmanand Katara Vs Union of India* has highlighted a serious problem, that the doctor's usually refuse to give immediate medical aid to the victim till legal formalities are completed. The Apex Court clarified that preservation of life is of paramount importance. It is the duty of the doctors to preserve life whether the concerned person be a criminal or an innocent person.

(c) **Right to Shelter**: The Supreme Court has emphasized upon the right to shelter and has expounded its own concept of a shelter. The Court has held that right to shelter is a Fundamental Right which springs from the right to residence assured in Article 19 and right to life under Article 21 of the Indian Constitution. For example, in the cases of *Shantisar Builders Vs Narayan Khimlal Totam case* and *U. P. Avas Evam Vikas Parsad Vs Friends Co. op. Housing Society Ltd. case.*

(d) **Right to Education**: The Supreme Court has implied the "Right to Education" as a Fundamental Right from Article 21. In *Mohini Jain Vs State of Kamataka case* while discussing the validity of an Act passed by Karnataka Legislature regarding the regulation of tuition fee in Private Medical Colleges of the State,
the Court said that it is right that the Constitution does not expressly guarantee the right to education, as a Fundamental Right. But the right to education flows directly from the right to life and that the right to education being concomitant to the Fundamental Rights, the state is under a Constitutional mandate to provide educational institutions at all levels for the benefit of the citizens.

(e) Right to Privacy: In *R.M. Malkani Vs State of Maharashtra case*\(^46\) and *People's Union for Civil Liberties Vs Union of India case*\(^47\), the Supreme Court stated that the telephone conversation is an important facet of a man's private life. The right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as right to privacy.

(f) Right to Life: The Supreme Court of India in *Gian Kaur Vs State of Punjab case*\(^48\), while deciding that if attempt to commit suicide is not regarded as penal then what happens to someone who abets suicide, observed that the right to life is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'.

(g) Protection against Solitary Confinement or Handcuffing: The Supreme Court has given right to protection against solitary confinement and handcuffing etc. in the cases of *Sunil Batra Vs Delhi Administration case*\(^49\) and *D. K. Basu Vs State of West Bengal case*\(^50\), by defining the scope of Article 21 to include within it's fold, the right to live with human dignity because the dignity of man superseeds all other
considerations. In *Sunil Batra Vs Delhi Administration case*, there were two petitioners confined in Tihar Jail, who challenged the vires of section 30 and section 56 of the Prisons Act and in second case the question of custodial deaths has been considered in depth by the Supreme Court.

**(h) Death Sentence** : The question of constitutional validity of death sentence has been raised before the Supreme Court several times under Article 17, 19 and 21. In *Attorney General of India Vs Lachna Devi case*\(^5\), the Supreme Court has ruled that execution of a death sentence by public hanging would be barbaric practice and it clearly contravenes Article 21. The Supreme Court in *Allaudeen Main case*,\(^5\) reiterated the proposition that only in those exceptional cases in which the crime is so brutal, diabolical and revolting as to shock the collective conscience of the community, would it be permissible to award the death sentence.

**(ii) Expansion of Women Rights** : The Constitution of India does not contain adequate provisions specifically favouring women as such. There are Article 15 (3), 14, 21 which can be used to spell out some safeguards for women. The Supreme Court has in course of time by its interpretative process of these various constitutional provisions extended some safeguards to women. Reference may be made to a few of these judicial pronouncements:

Recognising that women in India need to be liberated from unjust social, political and economic suppression, the Supreme Court has declared in *Bodhisattwa Gautam Vs Subhra Chakraborty case*,\(^5\) that rape is a heinous crime against a woman and amounts to violation of the Fundamental Rights guaranteed to a woman under Article 21.
In *Vishaka Vs State of Rajasthan case*, the Court has gone further and recognized the right of a rape victim to claim compensation from the offender for violation of her constitutional right to live with human dignity which is guaranteed to her by Article 21.

The Court has reiterated this view in *Chairman, Railway Board Vs Chandrima Das case*, where a Bangladeshi woman was gang raped by a few railway employees at Sealdah Railway Station. The Court ordered compensaton to her to the tune of Rs. 10 lakhs for violation of her rights under Article 21. The validity of Muslim Women Act 1986, was challenged in *Danial Latife Vs Union of India case*. Here the Supreme court observed that a woman who is major has the right to go anywhere and live with anyone she likes, without getting married. This may be regarded immoral by society but it is not illegal.

There is a difference between law and morality. The Supreme Court on 21 September 2005 dismissed a petition filed by former D.G.P. of Punjab K.P.S. Gill seeking review of the judgment upholding his conviction for outraging the modesty of a woman I.A.S. officer *Rupan Deol Bajaj case*.

(iii) **Ensured the enforcement of Labour Laws by Government** : In the field of Labour Law, the Supreme Court has, through its changing role, ensured the enforcement of Labour Laws by the Government and its contractors responsible to follow the law. In *Peoples Union for Democratic Rights Vs Union of India case*, a writ was brought before the Supreme Court by PIL for observance of various Labour Laws. The Court relied on Article 24 of the Constitution under which no child below the age of 14 years can be employed to work in any factory or mine or engaged in any other hazardous employment.

Another case on violation of Labour Laws was *Sanjit Roy Vs State of Rajasthan case*, which was filed because the payment of
wages by the State was lower than the Minimum Wages Act. The Supreme Court observed that Article 23 mandated that nobody could be required or permitted to provide labour or service to another on payment of anything less than the minimum.

In *Azad Rickshaw Pullers Union, Amritsar Vs State of Punjab case*, the Punjab Cycle Rickshaw Law Act, 1976 was challenged. The Court got several banks to agree to advance loans to rickshaw pullers for purchase of rickshaw which would be hypothecated to the banks and loan repaid in easy installments. This is a glaring example of how the courts go beyond their field of allowing or dismissing the petition and help to solve the problems of the economically disadvantaged sections of the society. This is a case when the Court has played a real activist role.

(v) **Expansion to other Fundamental Rights**: The Supreme Court has deduced the Principle of "equal pay for equal work" from Article 14, 16 and Preamble to the Constitution. No such principle is expressly embodied in the Constitution but the principle has now matured in a Fundamental Right. As the *State of Madhaya Pradesh Vs Pramod Bhartiya case*, which was filed on the basis of Arts 14 and 16 of the Indian Constitution, the Supreme Court explained the doctrine of "equal pay for equal work" as implicit in the doctrine of equality enshrined in Article 14, and flows from it. The rule is as much a part of Article 14 as it is of Article 16.

In *Kshetriya Kisan Gramin Bank Vs D.B. Sharma case*, the Supreme Court observed that the principle of "equal pay for equal work" does not apply when the employers are different. Employees of Regional Rural Banks sponsored by a Co-operative Bank cannot claim the same salary as the employees of Regional Rural Banks which are sponsored by the Commercial and Nationalised banks. The Supreme Court has ruled in *Balaji Raghavan Vs Union of India case*, that the
national awards like, 'Bharat Ratna, Padma Vibhushan' etc. awarded by the Government of India are not 'titles' within the meaning of Article 18. These awards are not volatile of the principles of equality as guaranteed by Article 14 and 18. The case was filed under Art 18(1) which prohibits the state from conferring any 'title' except a military or academic distinction. Giving a broad dimension to Article 19 the Supreme Court in *State of U.P. Vs Raj Narain case*, held that Article 19 not only guarantee freedom of speech and expression, it also ensures and comprehends the right of citizen to know, and to receive information regarding matters of public concerns.

In *K. A. Abbas Vs Union of India case*, the Supreme Court has upheld censorship of films under Article 19 on the ground that films have to be treated separately from other forms of art and expression because an emotional picture is able to stir up emotions more deeply than any other product. A film can therefore be censored on the grounds mentioned in Article 19. A case was registered under IDR Act which provides the Central Government with the means of implementing their industrial policy which is known as *Khoday Distilleries Ltd. Vs State of Karnataka case*, the Supreme Court held that a citizen has no Fundamental Right under Article 19 to do business in activities which are immoral and criminal and goods which are obnoxious and injurious to health, safety and welfare of general public.

