Chapter – V

RECENT JUDICIAL TRENDS ON SEPARATION OF POWERS

5.1 Introduction

An independent Judiciary, having the powers of 'Judicial review', is another prominent feature of our Constitution. On the other hand, we have avoided the other-extreme, namely, that of 'judicial supremacy', which may be a logical outcome of an over-emphasis on judicial review, as the American experience demonstrates. Judicial powers of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.[498]

Indeed, the harmonisation which our Constitution has effected between Parliamentary Sovereignty and a written Constitution with a provision for Judicial Review, is a unique achievement of the framers of our Constitution. An absolute balance of powers between the different organs of government is an impracticable thing and, in practice, the final say must belong to some one of them. This is why the rigid scheme of Separation of Powers and the checks and balances between the organs in the Constitution of the United States has failed in its actual working, and the Judiciary has assumed supremacy under its powers of interpretation of the Constitution to such an extent as to deserve the epithet of the 'safety valve' or the 'balance-wheel' of the Constitution. As one of her own Judges has said (Chief Justice HUGHES), "The Constitution (of the U.S.A.) is what the Supreme Court says it is". It has the powers to invalidate a law duly passed by the Legislature not only on the ground that it transgresses the legislative powers vested in it by the Constitution or by the prohibitions contained in the Bill of Rights but also on the ground that it is opposed to some general principles said to underlie vague expressions, such as due process, the contents of which not being explicitly laid down in the Constitution, are definable only by the Supreme Court. The American Judiciary thus sits over the wisdom of any legislative policy as if it were a third Chamber or super-Chamber of the Legislature.

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498. Dr. Durga Das Basu, Introduction to the Constitution of India, 20th Edition, 2012.

Under the English Constitution, on the other hand, Parliament is supreme and "can do everything that is not naturally impossible" (Blackstone) and the Courts cannot nullify any Act of Parliament on any ground whatsoever. As MAY puts it—

> "The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errs, its errors can be corrected only by itself."

So, English Judges have denied themselves any powers "to sit as a court of appeal against Parliament".

The Indian Constitution wonderfully adopts the *via media* between the American system of Judicial Supremacy and the English principle of Parliamentary Supremacy, by endowing the Judiciary with the powers of declaring a law as unconstitutional if it is beyond the competence of the Legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution or of any other mandatory provision of the Constitution, e.g., Arts. 286, 299, 301, 304; but, at the same time, depriving the Judiciary of any powers of 'judicial review' of the wisdom of legislative policy. Thus, it avoided expressions like 'due process', and made fundamental rights such as that of liberty and property subject to regulation by the Legislature[499]. But the Supreme Court has discovered 'due process' in Art. 21 in Maneka Gandhi's. [500] Further the major portion of the Constitution is liable to be amended by the Union Parliament by a special majority, if in any case the Judiciary proves too obtrusive. The theory underlying the Indian Constitution in this respect can hardly be better expressed than in the words of Pandit Nehru:

> *"No Supreme Court, no judiciary, can stand in judgment over the sovereign will of Parliament, representing the will of the entire community. It can pull up that sovereign will if it goes wrong, but, in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way. . . Ultimately, the fact remains that the Legislature must be*

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499. Dr. Durga Das Basu, Introduction to the Constitution of India, 20th Edition, 2012.
500. Ibid.

supreme and must not be interfered with by the Courts of Law in such measures as social reform."

Our Constitution thus places the supremacy at the hands of the Legislature as much as that is possible within the bounds of a written Constitution. But, as has been mentioned earlier, the balance between Parliamentary Sovereignty and Judicial Review was seriously disturbed, and a drift towards the former was made, by the Constitution (42nd Amendment) Act, 1976, by inserting some new provisions, e.g., Arts. 31D, 32A, 131A, 144A, 226A, 228A, 323A-B, 329A.