In a significant judgment, the Supreme Court observed on November 5, 2004 that the Governor of a state could independently accord the Fundamental Right of a person to carry on any business. Rule 7 (3) provides that no advertisements shall be permitted, the objective whereof is a religious or political nature and advertisements must not be directed towards any religious or political end.

In a historic judgment delivered on August 6, 2003, the Supreme Court of India ruled that government employees had no
Fundamental Right to go on a strike even for a just cause. The bench reiterated its earlier-observation that the Fundamental Rights of the people as a whole could not be subservient to the claim of the Fundamental Right of an individual or only a section of people.68

In a landmark judgment delivered on August 12, 2005, the Supreme Court of India held that unaided institutions, minority or non-minority, as they are not deriving any aid from state funds, have unfettered Fundamental Right to choose students and the procedure, subject to its being fair, transparent and non-exploitative. The Court allowed a 15% quota for NRI students in private colleges and permitted them to charge higher fees.69

The Supreme Court on March 22, 2005, laid down a fourth reason for which employees can be dismissed, "gheroing", or laying siege to officers. The Supreme Court had earlier ruled that sleeping during office hours, using abusive language against seniors and assaulting seniors and assaulting superior officers at work place constituted grounds for dismissing employees.70

The Apex court on October 21, 2005 held that the employees engaged on contract for a specific job, could not claim regularisation, as their service would be strictly guided by the terms and conditions of the contract under Article 14 of the Constitution of India.71

The liberal rule of locus standi has helped social actions group to come to court on behalf of disadvantaged section of the society groups such as the people's union for civil rights. People's union for democratic rights etc., similarly under trial prisoners, prison inmates, unorganised labour founded labour, pavement dweller, children and women in protective custody were able to receive the courts attention. The court also went into allegations of the killing of innocent people or suspected accused through false encounters, death of persons in police custody because of fortune, the case of binding prisoners by the police, for controlling occupational health hazards and diseases to
workers in asbestos industry for banning import, production and
distribution and sale of insecticides that causes health hazards.\textsuperscript{72}

\textbf{Taking Responsibilities for Free and Fair Elections :} The
electoral process is a crucial process for a Democracy. It must be free
from the misuse of money and muscle power which are not conducive
to free and fair elections. On January 1, 1990 the President issued
two notifications under Article 324 (2), rescinding the 1989
notifications, creating the two posts of Election Commissioners and
appointing two persons to these posts. The question arose whether
these notifications were constitutionally valid. The Supreme Court of
India in this case which is known as S.S. Dhanoa Vs Union of India
\textit{case}.\textsuperscript{73} has laid down an important proposition regarding the
composition of the Election Commission. The Court observed that
when an institution like the Election Commission is entrusted with
vital functions and is armed with exclusive and uncontrolled powers
to execute them, it is both necessary and desirable that the powers
are not exercised by one individual, however wise he may be.

On May 28, 1993 the Election Commission issued a directive
and made it clear that no polling at elections shall take place after
January 1, 1995 unless all eligible electors have been supplied with
identity cards. The Supreme Court granted interim stay and directed
that the Election Commission shall not withhold the elections to the
Legislative Assembly of Bihar and Orissa on the ground that the said
governments had failed to complete the process of issuance of photo
identity cards by the deadline prescribed by it.\textsuperscript{74}

Not only this, the Supreme Court of India passed a landmark
judgement in \textit{Common Cause, A Registered Society Vs Union of India
\textit{case}}\textsuperscript{75} where the question was about the election expenses incurred
by political parties. In the judgement, the Apex Court held that the
Election Commission has the power to call for details of money spent
by political parties in elections. On the basis of ruling of the Supreme Court, the Commission started the practice of obtaining the accounts of election expenditure incurred by political parties during elections.

On May 2, 2002 the Supreme Court passed a historic judgement in which the Court directed the Election Commission to issue certain directions to candidates for filing an affidavit detailing information about themselves. This was done to stop criminalisation of politics. In the matter of special Reference No. 1 of 2002 (Gujarat Assembly Election Matter), the Supreme Court’s decision gives some flexibility to frame the time table to hold election to a prematurely dissolved house. But the overall time frame for the purpose is six months from the date of dissolution. The Court has emphasized that free and fair elections are the sine qua non of democracy which is the basic feature of the Constitution.

Fortunately, the Supreme Court again came forward as guardian of people's right to information. In its judgement dated March 13, 2003 the Supreme Court declared the Amended Electoral Reform Law as unconstitutional and restored its May 2, 2002 verdict. The Court also directed the Election Commission to issue a fresh notification for the implementation of its judgement.

The Supreme Court of India banned on April 2, 2004 the telecast of all political or surrogate advertisements on cable networks and television channels which offended public morality, decency and religious susceptibility.

On October 22, 2005 the Supreme Court came down heavily on election authorities for laxity in scrutiny of nominations, especially in cases of Scheduled caste and Scheduled tribe candidates to check any fraudulent claims against reserved seats. It held that such acts were nothing but a fraud on the Constitution and deserved to be dealt with strictness.

The Court said that the provision of reservation for the Schedule
Caste and Schedule tribes communities was provided as a "protective measure which should not be allowed to be misused".\textsuperscript{80}

**Dismantling the Barriers of Poverty :** Article 14 of the Indian Constitution guarantees that the state shall not deny to any person equality before law or equal protection of law. Neither race, nor religion, nor sex, nor place of birth can bar any citizen from enjoyment of constitutional privileges, immunity from due process and equal protection of Law.\textsuperscript{81} The Supreme Court of India has made it a point to see that indigence no longer deprives the poor from the opportunity to seek justice.

Next, in *Hussainara Khatoon Vs State of Bihar* case,\textsuperscript{82} the writ petition for habeas corpus disclosed that a large number of persons were languishing in jails awaiting trial for years, simply because they were too poor to furnish bail. The Bench observed that under a constitutional system which promises social equality to all its citizens, the deprivation of liberty for the reason of financial poverty only, is an incongruous element in a society aspiring to achieve these constitutional objectives.

In *Kadra Pahadia Vs State of Bihar* case\textsuperscript{83} where several under trials were languishing in jail for 8 years without their trial having made any progress. The Supreme Court held that the indigent had a right to free legal service which could be enforced. In another case which is known as *Sukh Das Vs Union Territory of Arunachal Pradesh* case,\textsuperscript{84} the Supreme Court held that, if in a criminal trial the indigent accused was not offered legal aid, and he could not be represented by a lawyer due to indigence and consequently, was convicted, the conviction was vitiated and liable to be set aside. Here the Court made it obligatory for the Magistrate or the Session Judge to tell the accused that legal aid was available at State's cost, and to provide the same unless the accused refused to accept the same. In this way, the
Supreme Court is attempting to equalise the rich and the poor.

**Introduction to Right to Speedy Trial**

The Supreme Court of India in *State of Maharashtra Vs Champalal case* observed that in deciding a question whether there has been denial of right to speedy trial, the court is entitled to take into consideration whether the defendant himself was responsible for a part of the delay and whether he was prejudiced in the preparation of his defence by reason of delay, or whether the delay was unintentional, caused by overcrowding of the court's docket or the understaffing of the prosecutions. The Court asserted that the conviction cannot be quashed on the ground of delayed trial only. It depends upon the facts and circumstances of the case and there will be no justification to quash the conviction on the ground of delay only.

Supreme Court in *Sheela Barse Vs Union of India case*, while hearing an appeal for the violation of Article 39 of the Constitution (Directive Principles) the Supreme Court had set a time frame for the trial of young offenders. The judgement delivered by Chief Justice P.N. Bhagwati directed that where a complaint is filed or first information report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than seven years. The investigation shall be completed within three months from the date of filing complaint or FIR and if the investigation is not completed within three months, the case should be treated as closed. If however, the charge sheet is filed within three months, the case will be tried and disposed off within a period of six months. This period should be inclusive of the time taken up in committal proceedings. This case, by setting deadline for investigation, trial and disposal of criminal cases against child offenders has initiated a trend to tighten the government's machinery and to awaken them to their duties and fundamental liberties of the under trials. The Supreme Court has
observed in *P. Ramachandra Rao Vs State of Karnataka Case*, which comes under the area of criminal justice that it is neither advisable nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings.

**Enforcement of Rule of Law**: Supreme Court also enforces accountability by enforcing the basic tenet of the Rule of law, which is 'However high you may be' the law is above you. There are instances of spate of cases against ministers that proceeded at a very tardy pace. The investigating authority, which was under the control of the Prime Minister's office did not pursue there investigations to their logical conclusion. When a public spirited person went to the Supreme Court to claim that although these were serious charges, these matters had been pending for months and years, with little being done to solve these, the Court sprang into action and directed the investigating authorities to carry-out their duties under the criminal procedure code, irrespective of the high status of those involved. The authorities were asked to expedite their investigations and to report to the court about the course of their investigations. On September 18, 2003 the Supreme Court set in motion the legal process against the former U.P. Chief Minister Miss. Mayawati, the former State Environmental Minister. Mr. Nassemuddin Siddiqi and six officials in the Rs. 175 crore Taj corridor scam by directing the CBI to register FIR against them.

Three judge bench of the Supreme Court of India directed the CBI on March 15, 2004 to investigate 48 Fake stamp paper scam related cases across 12 states and submit a status report in just four months. The bench of the Apex Court directed the 12 states to provide necessary infrastructure and resource facilities to the CBI for taking over these cases for investigation.

The Supreme Court recently ordered transfer of the Chief
Secretary of U.P., Neera Yadav to some other post in the cadre/grade to which she belongs. Corruption charges were questioned against her in the Noida Scam. The Bench directed that, steps to give effect to the order should be taken within seven days.\textsuperscript{90}

**Directing the Governments to do Their Duties:** The Supreme Court gives new directions to the Central Governments and State Governments to do their functions for maintaining the rule of law.

The Supreme Court delivered the judgement in *Indra Sawhney Vs Union of India case*\textsuperscript{91} in 1992 in which appeal was made under Article 16, the Court required the states to appoint commissions to identify the creamy layer amongst the backward classes.

Regarding water disputes between states, the Supreme Court in *State of Haryana Vs State of Punjab case*,\textsuperscript{92} issued a mandatory injunction directing the state of Punjab to complete the Satluj-Yamuna link cannal and make it functional within a year. The Court also directed the Central Government to discharge its own constitutional obligation to ensure that the canal is completed as expeditiously as possible.

In a significant judgement, the Supreme Court has directed all States and Union Territories to immediately issue orders banning smoking in public places and public transports, including railways.\textsuperscript{93}

The Union government was restrained from proceeding with the privatization of the Hindustan Petroleum Co. and the Bharat Petroleum Co. Ltd. by the Supreme Court on September 16, 2003 on the ground that disinvestments in them could not be done without prior approval of the Parliament. In a bid to improve the notoriously low compliance rate of the Dowry Prohibition Law, the Supreme Court on May 3, 2005 directed the Centre and States to require all male employees to disclose whether they had taken dowry.\textsuperscript{94}

On May 4, 2005 taking cognizance of a letter of a noted wildlife
conservationist detailing the fall in tiger, population in almost all reserved forests across the country, the Supreme Court has issued notice to the Centre seeking its reply why CBI probe could not be conducted about the "depleting" population of the species in other sanctuaries as had been done by the agency in respect of Sariska in Rajasthan.95

**Evolution of The Trend of Compensation** : The trend of payment of compensation evolved by *Rudal Shah*96 and *Deoki Nandan cases*97 are a welcome development to make the government pay for its maladministration due to which the peace of mind and the personal liberty is unnecessarily taken away. *Rudal Shah Vs The State of Bihar* case was not a case of undertrials awaiting trial in prisons but was a peculiar case where a person was acquitted by the court but was not released by the jail authorities for fourteen years of his life. The question before the Court was whether in the exercise of its jurisdiction under Article 32, the court could pass an order for payment of money. Thus, in this case, the petitioner was granted a compensation of Rs. 35,000. *Deoki Nandan Pd. Vs State of Bihar case* also happens to be against the State of Bihar. The petitioner was a retired person but his pension was withheld by the government. The Supreme Court passed the order for the payment of his pension and Rs. 25,000 as compensation.

In another case, *Oraon Vs State of Bihar case*,98 the Supreme Court awarded Rs. 15,000 as compensation to an undertrial prisoner who had unnecessarily been detained in a lunatic asylum for six years and was found to be fit to be discharged.

In *A.S. Mittal Vs State of U.P. case*,99 one hundred and eight patients were operated upon for cataract and other diseases of the eyes in an eye camp organised by the Khurja Lions Club, and the eyes operated upon were damaged irreversibly due to normal saline used
on the eyes at the time of surgery. The case was filed in form of PIL. The Court ordered the State government to pay a sum of Rs. 5,000 and an additional sum of 12,800 to each victim of the tragedy.

The Supreme Court has upheld the award of Rs. 40,000 compensation per acre to the residents of five villages in Amritsar district for acquiring of their land by Army for expansion of cantonment in 1977, fixed by the Punjab and Haryana High Court.100

Curtailment in The Remission Power of The Executive by The Supreme Court: On September 16, 2005 in Md. Munna Vs Union of India and others case,101 the Supreme Court relying on Gopa Vinayak Godse Vs State of Maharashtra case102 reiterated that life imprisonment was to be understood as imprisonment for life, subject to the remission power of the Executive, that life imprisonment means imprisonment for life has been pronounced by the Supreme Court periodically in a number of cases over the years. However, reading sections 432 and 43 3A of the code of criminal procedure together makes clear that the appropriate government can exercise its powers of remission at any stage, except in serious offences where the convict must serve minimum 14 years before remission or commutation.

In the case of Dalbir Singh Vs Punjab103 the Supreme Court noted that life imprisonment may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large.

The Supreme Court in a series of decisions over the past decade, has set a minimum period of 2 years in awarding life sentences. The Supreme Court went one step further when in Subhash Chander, etc Vs Krishan Lal & others case,104 the Court ruled that for the accused-Krishan Lal, the imprisonment life shall be the
imprisonment in prison for the rest of his life.

In this context, the recent Supreme Court's judgement in *Md. Munna's case* is perhaps more important that it initially appears to be, as it acknowledges the state's primacy over remission and commutation powers. Decisions of the Supreme Court of India on the issue of appointment of judges, especially the 'word' consultation has generated lot of discussion.

Thus it become clear, when the two political branches of the government viz, the legislature and the executive fail to discharge their respective functions, there will be a collapse of respective functions, there will be a collapse of responsible government. Since a responsible government is the hallmark of a successful democracy and constitutionalism, its collapse warrants many a drastic and unconventional steps. When the parliament fails to make the necessary law to suit the changing times and when the governmental agencies fail miserably to perform their administrative functions sincerely and with integrity, it would lead to an erosion in confidence in the constitution and democracy, among the citizens. In such type of situation, the Supreme Court legitimately step into the areas usually embarked for the legislature and executive.\(^{105}\) For this purpose, the court, because much more accessible and its doctrinal law because much more people oriented it adopted time strategies (i) it reinterpreted the provisions of the fundamental rights more liberally so as to maximise the rights of the people and particularly the disadvantaged sections of the society and (ii) it facilitated access to the courts by relaxing its technical rules of locus standi, entertaining letter petitions or acting suo moto and developing a public law, proactive technology for the enforcement of fundamental rights.
JUDICIAL ACTIVISM AND PARLIAMENT: EMERGING RELATIONSHIP:

In the 1980s, the Supreme Court has concluded that Parliament is unable to act in the public interest. Perceiving a vacuum in governance, it began to hand down important judgements dealing with constitution, the weaker sections of society and the environment. The relationship between Parliament and Supreme Court has been also changed due to the judicial activism or the Activist role of judges. To get into the details of the confrontationist situation it would be revealing to analyse the following facts with reference to each of the cases mentioned above.

Judicial Review and Ninth Schedule:

After the end of emergency period the Supreme Court was again asked to pronounce upon the validity of constitution first and fourth amendment acts in Woman Rao's case. The Supreme Court by majority held that all amendments to the constitution which were made before April 24, 1973 including those by which the Ninth schedule to the constitution was amended from time to time were valid and constitutional. But amendments to the constitution made on or after that date by which the ninth schedule was amended were left open to challenge on the ground that they were beyond the constituent power of parliament because they damaged the basic structure of the constitution.