The Janata Government, coming to powers in 1977, restored the pre1976 position, to a substantial extent, through the 43rd and 44th Amendments, 1977-78, by repealing the following Articles which had been inserted by the 42nd Amendment—31D, 32A, l3lA, 144A, 226A, 228A, 329A; and by restoring Art. 226 to its original form (substantially).

On the other hand, the Judiciary has gained ground by itself declaring that 'judicial review' is a 'basic feature' of our Constitution, so that so long as the Supreme Court itself does not revise its opinion in this behalf, any amendment of the Constitution to take away judicial review of legislation on the ground of contravention of any provision of the Constitution shall itself be liable to be invalidated by the Court.

5.2 Judicial View on the Doctrine of Separation of Powers

As clearly mentioned about the separation of powers there were times where the judiciary has faced tough challenges in maintaining and preserving the Doctrine of separation of powers and it has in the process of preservation of the above said Doctrine has delivered landmark judgments which clearly talks about the independence of judiciary as well as the success of judiciary in India for the last six decades.

A survey of the constitutional provisions establishes that this doctrine under the Constitution of India is an approximation of the British position rather than American. There is no direct declaration on this point which is also not possible today when the doctrine is being surrendered in the face of unprecedented growth of delegated legislation and judicial powers of the

Administration. *Justice Mahajan* took note of this point and stated in the famous case of *Re Delhi Laws Act,*[501] that :

> *"It does not admit of serious dispute that the doctrine of separation of powers has, strictly speaking, no place in the system of government that India has, at present under our Constitution. Unlike the American and Australian Constitution the Indian Constitution does not expressly vest the different sets of powers in different organs of the State. Our Constitution though federal in form is modeled on the British Parliamentary system, the essential feature of which is the responsibility of the executive of the Legislature……"*

To the same effect is the observation of *Justice Das in Ram Krishna Dalmia v. Justice Tendolkar*[502] when he said – "The Constitution does not express the existence of separation of powers, and it is true that division of powers of the government into legislative, executive and judicial is implicit in the Constitution but the doctrine does not form an essential basis of foundation stone of the constitutional framework as it does in U.S.A. In *Chandra Mohan v. State of U.P.,*[503] it was held that though our Constitution does not accept the strict doctrine of separation of powers but provides for an independent judiciary in the State, it constitutes a High Court for each State prescribes the institutional conditions of service of the justices thereof, confers extensive jurisdiction on it issue writs to keep all tribunals, including in appropriate cases the Government which is bound and given to it the powers of superintendence over all courts and tribunals in the territory over which it has jurisdiction. Again in *Udai Ram Sharma v. Union of India*[504] the Court categorically stated that the doctrine has not been accepted by our Constitution. The Court expressed its opinion that the American doctrine of separation of powers has no application in India.

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501. AIR 1951 SC 747.
502. 1959 SCR 229, see also Ram Jawaya v. State of Punjab, AIR 1955 SC 549 and Jayanti Lal Amrit Lal v. S.M. Ram, AIR 1964 SC 649.
503. AIR 1966 SC 1987
504. AIR 1968 SC 1138

The first major judgment by the judiciary in relation to Doctrine of separation of powers was in *Ram Jawaya v State of Punjab.*[505] The court in the above case was of the opinion that the Doctrine of separation of powers was not fully accepted in India. Further the view of Mukherjee J adds weight to the argument that the above said doctrine is not fully accepted in India. He states that:

> *"The Indian constitution has not indeed recognize the doctrine of separation of powersing its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another".*

Later in *I.G. Golak Nath v State of Punjab,*[506] Subha Rao, C.J opined that:

> "The constitution brings into existence different constitutional entitles, namely the union, the state and the union territories. It creates three major instruments of powers, namely the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping there limits. They should function with the spheres allotted to them."

The above opinion of the court clearly states the change in the courts view pertaining to the opinion in the case of *Ram Jawaya v. state of Punjab* related to the doctrine of separation of powers.