The court observed,

"The constitution (First amendment) Act, 1951 which introduced article 31-A into the constitution with retrospective effect, and section 3 of the constitution (fourth amendment) Act, 1955 which substituted a new clause (1), sub-clauses (a) to (e), for the original clause (1) with retrospective effect, do not damage any of the basic or essential features of the constitution or its basic structure and are
valid and constitutional being within the constituent power of parliament.

We hold that all amendments to the constitution which were made before April 24, 1973 and by which the IX schedule to the constitution was amended from time to time by the inclusion of various Acts and regulations therein, are valid and constitutional. Amendments to the constitution made on or after April 24, 1973 by which the IX schedule to the constitution was amended from time to time by the inclusion of various Acts and regulations therein, are open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of the parliament since they damage the basic or essential features of the constitution or its basic structure.”

So the Supreme Court upheld the basic structure doctrine and specifically stated that though Ninth Schedule and Article 31-B in themselves were not violative of basic structure of the constitution, any amendment or additions to the schedule after Kesavananda Bharti would have to be examined with respect to the alteration of the basic structure of the constitution. But parliament continued to add Acts to the Ninth Schedule, to escape judicial review and many of these acts were unrelated to land reforms which formed the basis of creation of the ninth schedule in 1951.

After that in S.P. Sampat Kumar V/s Union of India the constitutional validity of Act 323 A and the provisions of Administrative Tribunals Act, 1985 was challenged on the ground that the Act by excluding the jurisdiction of the High Courts under Articles 226 and 227 in service matters had destroyed the power of judicial review which was a basic features of the Indian Constitution. The Supreme Court upheld the validity of Act 323-A and the Act as the necessary changes suggested by the Court were incorporated in the Administrative Tribunal Act. It held that though the Act has excluded the judicial review of High court in service matters under Article 226
and 227, but as it has not excluded judicial review under Article 32 and 136, the Act is valid. The Amendment does not affect basic structure of the constitution as it has vested the power of judicial review in an alternative institutional mechanism, after taking it from the High courts which is not less effective than the High Courts.

The court gave elaborate suggestions as to how the tribunals should be appointed, one of which was that they should be made in consultation with the Chief Justice of India. The Act was amended in accordance with those suggestions. Subsequently, however, doubts were expressed regarding the competence of the tribunals to become substitutes for the High Court. Further, experience showed that since the decisions of the tribunals were final and subject only to an appeal to the Supreme Court, the redressal of grievances had become more expensive and time consuming. Since the Act provided that an appeal lay only to the Supreme Court, the litigants in service matters who were government employees were put to great hardship.

In *Raghunathrao Ganpatrao V/s. Union of India*, the Supreme Court upheld the constitution (Twenty Sixth Amendment) Act, 1971 which derecognized the former Indian rulers and abolished their privy purses and other privileges by repealing Article 291 and 362 and inserting Article 363-A. The court conceded that the repealed provisions were an integral part of the constitution but did not agree that every integral provision constituted a basic structure of the constitution. It rather found the amendment in consonance with republicanism, human dignity, and equality proclaimed in the preamble and running through the constitutional provisions.

In 1997 the Supreme Court overruled its decision of *S.P. Sampath Kumar in L. Chandra Kumar Vs. Union of India* that article 323 - A (2) (d) of the Constitution in so far as it permitted parliament to exclude the jurisdiction of the High Court under Article 226 over the administrative tribunals was violative of the basic
structure of the Constitution. The court held that administrative tribunals could never be equivalent to a High Court. The power of the High Court under article 226 of the constitution was a part of the basic structure of the Constitution. Therefore, the court observed that an aggrieved party should be entitled to move a High Court under Article 226 against the decision of a tribunal. The court observed,

"We, therefore, hold that the power of judicial review over legislative action vested in the High court under Article 226 and in this court under Article 32 of the constitution is an integral and essential feature of the constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High courts and the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded."

Thus, the court emphasised that judicial review is a basic feature of the constitution which could not be diluted by transferring judicial power to the administrative tribunals and excluding the review of their determining under Article 32 and 226.

**Recent Developments**: The strength of the Indian Republic can be said to rest on the doctrine of division of powers between the legislature and the executive on the one hand and the judiciary on the other. On 11 January, 2007, the dynamics of the doctrine revealed a clear tilt in favour of the judiciary, with the Supreme Court appropriating to itself the power to pronounce on the legality of laws enacted by Parliament with inbuilt immunity from the consequences of their impact on fundamental rights. The court did so when a nine judge bench sought to resolve a constitutional issue involving the nature and character of the protection provided by Article 31-B of the constitution of India to laws added to the Ninth Schedule of Constitution in *I.R. Coelho Vs. State of Tamil Nadu and others*.112 Article 31-B, inserted by the first amendment to the constitution in
1951 says that none of the acts and regulations specified in Ninth Schedule shall be void on the grounds of inconsistency with the fundamental rights guaranteed under the constitution.

The Bench, after examining the scope and power of parliament to enact laws and include them in the Ninth schedule, held that the power of judicial review could not be taken away by putting a law under the Ninth schedule. In its unanimous verdict, the bench, while recognising the supremacy of the court to examine the validity of inclusion of a law in the Ninth schedule, did not accept the argument that introduction of Article 31-B was just a one time measure to protect agrarian laws after the abolition of the Zamindari System and that it outlived its purpose. The Bench did not go into the question of validity of Article 31-B as it was not under challenge. The majority observed that the power to grant absolute unity at will is not compatible with the basic structure doctrine, therefore, after April 24, 1973 the laws included in the Ninth Schedule would not have absolute immunity. The validity of such laws can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14, Article 19 and Article 15 and the principles underlying them. The bench said, "Insertion in the ninth schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated.

The Supreme Court further stated that if the validity of any Ninth Schedule law has already been upheld by the court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III of the constitution is subsequently incorporated in the Ninth Schedule after 24th April, 1973 such a violation shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying there under.
Writing the judgment for the Bench, Justice Sabharwal said, "The framers of the constitution have built a wall around certain parts of fundamental rights, which have to remain forever, limiting the ability of the majority to intrude upon them. That wall is the basic structure doctrine, it cannot be said the same constitution that provides for a check on the legislative power will decide whether such a check is necessary or not. It would be a negation of the constitution. The unchecked and rampant exercise of this power (to include laws in the Ninth Schedule), the number having gone up from 13 to 284, shows that it is no longer a more exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in the destruction of constitutional supremacy and creation of a parliamentary hegemony and absence of full power of judicial review to determine the constitutionality of such exercise."\textsuperscript{113}

Now after the landmark judgment of Supreme Court in \textit{I.R. Coelho} which was delivered on January 11, 2007 it is now will settled principle that any law placed under Ninth Schedule after April 23, 1973 are subject to scrutiny of court’s, if they violated fundamental rights and thus put the check on the misuse of the provision of the Ninth Schedule by the legislature.

With these pronouncements, the existence of the doctrine of basic structure in Indian constitutional law is no more a matter of dispute. The only dispute remains about its contents. Some of the contents seem to have settled, while others are in the process of setting down and still some others will settle in course of time. After the emergency period there is a change in the working relationship of parliament and the Supreme Court of India especially in the constitutional field. In pre-emergency period, if Supreme Court declared an act or law passed by the parliament as invalid, the parliament responded it soon by amending the constitution. But after 1980 or in the post emergency period, in the constitutional field there
are very few counter attacks by these institutions against each other. The Supreme Court has declared many laws as unconstitutional and invalid but the parliament did not amend the constitution as it did in early times.

**The Mandal Commission and the Reservation Policy:**

In India, reservation is an arena where several conflicts between judges and politicians have emerged. On 8th September 1993 a notification announcing the implementation of one of the major recommendations of the Report of the Mandal commission was issued. Reservation was not a new idea. The concept was old enough. It existed in 1885. However the concept has always remained controversial. The constitutional provisions for backward classes lay down broad contours leaving the contents largely vague and undefined. The first backward classes commission was appointed under Article 340 under chairmanship of Kaka Kalelkar in 1953, met with an ignominious end. The central government passed the buck to the state governments but it drew a blank and venture was abandoned. Up to 1978 the matter remained dormant. The Janata government in 1979 appointed the second backward class commission. Its chairman was Bindeshwar Prasad Mandal. It submitted its report in 1980 which was published in 1982.

In the meantime, the Janta government collapsed due to internal dissensions and the congress party headed by the P.M. Smt. Indira Gandhi came to power at centre. The congress party did not implement the Mandal commission report till 1989. In 1989, the congress party was defeated in parliamentary elections and the Janta Dal again came to power and decided to implement the Mandal commission report as it had promised to the electorate. On 7 August, P.M. Shri V.P. Singh announced the recommendations of the report and on 13/08/1990 formal official memorandum was issued. The
acceptance of the memorandum of the report caused mass disturbances and riots across the entire nation. The report contained a number of flaws, it was much criticised and the intentions of the government were suspected as trying to construct backwardness as a political resources and that the compensatory discrimination would turn from being a temporary and exceptional device into a regime of communal quotas.

A writ petition on behalf of the Supreme Court Bar Association was filed challenging the validity of the office memoranda and for staying its operation. The Bench of the court stayed the operation of the office memoranda till the final disposal of the case on October 1, 1990. Unfortunately the Janta government again collapsed due to defections and in 1991 parliamentary elections, the congress party again came to power at the centre. The change of government at the centre brought another official memorandum into being on 25th September, 1991 modifying the previous one. The five Judges Bench referred the matter to a special constitution Bench of 9 Judges in view of the importance of the matter to finally settle the legal position relating to reservations as in several earlier judgments, the Supreme Court have not spoken in the same voice on this issue.

The Nine Judge Bench of the Supreme Court by majority held that the decision of the Union Government to reserve 27% government jobs for backward classes provided socially advanced persons-creamy layer among them- are eliminated, is constitutionally valid. The Court accordingly partially held the two impugned notifications dated August 13, 1990 and September 25, 1991 as valid and enforceable but subject to the conditions indicated in the decision that socially advanced persons- creamy layer among BC's are excluded. However, the court struck down the congress government's office memoranda reserving 10% government jobs for economically backward classes among higher classes. The majority also held that the reservation
should not exceed 50 per cent.

The Court directed the Union Government, state governments and Union territories to appoint a permanent statutory body to examine complaints of wrong inclusion or non-inclusion of groups, classes and sections in the list of other backward classes. The majority held that in view of the guidelines laid down in its decision, there is no need to express any opinion on the correctness or adequacy of the exercise done by the Mandal commission Judges held that the report is valid and can be implemented.\textsuperscript{114}

In order to bypass the Supreme Courts ruling on the issue, the parliament amended the constitution by the Constitution (Seventy Seventh Amendment) Act, 1995.\textsuperscript{115} The amendment has added a new clause 4-A to article 16 of the constitution. Clause 4-A provides that noting in this article shall prevent the state from making any provision for reservation in matters of promotion to any class or classes of posts in the services of the state in favour of the scheduled castes and scheduled tribes which in the opinion of the state, are not adequately represented in the services under the state.

This simply means that reservation in promotion in government jobs will be continued in favour of SC’s and ST’s even after the Mandal case if the government wants to do so. This is thus clearly intended to nullify the effect of the decision of the Supreme Court in Mandal case.

The Supreme Court has to intervene again in \textit{Union of India vs Virpal Singh},\textsuperscript{116} the court has tried to mitigate to some extent the inequity that reservation in general has to represent by holding that caste criterion for promotion is violative of Article 16 (4) of the Constitution. The case was concerned with the legality of the extension of reservation to promotions in Railway Service which enabled specified groups not only to get jobs on their caste labels but also get promotions on the same basis. The Supreme Court held that seniority between reserved category candidates and general
candidates shall continue to be governed by their panel position prepared at the time of selection.

**Mandal II:** The Supreme Court’s Judgment in *Indra Sawhney* case although cleared the persisting doubts over the legality of reservation for OBCs, it left number of areas of potential conflicts, particularly the extension of reservation to other domains particularly the lucrative higher education. Owing to the constant political lobbying by OBC groups and united progressive Alliance (UPA)'s own calculation of regaining backward classes constituencies, in 2005 the issue of extending reservation in higher education institutions was taken up by the parliament in the form of 93rd (constitution) Amendment act, extending 27% of seats in elite educational institutions such as Indian Institute of Technologies and Indian Institute of Management for OBCs' This was followed by an Act of parliament in 2007 which confined itself to quotas for OBCs in central educational institutions. However, this move of parliament was challenged in the Supreme Court in *Ashok Kumar Vs Union of India.* The five member Bench said that there is the right to equality, however, the basic structure of the constitution is violated only when any right is abrogated, not when that right is amended or altered. In short, the Bench unanimously agreed that it is legitimate to place some limitation on the right to equality in order of pursue a larger social purpose. In supporting this view, the court supported caste as legitimate criterion for determining backwardness, although not the sole criterion. The court said as long as caste is used along with other criteria for determining backwardness, it cannot be said to be violative of the Constitution. As for the 'creamy layer', the bench unanimously rejected its exclusion from the main provision of reservation. The judgment said that creamy layer stands excluded the moment it is accepted that, along with caste, poverty has to be a criteria for
determining backwardness. In the words of the Chief Justice, extending the benefits of quotas to those who have already attained economic well-being or educational advancement would be unreasonable, discriminatory or arbitrary, resulting in reverse discrimination. Above all, the judgment gives an impression that there are no backward classes in India and their existence is a figment of the imagination of the political class. Even if some classes are there, it seems to say, these are filled with the creamy layers who occupy almost all the seats in prestigious educational institutions year after year, dislodging meritorious students belonging to the Brahmin and Kshatriya communities. This judgment has taken note of some of the arguments against the impugned reservation policy to the effect that a time has come to replace the vote bank scenario with a talent bank. Lastly, the relationship of parliament and Supreme Court on the reservation issue is not peaceful. In matters relating to reservation in favour of the weaker sections of society, there has been a history of undersolved conflicts leading even to amendments of the constitution.

**Election Reforms**

Elections are essential for Indian democratic system. Because by the process, people form their government through their representatives. As far as, the Election reforms are concerned the Supreme Court of India has been trying on this issue since 1980. The opinion of the Supreme Court on Electoral reforms has inserted confrontation between parliament and Supreme Court of India. The Supreme Court had held in *India Vs Association for democratic reforms*\(^{118}\) that a voter had a right to know the antecedents of candidates who offered herself for election to parliament or a state legislature. The court ordered the election commission to seek the following information from the candidate while filing their nomination:

1. Whether the candidate was convicted/acquitted of any criminal
offence in the past and if so, whether she was punished with imprisonment or fine.

2. The assets of a candidate and of her spouse and that of dependents;

3. Prior to six months of filing the nomination, whether the candidate was accused in any pending case, of any offence punishable with imprisonment for two years or more in which charge was framed or cognizance was taken by court of law if so, the details thereof:

4. Liabilities, if any, particularly other, there were any overdues of any public financial institution or government dues; and

5. The educational qualifications of the candidate.

The Supreme Court held that such information was essential for free and fair elections, which was part of the basic structure of the Constitution. After this decision, all political parties met and strongly protested against the intrusion of the Supreme Court in matters which were, in their opinion, within the exclusion domain of parliament. The government decided to enact an ordinance under Article 123 of the Constitution to amend the representation of the people Act, 1951. The ordinance (Section 33-A) provided that a candidate would be required to give the following information:

1. Conviction of any offence and sentence of imprisonment of one year or more;

2. Any case in which the candidate has been accused of any criminal offence punishable with imprisonment of two years or more and charge was framed by any court of law.

Section 33-B of the ordinance further said that notwithstanding anything contained in any judgment, decree or order of any court or any, direction, order or any other instruction issued by the Election commission, no candidate shall be liable to disclose or furnish any such information, in respect of her election, which is not required to
be disclosed or furnished under this Act or the rules made thereunder. The ordinance meant that only the information specified in section 33-A was required to be given by the candidate at the time of her nomination.