There after one of the most land mark judgments delivered by the Supreme Court in *Keshvananda Bharti v Union of India*[507]' the court was of the view that amending powers was now subject to the basic features of the constitution. And hence, any amendment tampering these essential features will be struck down as unconstitutional. Beg, J. added that separation of

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505. AIR 1955 SC 549
506. AIR 1967 SC 1643
507. (1973) 4 SCC 255

powers is a part of the basic structure of the constitution. None of the three separate organs of the republic can take over the functions assigned to the other.[508] Hence this further confirmed the opinion of the court in relation to the doctrine of separation of powers.

Then in *Indira Gandhi Nehru v. Raj Narain*,[509] where the dispute regarding P.M. election was pending before the Supreme Court, opined that adjudication of a specific dispute is a judicial function which parliament, even under constitutional amending powers, cannot exercise i.e. the parliament does not have the jurisdiction to perform a function which the other organ is responsible for otherwise there will be chaos as there will be overlapping of the jurisdictions of the three organs of the state. Also the constituent Assembly of France in 1789 was of the view that "there would be nothing like a Constitution in the country where the doctrine of separation of powers is not accepted. So if there is a provision then there should be proper implementation and this judgment emphasis on that point only.

Also in *I.R. Coelho v. State of Tamil Nadu,*[510] S.C. took the opinion opined by the supreme court in Kesavananda Bharati case pertaining to the doctrine of basic structure and held that the Ninth Schedule is violative of the above said doctrine and hence from now on the Ninth Schedule will be amenable to judicial review which also forms part of the basic structure theory.

From the above few case laws right from *Ram Jawaya v. State of Punjab in 1955 to I.R. Coelho v. State of Tamil Nadu,* there has been a wide change of opinion as in the beginning the court was of the opinion that as such there is no Doctrine of Separation of Power in the constitution of India but then as the passage of time the opinion of the Supreme Court has also changed and now it do includes the above said Doctrine as the basic feature of the constitution.

The proponents of procedural democracy take into consideration the possibility of unjust outcomes of the decision-making process, but they

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508. http:/www.legalserviceindia.com
509. 1975 supp SCC 1
510. AIR 2007 SC 861

consider these cases as highly unlikely and as rare side-effects. They state that imposing substantive limits on democracy, such as the substantive concept of the separation of powers, would necessarily lead to the preference of one interpretation of justice to the other. Preferring the justice of one to the other systematically limits equal treatment is taken to equal account when operating the state. Without procedural equality the state as such cannot be justified.[511] Equality should be provided in way of provisions irrespect of men, women, child and transgenders.

In respect of separation of powers Justice markandey Katyu said that the separation of powers principle propounded by the French political thinker montes quieu has been elaborately discussed in judgment in the case of *Divisional manager,* Aravali *Golf course v. Chander Haas.*[512] Judicial activism is basically a deviation from this principle. It is based on the theory of jurisprudence called sociological jurisprudence which arms the judiciary with wide legislative and executive powers.

We may come directly to the subject of judicial activism where many difficulties have been arisen. The common ancestor of both the U.S. and Indian judiciary is the British judiciary. Hence both the countries are indebted to the British legal system for many of their principles and institutions. Judicial review of statutes has been discussed by the Supreme Court in a decided case of Government of *Andhra Pradesh v. P. Laxmi Devi.*[513]

In England, since parliament was supreme and there was no written constitution, the traditional approach of the British judges was only to apply the law made by parliament to the facts of a particular case and thereby reach to a decision based on that law. In context of law Austin said that "Law is the common of the sovereign and since in England the sovereign was parliament. In this sense law was made by the parliament, not the judges. The traditional understanding of the judicial process is that while the legislature makes laws

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511. J. Goldsworthy: Parliamentary Sovereignty: Contemporary Debates, Cambridge University Press, 2010.
512. (2008) 1 SCC 683.
513. 2008 SCC.

and the executive implements them. The judiciary's function is only to interpret and apply the law to the facts of a particular case.[514]

5.3 Federalism vis-a-vis basic Structure

Federalism constitutes a complex Governmental mechanism for governance of a country. It seeks to draw a balance between the forces working in favour of concentration of powers-in the Centre of it in a number of units. A federal Constitution establishes a dual polity as it comprises of two levels of Government. The two levels of the Government divide and share the totality of a Governmental functions and powers between themselves. The distribution of legislative powers between the Centre and the States is the most important characteristic of any federal system. Thus a federal Constitution envisages a demarcation or division of Governmental - function and powers between the Centre and the regions by the sanction of the Constitution itself which is usually a written document and also a rigid one i.e. which is not capable of amendment easily.

The Constitution of India establishes a dual polity in the country, consisting of Union Government and State Governments. The States are regionally administrative units into which the country has been divided and thus India has been characterized as "Union of States"[515]. Detailed provisions are provided in the Constitution in Part XI from Articles 245- 293 by which the legislative, administrative and financial powers are divided between the Union and the States, which are maintaining a delicate balance between the Union and the States. The ratio laid-down by the Apex Court in the above cited case appears to have the capability to disturb this delicate balance.

5.3.1 The facts and the Judgment

In the case *State of West Bengal v. Committee for the protection of democratic rights*:[516] The above stated case arose out of the following fact situation. The complainant along with a large number of workers of a political party had being staying in several camps of that party at Garbeta, Midnapur district in the State of West Bengal. On 4-1-2001 the complainant and few

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514. Justice Katju.blogspot.com

515. Article 1 (1) of the Constitution – Also see M.P.Jain, "Indian Constitutional Law" (Nagpur : Wadhwa 2003) at pp. 553-54.

516. AIR 2010 SC 1476

others decided to return to their homes from one such camp. When they reached the complainant's house, some miscreants, numbering 50-60, attacked them with fire arms and other explosives, which resulted in casualties. The complainant managed to escape from the place of occurrence, hid himself and witnessed the carnage. He lodged a written complaint with Garbeta police station on 4-1-2001 and the FIR was registered on 5-1-2001 for offences under Sections 148, 149, 201, 302, 364,436, 448 of Indian Penal Code, 1860 read with Sections 25 and 27 of the Arms Act, 1959 and Section 9-B of the Explosive Substances Act, 1884.[517]

On 8-1-200 1 the DGP, West Bengal directed CID to take over the investigations in the case. A writ petition under Article 226 was filed in the High Court of Calcutta by the Committee for the Protection of Democratic Rights ('CPDR' for short) West Bengal in public interest, alleging, *inter alia*, that although in the said incident 11 persons had died on 4-1-2001 and more than three months had elapsed since the incident had taken place yet, except two persons no other person named in the FIR had been arrested, no serious attempt has been made to get the victims identified and so far the police had not been able to come to a definite conclusion whether the missing persons were dead or alive. It was alleged that since the police administration in the State was under the influence of the ruling party which was trying to hide the incident to save its image, the investigations into the incident may be handed over to the Central Bureau of Investigation (CBI), an independent agency[518].

After considering the affidavit filed in opposition by the State Government, the High Court of Calcutta felt that in the background of the case it had strong reservations about the impartiality and fairness in the investigation by the State Public because of the political fall Out and no useful purpose would be served in continuing with the investigation by the State investigative agency. Moreover, even if the investigation was conducted fairly truthfully by the State police, it would still be viewed with suspicion because of the allegation that all the assailants were members of the ruling

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517. Dr. K. Madhusudna Rao "Federalism in India : A Comment on State of West Bengal Case", AIR 2010 Jur.. 787.

518. State of West Bengal Case, AIR 2010 SC 1476

party. Having regard to all these circumstances, the High Court deemed it appropriate to hand over the investigation into the said incident to the CBI.

Aggrieved by the order passed by the High Court, the State of West Bengal filed a petition for SLP before the Supreme Court. After hearing the rival contentions the Constitution Bench of the Supreme Court[519] held that:

> *".....a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violaie the doctrine of separation of powers and shall be valid in law. Being the protector of Civil Liberties of the citizens, this Court and the High Courts have not only the powers and jurisdiction but also an obligation to protect the Fundamental Rights. guaranteed by Part-Ill in general and under Article 21 of the Constitution in particular, zealously and vigilantly"*[520].