The validity of this ordinance and latter of the Act, which parliament had passed in place of the ordinance, was challenged before the Supreme Court. The Supreme Court struck down section 33-B of the Act in *P.U.C.L. Vs India*.119

The court held that section 33-B does not pass the test of constitutionality. The reasons are more than one. Firstly, when the right to secure information about a contesting candidate is recognized as an integral part of fundamental right as it ought to be, it follows that its ambit, amplitude and parameters cannot be chained and circumscribed for all time to come by declaring that no information, other than that specifically laid down in the Act, should be required to be given. The right to information should be allowed to grow rather than being frozen and stagnated; but the mandate of section 33-B prefaced by the non-obstinate clause impedes the flow of such information conducive to the freedom of expression. The second reason why section 33-B should be condemned is that by blocking the ambit of disclosures only to what has been specifically provided for by the amendment, the parliament failed to give effect to one of the vital aspects of information, viz; disclosure of assets and liabilities and thus failed in substantial measure to give effect to the right to information as a part of the freedom of expression.

Recently, the Supreme Court held that charge sheeted members of parliament and MLAs, on conviction for offences, will be immediately disqualified from holding membership of the House without being given three months time for appeal, as was the case before.120

A Bench of Justice A.K. Patnaik and S.J. Mukhopadhaya stuck
down as unconstitutional section 8 (4) of the representation of the people Act that allows convicted lawmakers a three-month period for filing appeal to the higher court and to get a stay of the conviction and sentence. The bench, however, made it clear that the ruling will be prospective and those who had already filed appeals in various high courts or the Supreme Court against their convictions would be exempt from it.

Section 8 of the RP Act deals with disqualification on conviction for certain offence;

A person convicted of any offence and sentenced to imprisonment for varying terms under sections 8 (1) (2) and (3) shall be disqualified from the date of conviction and shall continue to be disqualified for a further period of six years since his release. But section 8 (4) of the RP Act gives protection to MPs and MLAs as they can continue in office even after conviction if an appeal is filed within three months. The court further added that a reading of the two provisions in Article 102 (1) (e) and 191 (1) (e) of the Constitution would make it abundantly clear that parliament is to make one law for a person disqualified for being chosen as, and for being, a member of either house of parliament or legislative assembly or legislative council of the state. Parliament thus does not have the power under articles 102 (1) (e) and 191 (1) (e) of the Constitution to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of parliament or the state legislature.

The Union Cabinet’s first response to the Supreme Court verdict was to amend the representation of the people Act 1951 in order to save the seats of criminal legislators. It approved two amending bills to negate the recent Supreme Court verdict on disqualification of convicted legislators. The first amendment sought to add a proviso to sub-section (4) of section 8 of the RP Act-stating that the convicted
member shall continue to take part in proceedings of parliament or legislature of a state but he shall neither be entitled to vote nor draw salary and allowances till the appeal or revision in finally decided by the court. The other amendment said that an MP or MLA would not lose his right to vote if under arrest even for a short duration and thereby would retain his right to contest a poll. However, despite the government's desperate efforts during the monsoon session of parliament, it could not effect these changes because a key amending bill was referred to a parliamentary standing committee. The government then decided to bring an ordinance to undo the Supreme Court's historic verdict. But the strangest development of all is the manner in which Mr. Rahul Gandhi, the congress vice-president woke up and publicly rebuked his own government for bringing the ordinance. More recently, in yet another electoral reform the Supreme Court directed the Election Commission to have an option of the 'None of the Above' (NOTA) on the Electronic Voting Machines (EVMs) and ballot papers, which can be used by voters to reject all candidates contenting the polls. So far, people casting votes are required to enter their names in a register and cast their vote on a separate paper ballot. The Supreme Court observed that negative voting would encourage even people who are not satisfied with any of the candidates to turn up to express their opinion and reject all contestants. The bench headed by the Chief Justice of India, P. Sathasivam, said that negative voting will lead to a systematic change in polls and political parties will be forced to project clean candidates. If the right to vote is a statutory right, then the right to reject candidate is a fundamental right of speech and expression under the constitution.

**Directive legislation by Supreme Court** : In the Indian constitutional set up, legislation is the main function of the
parliament. But in contemporary times by the Supreme Court, directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The court has taken over the legislative function not in the traditional sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court. In *M.C. Mehta Vs state of Tamil Nadu*, although the actual petition was in respect of child labour is Sivakasi in Tamil Nadu, where a large number of children were engaged in the hazardous work of matchbox manufacture, the court thought it fit to travel beyond the confines of Sivakasi and to deal with the issue in wider spectrum and broader perspective taking it as a national problem. Referring to the directive principles of state policy in general and particularly the principle enjoining upon the state to provide free and compulsory education for children below the age of fourteen years contained in Article 45, the court observed:

> It is the duty of all the organs of the state to apply these principles. Judiciary being also one on the three principal organs of the state, has to keep the same in mind when called upon to decide matters of great public impo

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(a) The government must either provide a job to an adult member of a family in lieu of the child belonging to that family who has been employed in any factory, mine, or other hazardous work or it must deposit Rs. 5000 for every child.

(b) The offending employer must be asked to pay Rs. 20,000 as compensation for every child employed in contravention of the provisions of the child labour Act;

(c) All amounts received from the employers as well as governments should be deposited in a fund called the child labour
Rehabilitation cum welfare fund;

(d) The alternative employment gives as per above direction or the interest on Rs. 25,000 payable to the parent or guardian of a child worker shall be stopped if the child is not sent to school;

(e) The inspectors appointed under section 17 of the act shall ensure compliance with its provisions.

In *Laxmikant Pandey V. India*, the Supreme Court gave directions as to what procedures should be followed and what precautions should be taken while allowing Indian children to be adopted by foreign adoptive parents. There was no law to regulate inter-country adoptions and such lack of regulation could cause incalculable harm to Indian Children, considering the possibility of child trade for prostitution as well as slave labour.

After that in *Visaka Vs Rajashtan*, the Supreme court was asked to lay down directions for the effective implementation of gender equality, which was threatened by sexual harassment of working women. The court observed;

"The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement is of the legislative and executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, and effective redressel requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum."  

The Supreme Court laid down the following guidelines:

1. All employers persons incharge of work place whether in the public or private section, should take appropriate steps to present sexual harassment without prejudice to the generality of his obligation.

2. Where such conduct amounts to specific offences under the
Indian Penal Code or under any other law, the employer shall appropriate action in accordance with law by making a complaint with the appropriate authority.

3. The victims of sexual harassment should have the opinion to seek transfer of the perpetrator or their own transfer.

This was a clear case of judicial legislation and usurpation of the power of the legislature, but ultimately it benefits the people. When the legislature shumbers, judicial usurpation obtains legitimacy and approval from the general public.

*Directions in common cause Vs India,*\(^{126}\) provided for how blood should be collected, stored, and given for transfusion and how blood transfusion could be made free from hazards. Directions were given to the government to disseminate knowledge about environment through slides in cinema theatres or special lessons in schools and college.\(^{127}\) The court has insisted that it undertook law making through directions only to fill in the vacuum left by the legislature or the executive and that its directions could be replaced by legislation enacted by the legislature or, where no legislation was required, by the executive, whose power was continuous with the legislature.

Thus, Supreme Court has increasingly been enacting judicial legislation, taking on a task that is meant for the legislative and elected representatives. This trend reached a new high when the apex court recently ordered the Central Government to distribute foodgrains, found rotting for want of storage facilities, to the poor and hungry. After this more recently, the Prime Minister has to intervene to make it clear that the court is stepping into the domain of policymaking, an area mean for the executive and legislature.

The Supreme Court had asked the government to distribute foodgrains rotting in government godowns or rotting due to lack of storage facilities for free to the poor and hungry. According to Times of India the Supreme Court said:
The foodgrains are rotting. You can look after your own people. As a part of short term measures, distribute it to the hungry for free.

Besides this, the court suggested that the government should increase the quantity of food supply to the people living below poverty line and the government should open the fair price shops for all the 30 days in a month.\textsuperscript{128}

\textbf{Anti-defection law and privileges of legislature :} The Constitution (fifty second) amendment Act\textsuperscript{129} has amended articles 101, 102, 190 and 191 and added a new schedule the tenth schedule to the Constitution which specifies the disqualifications on the ground of defection. The amendment has added a new clause (2) to articles 102 and 191 which provides that a member shall be disqualified for being a member of either house of Parliament or of state legislatures if he incurs the disqualifications specified in the X schedule:

(a) If he voluntarily gives up the membership of the political party on whose ticket he is elected to the house; or

(b) If he votes or abstains from voting in the house or by any person or authority authorized by it in this behalf, without the prior permission, of such party and unless it has been condoned by the party within 15 days from the date of voting or abstention; or

(c) If any nominated member joins any political party after the expiry of six months from the date on which he takes his seat in the House.