In support of this observation the Supreme Court has laid down the following principles of Constitutional and Statutory interpretation.[521]

1. The Fundamental Rights, enshrined in Part-Ill are inherent and cannot be extinguished by any Constitutional or statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic Structure.
2. Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties. This Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a

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519. Ibid., - The Bench comprising of K.G. Balkrishnan, C.J. and R.V. Ravindran, D.K. Jain, P. Sathasivam and J.M. Panchal, JJ. and the judgement of the Court was delivered by Justice D.K. Jain.
520. Ibid.
521. Ibid.

duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.

3. In view of the Constitutional scheme and the jurisdiction conferred on this Court u/A 32 and the High Courts u/A 226 of the Constitution the powers of judicial review being an integral part of the basic structure of the Constitution, no act of Parliament can exclude or curtail the powers of the Constitutional Court with regard to the en forcement of the Fundamental Rights. As a matter of fact, such a powers is essential to give practicable content to the objectives of the Constitution embodied in Part-Ill and other parts of the Constitution. Moreover in a Federal Constitution, the distribution of legislative powers between the Parliament and the State legislatures involves limitation on legislative powers and therefore, this required an authority other than Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and State legislations, it is also necessary to show any transgression by each entity. Therefore, judicial review is justified by combination of the principles of separation of powers, rule of law and the principle of Constitutionality and the reach of judicial review.

4. If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that the Courts act as guardian and interpreters of the Constitution and provide remedy u/A 32 and 226, wherever there is an attempted violation. In the circumstances any direction by the Supreme Court or the High Court in the exercise of the powers u/A 32 or 226 to uphold the Constitution and maintain rule of law cannot be termed as violating the federal structure.

5. Restriction on Parliament by the Constitution and restriction on the executive by Parliament under an enactment, do not amount to

restriction on the powers of the judiciary under Article 32 or 226 of the Constitution.

6. If in terms of entry 2 of list II of the Seventh Schedule on the one hand and Entry 2-A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, the Supreme Court would be precluded from exercising the 'same powers' which the union could exercise in terms of the provisions of the statute. In the opinion of the Court, the exercise of such powers by the Constitutional Courts would not violate the doctrine of separation of powers. In fact, if in such a situation the Court fails to grant relief it would be failing in its constitutional duty.

7. When the Special Police Act itself provides that subject to consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the Court can also exercise its constitutional powers of judicial review and direct CBI to take up the investigation within the jurisdiction of the State. The powers of the High Court u/Art. 226 cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by S. 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the constitutional Courts. Therefore, exercise of powers of judicial review by the High Court in the opinion of this Court would not amount to infringement of either the doctrine of separation of powers or the federal structure.

5.3.2 Analysis of the Judgment

With due respect to the authority, it is humbly submitted that this judgment is open for public discussion on the following grounds

1. Pointing out the fundamental aspect of Indian Federalism, B. P. Jeevan Reddy, J. in *S. R. Bommai v. Union of India*[522] observed that "within the sphere allotted to them, the States are supreme. The centre cannot

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522. AIR 1994 SC 1918.

tamper with their powers. More particularly the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States Let it be said that Indian federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle—the outcome of our own historical process and a recognition of the ground realities It is equally necessary to emphasise that Courts should be careful not upset the delicately-crafted constitutional scheme by a process of interpretation."

Although, through this observation the Supreme Court has laid down an important principle of constitutional interpretation concerning federal provisions of the Constitution, this has failed to convince the Constitution Bench of the Supreme Court in the *State of West Bengal v. Committee* for Protection of Democratic Rights ('CPDR case' in short) when it ruled that the High Courts and the Supreme Court can direct, without the consent of the States, the CBI to conduct investigation into the offences committed in a State.

2. Another aspect of the CPDR case that needs to be considered is the interpretation placed by the Supreme Court on S. 5 and S. 6 of the Delhi Special Police Estab1ishmet Act, 1946 ('DSPE Act' for short). The CBI as a Special Police set up under the DSPE Act for the investigation of certain offences in any Union Territory. The Superintendence of the CB1 vests in the Central Government, which species, by notification, the offences or classes of offences to be investigated by the CBI.

Section 5 of the DSPE Act empowers the Central Government to extend the powers and jurisdiction of the Special Police Establishment to any area, in a State, not being a Union Territory .for the investigation of any offences or classes of offences specified in a notification under S. 3, and on such extension of jurisdiction, a member of establishment shall discharge the functions of a police officer in that area, and shall, while show discharging such functions, be deemed to be a member of a police force of that area and be vested

with powers, functions and privileges and be subject and liabilities of a police officer belonging to that police force.

Section 6 :— Consent of the State Government to exercise of powers and jurisdiction — Nothing contained in S. 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or railway area, without the consent of the State Government.

The legal and the constitutional implications of S. 6 are as follows—

A) Section 6 is mandatory and a constitutional imperatiYe arising from the federal nature of country's Constitution and the division of powers between the Union and the States. Without S. 6, S. 5 would be outside the legislative competence of Parliament and, as such, unconstitutional and void, for the reason that the basic principal federalism is that the legislative and executive powers are divided between the Union and the States not by any law made by Centre, that by the Constitution itself.[523]

B) The Constitution incorporates the concept of federalism in various provisions. List II and List III of Seventh Schedule give plenary powers to the State Legislatures in the specified subjects, "police," including Railway Police is the State subject[524]

"Public order" : is in State list.[525] The Centre's powers to extend the CBI's jurisdiction can be traced to Entry 80 of List I which runs as follows:—

> *"80. Extension of the powers and jurisdiction of the members of a police force belonging to any State to any area outside that State. but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in such area is situated : extension of the powers and jurisdiction of members of a police force belonging any State to Railways outside that State."*

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523. Frontline, 26 March, 2010, at 42.
524. Entry 2, List II, Schedule VII of the Constitution.
525. Entry 1, List II, Schedule VII of the Constitution.

This entry rules out expressly such extension without the consent of the concerned State Government. Entry 2A of List I which is quoted in the judgment as supportive of the ratio of the CPDR case is as follows— "2-A : Deployment of any armed force of the Union or any other force subject to the control of Union or any contingent or unit thereof in any State in aid of the civil powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment."

Thus, under this entry the centre as powers to deploy its armed forces or any other force under its control in aid of civil powers in a State to maintain public order. The words "any other force" in this entry refer to forces other than the armed forces, for instance, para-military forces. The words "in aid of civil powers" in this entry indicate that the central forces can be deployed to help and supplement the efforts of the State forces in restoring public order. The central forces and the State authority have to act in unison for this purpose.[526]

But the CBI is neither an armed force nor a para-military force, so as to be subject to the control of the Union within the meaning of this entry. Basing upon entry 2-A and 80 of List-I, the observation made by the Court that it has "same powers" as that of the Central Government, is not justified as the Central Government has no such powers to interfere in the maintenance of public order in the State under entry 2-A and entry 80 of List-I without the consent of the State Government. Further, a judicial decision rendered in violation of law is regarded as "error of law apparent on the face of the record"[527] for which the writ of certiorari is the appropriate remedy. A renowned jurist stated that "error of law apparent on the record is an insult to the legal system which the Courts cannot over look."[528]

C) The cardinal rule of construction of statutes is to read the statutes literally, that is, by giving to the words their ordinary, natural and grammatical meaning.[529] A plain reading of S. 6 of the DSPE Act suggest that its requirements are mandatory and must be complied

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526. M.P. Jain, "Indian Constitutional Law" (Nagpur : Wadwa : 2003 : 2003) at p. 563.
527. Chetikar Jah (Dr.) v. V.P. Verma (Dr.) AIR 1970 SC 1832.
528. I.P. Massey, "Administrative Law" (Lucknow : EFC : 2001) at pp. 316-17.
529. G.P. Singh, "Principles of Statutory interpretation" (Nagpu : Wadhwa : 2001) at p. 75.