Floor crossing, therefore, is not the only form of defection envisaged under schedule X. In the occasion of a direction being issued by a political party to vote in a particular manner on a matter, the member of the party is mandated to comply with the direction. Anything contrary to this directive is also perceived as an act amounting to defection.

In \textit{Kihota Hollohon Vs Zachilhu and others}\textsuperscript{130} the Supreme Court
was asked to examine the constitutional validity of the Constitution (Fifty Second Amendment) Act, 1985.

Article 105 (1) of the Constitution guarantees freedom of speech in parliament and article 194 (1) guarantees freedom of speech in the legislature of every state. Clause (2) of each of the above articles confers immunity upon each member of the legislature from judicial proceedings in respect of anything said or any vote given by him in the House. It was contended that clause (2) (1) (d) of the tenth schedule curbed the freedom of speech of a legislative member. The right to vote, it was asserted, was a concomitant of the right to free speech guaranteed by article 105 of the Constitution. It was further contended that since freedom of speech in the House was part of the basic structure of the constitution the above provision of the Constitution (Fifty Second Amendment) Act in so far as it curtailed such freedom violated the basic structure of the constitution and was therefore void.

The Supreme Court in Kihota case has struck down para 7 of the Anti defection Law (X schedule) which provided that the speaker’s decision regarding the disqualification shall be final and no court could examine its validity. The court held that the function of the speaker, while applying the Anti defection law is like that of a tribunal and therefore is open to judicial review. But by a majority the court held that scheduled X is not volatile of freedom of speech, freedom of vote and conscience of members of parliament and legislatures of states.

Applying the doctrine of severability, the majority held that para 7 was severable from the rest of the schedule and therefore, its invalidity did not affect the rest of the schedule. The minority, however, was of the view that Para 7 was not severable from the rest of the schedule, and even if it was, the doctrine of severability could not be applied to an amendment which required observance of the
procedure laid down in the proviso the clause (2) of Article 368 but in
fact did not observe such procedure.

This was the first instance of an amendment having been
invalidated for non-compliance with the procedure laid down in the
provision to clause (2) of Article 368.

After that in P.V. Narsimha Rao Vs State, the Supreme Court
observed that freedom of speech within the house formed part of the
basic structure of the constitution. This opinion came while deciding
whether a member of the house could be prosecuted for taking a bribe
for voting against a no confidence motion against the Rao government.
The majority has held that the scope of protection of immunity
available to the members of parliament is quite wide and is not
confined only against judicial proceedings but is available to them
against all civil action and criminal proceedings for anything said or
any vote given by them in the House of parliament. The object of the
protection is to enable members to speak their mind in parliament
freely and fearlessly. The court held that the MP's who had taken
bribe and voted in parliament against no confidence motion brought
against the Narshimha Rao Government are entitled to the protection
of Article 105 (2) and are not answerable in a court of law for alleged
conspiracy and agreement. But the MP's who had given bribe but not
voted on the no-confidence motion are not entitled to the protection of
Article 105 (2) and an action can be initiated against them under the
relevant law.

In the recent cash for query case Raja Ram Pal Vs Hon'ble
Speaker, Lok Sabha, a constitution bench of the Supreme Court has
acknowledged the power of the legislature to expel their members. The
court held that legislature is Supreme in its own sphere, and it is the
sole authority to deal with and regulate its internal proceedings and
other affairs. In this case, the Supreme Court of India has upheld the
expulsion of 11 members of parliament in the cash for questions
scam. Who were expelled on allegations of having accepted bribe for asking questions in Parliament challenged the validity of their expulsion, among others, on the ground that Parliament or its houses did not have such a privilege. Rejecting the petition, a divided court held that such a privilege exits. Speaking for the majority of three, Chief Justice Sabharwal held that such a privilege did not fall within the privilege of a house to regulate its constitution but it fell within the privilege to punish for its contempt. The Court further said that if a citizen, whether a non-member or a member of the Legislature, complains that his fundamental rights under Article 20 or 21 had been contravened, it is the duty of this Court to examine the merits of the said contention, especially when the impugned action entails civil consequences.

It seems clear that the Supreme Court of India has not shown any interference in the domains of the Speaker’s or Chairman’s decisions. In most of the instances, where the court has been asked to sort out the matter, the Court denied to entertain appeals.

**Article 356 and Judiciary**: Article 356 of the Constitution of India provides that when the President of India is satisfied that the government of a state is not functioning ’in accordance with the provisions of this constitution, he may by proclamation assume to himself all or any of the functions of the government of the state and all or any of the powers vested in or exercisable by the governor or any body or authority in the state other than the legislature of the state and it also declare that the powers of the state legislature shall be exercisable by or under the authority of parliament. After its approval by both houses of parliament, the proclamation remains valid for six months from the date of issue. However, the total period for which the proclamation remains operative cannot exceed three years. This is known as president's rule.

After independence *K. K. Aboo vs Union of India*133 was the first
case in which the legality and the constitutionality of a presidential proclamation was challenged in a court of law. The High Court of Kerala refused to go into the constitutionality of the proclamation. However, it did go into the facts of the case to observe that the Governor had made a thorough enquiry into the possibility of the formation of a constitution ministry. Thus, the court rejected the petition. However, what is interesting to note here is that even while the court refused to go into the constitutionality or otherwise of the proclamation, the court was eager to enter into a factual discussion of the same and uphold its legitimacy. After that case various High Courts, over a period of time, were united in the view that the courts may not exercise their powers of judicial review with regard to the proclamations issued by the president under Article 356 of the Constitution.

Since the congress party for many years had an absolute majority in parliament and in most of the states there was for all practical purposes a one party rule. Article 356 was invoked more often than it should have been and mostly for removing the governments of opposition parties. When the Janta government came to power in 1977, it dismissed nine state governments and dissolved their assemblies in one stroke on the ground that the ruling party in those states, which was the congress party, had suffered defeat in the elections of the Lok Sabha. The election to that office was to take place in the near future. Unfortunately, when suits were filed under article 131 of the Constitution by the affected state governments, the Supreme Court in state of Rajasthan Vs Union of India dismissed those suits.

For the first time in case of Rajasthan, the Apex Court departing from the earlier view adopted by the different High Courts in respect of proclamation of emergency made by the President under Article 356, formulated a view that in certain circumstances the challenge could
be entertained for the exercise of judicial review.\textsuperscript{68} The Judgment in this case reversed the trend to some extent by ruling that in a case where the government had disclosed the grounds of action taken under Article 356 and it was challenged on the ground of being malafide or extraneous to the situation. It was also held by the Court that the President's satisfaction could not be challenged but only the existence of the satisfaction which would not be there if the grounds alleged were malafide or the exercise of power was wholly based on extraneous or irrelevant grounds. The court in its judgment agreed partly with the plea of the petitioners that the mere defeat of the ruling party in the Lok Sabha elections could be itself not be a ground for construing that the government of the state cannot be carried on in accordance with the provisions of the Constitution. The Supreme Court in this case rejected the contention by the Union of India that a Presidential proclamation under Article 356 was completely outside the purview of judicial review.

After that, the Supreme Court in \textit{S. R. Bommai Vs Union of India case}\textsuperscript{135} where the Governor ignored the proposal of the Chief Minister that the Assembly session be called to test the strength of the Ministry on the floor of the House. He also did not explore the possibility of an alternative government but reported to the President that as Shri Bommai had lost the majority support in the House, and as no other party was in a position to form the government, action be taken under Article 356. As a result the President issued the proclamation 1989. The court has decreed that the Assembly should not be dissolved before parliamentary approval and that the floor of the house is a constitutionally ordained forum for testing a ministry's strength.

A nine judge bench of the Supreme Court has rightly observed by using the powers of the Governor under article 174(2) (b) read with article 256(1) (a) till at least both the Houses of Parliament approve of the proclamation.
The court made the following observations:

(a) The validity of the proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the proclamation was issued in the mala fide exercise of the power. When a prima facie case is made out in the challenge to the proclamation, the burden is on the Union Government to prove that the relevant material did in fact exist. Such material may be either the report of the Governor or other than the report.