with. Further, provisions starting with negative words are clearly prohibitory and ordinarily used as a legislative devise to make a statute imperative.[530] S. 6 starts with negative expression i.e. "Nothing in 5. 5" which implies the mandatory nature of S. 6. These principles of statutory interpretation are mandatory and must be complied with and if so complied the observation made by the Court that the CBI can direct investigation into the offences committed in a State without the consent of the State concerned- is not based on these settled principles of statutory constructions.

3. Article 142 of the Constitution provides that the Supreme Court may pass such order as is necessary for doing complete justice in any cause or matter pending before it. However, a five-Judge Bench of the Supreme Court in *Supreme Court Bar Association v. Union of India*[531] ruled that "Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly." The ratio of the CPDR case is contrary to this observation.

4. The Union Government argued that in a federal structure it was the duty of the Courts to uphold the constitutional values and enforce constitutional limitations, as the ultimate interpreter of the Constitution. There is no dispute over this argument that judicial review acts as the final arbiter to give effect to the distribution of legislative powers between the Parliament and the State Legislatures. But this case did not involve any dispute between the Centre and the States over the distribution of legislative powers, nor was there any allegation that either of them transgressed those powers. In other words this case did not involve any violation of federal structure by legislative action.[532]

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530. Ibid., at 321

531. AIR 1998 SC 1895 The Bench comprising of S.C. Agarwala, G.N. Ray, Dr. A. S. Anand, S.P. Bharucha and S. Rajendra Babu, J.J. and the judgement of the Court was delivered by Justice A.S. Anand (as he then was).

532. Forntline, 26 March 2010, at 43.

5. The Supreme Court opined in CPDR case by saying that if the investigation by the State police lacks credibility or does not inspire confidence, then also the constitutional Courts can direct a CB1 investigation. This observation is open for debate for the following reasons:

A. It is common that all victims allege bias when the State police investigate an offence specially when political parties are alleged to have been involved in an offence occurred in a State. This type of imputation on the State police cannot be a ground to deny this powers to the State.

B. If the Courts have the discretion to decide whether in a particular case the State police lack credibility or do not inspire confidence, then it will be difficult for the Courts to justify their discretion in the absence of clear guidelines for guiding the discretionary powers and thus may lead to the charge of arbitrariness. Long back the Apex Court has laid down that a law creating a special Court for trial of certain offences must contain guidelines to be followed by the executive for referring the cases to the special court for what without which the law was declared unconstitutional as unguided discretion leads to arbitrariness.[533] Similar principle applies to the Courts also when they sought to refer the cases to the investigative agencies. In the absence of any clear cut guidelines which must lay down an objective criteria in guiding the Courts to refer the cases for investigations, exercise of such discretionary powers without guidelines leads to arbitrariness.

6. In CPDR case the Court sought to expand the scope of Article 21 which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The Constitution Bench held that the Court has a duty to enforce human rights that provide for fair and impartial investigations against any person accused of committing a cognizable offence. This aspect of the

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533. State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 ; Kathi Raning v. Sourashtra, AIR 1952 SC 123 : Delhi Administration v. G.C. Sukla, AIR 1980 SC 1382.

judgment strengthens human dignity inherent in the guarantee of right of life, in Article 21, which is a basic feature of the Constitution. However, while giving effect to this principle, the judgement in CPDR case went against the Constitutional scheme on the federal structure of the constitution.[534]

7. The Constitution has distributed not only legislative powers but also administrative powers between the Union and the States.[535] One salient principle in this regard is executive powers is co-terminus with legislative powers. Whenever the State Government wants to delegate its executive powers to the Union it can do so in accordance with the provisions mentioned in Article 258-A and not otherwise. Therefore, the courts can not overlook this constitutional provision and exercise administrative powers vested in the States in violation of this provision. If the provision is violated itwill have debilitating effect on the inter-Governmental delegation of administration powers and more specifically the provisions contained by Article 258-A.