(b) Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction.

(c) When the President issues proclamation under article 356(1), he may exercise all or any of the powers under sub-clauses (a), (b) and (c) thereof. It is for him to decide which of the said powers he will exercise, and at what stage, taking into consideration the exigencies of the situation.

(d) Since the provisions contained in clause (3) of article 356 are intended to be a check on the powers of the President under clause (1) thereof, it will not be permissible for the President to exercise powers under sub-clauses (a), (b) and (c) of the latter clause, to take irreversible actions till at least both the Houses of Parliament have approved of the proclamation. It is for this reason that the President will not be justified in dissolving the Legislative Assembly.

(e) If the proclamation issued is held invalid, then notwithstanding the fact that it is approved by both Houses of the Parliament, it will be open to the court to restore the status quo to the issuance of the proclamation and hence to restore the Legislative Assembly and the Ministry.

(f) In appropriate cases, the court will have power by an interim
injunction, to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the proclamation to avoid the fait accompli and the remedy of judicial review being rendered fruitless. However, the court will not interdict the issuance of the proclamation or the exercise of any other power under the proclamation.

(g) While restoring the status quo ante, it will be open for the court to mould the relief suitable and declare as valid actions taken by the President till that date. It will also be open for the Parliament and the Legislature of the State to validate the said actions of the President.

(h) Secularism is a part of the basic structure of the Constitution. The acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the government to the State cannot be carried on in accordance with the provisions of the Constitution."

Whereas in Kesavananda Bharati the court asserted the power of review of the exercise of the constituent power by parliament in Bommai the court asserted its power of judicial review over the exercise of power by the president under Article 356 of the Constitution. Till then the court had claimed a limited power of judicial review over the exercise of power by the president under Article 123, Article 352 and Article 356. Justice Sawant observed the president had no power to dissolve the legislative assembly of the state till the proclamation was approved by the houses of parliament under article 356 (3). The president may have power only to suspend the legislative assembly under clause (2) (c) of article 356. Clause (3) of article 356, which requires approval of both the houses of parliament, was a check upon the exercise of power by the president under clause (1). The judges made it clear that even if parliament approved the
proclamation, that would not inhibit the court from declaring it unconstitutional and void if it was so. Keeping the assembly in suspended animation until parliament approved the proclamation was one way of strengthening the parliament control.

**Office of Profit:**

Office of profit has not been defined in the Constitution of India. The courts have however, issued various guidelines to determine as to which office is an office of profit. The main object to this provision is to secure the independence of the member of Parliament from the benefits of the Executive which may be under influence and there may be conflict between duty and self interest among the members of Parliament. The office of profit means an office to which some benefit is derived or might reasonably expressed to be made by the holders of the office. Profit simply means any material gain. It must be received by way of salary or honorarium which is meant for meeting his daily expenses so to enable him to discharge his functions. The Supreme Court of India in *K. B. Rohumaray vs Shankar Rao*,\(^{136}\) held that the honorarium paid to the members of the Wage Board under the Bombay Industrial Act, 1946 is not profit because it is not sufficient even for his pocket expenses. The Parliament of India has enacted the Parliament (Prevention of Disqualification), Act 1959 which exempts certain offices as not the disqualify their holders for membership of Parliament. After that in *Shibu Soren vs Dayanand Sahay*,\(^{137}\) the election of the appellant as members of the Rajya Sabha was invalidated by the Court because at the time of his election an office of profit insofar as he was drawing an honorarium in addition to daily allowance and other perquisites like rent free house and chauffer driven car and secondly and office under the government of the State insofar as he was appointed chairman of the Jharkhand Area Autonomous Council by the Governor of the State and held office.
during his pleasure. In March 2006 as the membership of Rajya Sabha of a member from Uttar Pradesh was terminated by the Election Commission of India citing Court precedents on Office of Profit Question, it had resulted in a possible situation of a large number of Parliamentarians and members of state Legislatures losing their positions.

As this juncture, in order to save the situation and the positions of a very large number of representatives at various levels, the Parliament (Prevention of Disqualification) Amendment Bill, 2006 was enacted and sent to the President for his approval. However, 56 offices were exempted from office of profit despite objection from the President. In fact, the Articles 102 (1) (a) and 191 (1) (a), dealing with the office of profit were made a part of the Constitution with a view of eliminate or reduce the risk of conflict between duty and interest among members of the legislatives so as ensure that the Legislature concerned are under no obligation to the executive on account of receiving pecuniary gain or profit from it, which may sender them amendable to influence of the executive, while discharging their obligations as legislator. However, the Supreme Court is seized of the matter on the basis of a PIL that questions the adhocism the legality of the office of Profit Act. The court laying down this proposition and upholding the disqualification in Jaya Bachahan vs Union of India of the petitioner who held the office of the Chairperson of U. P. Film Development Council with entitlement to honorarium and several allowances and perquisites even though the petitioner claimed to have received none, the Court held that where the office carries with it certain emoluments then it will be an office of profit even if the holder of the office chooses not to receive such as emoluments.

**Independence of Judiciary**

Even though the Constitution of India does not accept strict separation of powers, it provides for an independent judiciary with
extensive jurisdiction over the acts of the legislature and the executive. Independent judiciary is the most essential attribute of rule of Law and is indispensable to sustain democracy. Independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but also to the people at large who seek judicial redress against perceived legal injury or executive excess. Thus the position of the Supreme Court is very strong and its independence is adequately guaranteed. But there are many disturbing instances which are likely to threaten the independence of judiciary at present. Article 124 vests the legal power of appointment in the executive but the executive is required to consult legal experts such as judges of the Supreme Court and High Courts in appointing judges of the higher courts. But Supreme Court interpreted the word 'consultation in such a literal manner that it gave virtually a discretion in the matter. The Supreme Court in S.P. GuptaVs Union of India\textsuperscript{139} held that the word consultation did not mean concurrence and the Executive was not bound by the advice given by the judges. The Government may completely ignore the advice of legal experts. Thus the power of appointment of the judges was solely vested in the Executive from whose dominance the judiciary was expected to be free.

Thereafter, in judges transfer cases known as S.C. Advocates on Record Association Vs Union of India\textsuperscript{140} the Supreme Court by a 7:2 majority overruled S.P. Gupta's case and held that the opinion of the Chief Justice of India must be given the greatest weight in the selection of the judges of the Supreme Court and High Courts and the transfer of the High Court judges. The selection should be made as a result of a participatory consultative process. The Chief Justice was required to consult two senior most judges of the Supreme Court before sending his recommendations to the Government.

In, Transfer of Judges case III, a nine judge Bench of the
Supreme Court has unanimously held that the recommendations made by the Chief Justice of India on the appointment of judges to the Supreme Court without following the consultation process are not binding on the Government. Widening the scope of Chief Justice of India’s consultation process, the court gave its opinion on the nine questions in the presidential reference. The President had sought the Supreme Court’s clarification under Article 143. On the consultation process, as laid down in *S.C. Advocates on Record Association* case in 1993. In that case the Supreme Court gave primacy to the opinion of the Chief Justice of India formed in consultation with two senior most judges of the Supreme Court in regard to the appointment of judges and their transfers. Thus the main question on which the advisory opinion of the court was sought was whether the government was bound by the recommendation of Chief Justice sent to it without consulting his two senior most colleagues.

The decisions of Supreme Court in *Supreme Court Advocate on Record Association and Re-presidential* the process of appointments of judges of higher judiciary has been completely reversed. As a result Article 124 has been made redundant. These cases have vested the powers of appointment of judges of higher judiciary completely in the Supreme Court.

Lastly, it is said that laws has a social purpose, i.e., betterment of society. Judiciary under Indian constitution is conceived as an arm of the social revolution. Legislature, while emanating a law, can not visualise all situations arising in future and needing the support of law. New situation generally and usually develop and the law has to be interpreted and applied to solve problems arising out of such situations. For this purpose, the judicial creativity or craftsmanship is utilised to fill in the gaps between the law as it is and the law as it out to be built in this process is the proper perception and commitment to proper social values.
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