8. Finally, the Supreme Court in Kesvananda Bharati v. Kerala[536] held that federalism is the basic feature of the Constitution. The implication of this observation is that the federal provision of the Constitution including distribution of legislative, administrative and financial powers between the Union and the States are beyond the reach of Parliament under Article 368,except as otherwise provided in the proviso to Article 368. In the light of this observation it is difficult to be convinced as to how the Courts can violate these federal provisions when the Courts have imposed restrictions on the Parliament in its amending powers. The proviso to Article 368 lays down the procedure for amendment of the federal provisions of the Constitution by the Parliament under Article 368, but neither Article 32 not Article 226 refer to any such procedure.

In the result, the observations made by the Apex Court in CPDR case that the Courts have powers to direct the CBI to conduct investigation into the

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534. Frontline, 26 March, 2010, p. 41.
535. Article 256-258 A of the Constitution.
536. AIR 1973 SC 1461.

offences committed in a State without the consent of the State concerned, appears to be inconsistent with the federal structure of the Constitution, instead of this, he constitutional Courts such as Supreme Court and High Courts can order the State police to conduct fair investigations under the supervision of the constitutional Courts for better protection of human rights in the country.

5.4 Is Separation of Power a part of the basic structure?

According to the Constitution, Parliament and the State Legislatures in India have the powers to make laws within their respective jurisdictions. This powers is not absolute in nature. The Constitution vests in the judiciary, the powers to adjudicate upon the Constitutional validity of all laws. If a law made by Parliament or the state legislatures violates any provision of the Constitution, the Supreme Court has the powers to declare such a law invalid or ultra vires. This check notwithstanding, the founding fathers wanted the Constitution to be an adaptable document rather than a rigid framework for governance. Hence Parliament was invested with the powers to amend the Constitution. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers, the apex court pronounced that Parliament could not distort, damage or alter the basic features of the Constitution under the pretext of amending it. The phrase 'basic structure' itself cannot be found in the Constitution.

5.4.1 The Golaknath verdict

In 1967 an eleven-judge bench of the Supreme Court reversed its position. Delivering its 6:5 majority judgement in the *Golaknath v. State of Punjab case*[537], Chief Justice Subba Rao put forth the curious position that Article 368, that contained provisions related to the amendment of the Constitution, merely laid down the amending procedure. Article 368 did not confer upon Parliament the powers to amend the Constitution. The amending powers (constituent powers) of Parliament, arose from other provisions contained in the Constitution (Articles 245, 246, 248) which gave it the powers to make laws (plenary legislative powers). Thus, the apex court

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537 I.G. Golaknath v. State of Punjab, AIR 1967 SC 1643.

held that the amending powers and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13 (2).

The majority judgement invoked the concept of implied limitations on Parliament's powers to amend the Constitution. This view held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental rights for themselves. Article 13, according to the majority view, expressed this limitation on the powers of Parliament. Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament. They observed that a Constituent Assembly might be summoned by Parliament for the purpose of amending the fundamental rights if necessary.

In other words, the apex court held that some features of the Constitution lay at its core and required much more than the usual procedures to change them.

The phrase 'basic structure' was introduced for the first time by M. K. Nambiar and other counsels while arguing for the petitioners in the Golaknath case, but it was only in 1973 that the concept surfaced in the text of the apex court's verdict.

Nationalisation of Banks and Abolition of Privy Purses

Within a few weeks of the Golaknath verdict the Congress party suffered heavy losses in the parliamentary elections and lost powers in several states. Though a private member's bill ~ tabled by Barrister Nath Pai - seeking to restore the supremacy of Parliament's powers to amend the Constitution was introduced and debated both on the floor of the house and in the Select Committee, it could not be passed due to political compulsions of the time. But the opportunity to test parliamentary supremacy presented itself once again when Parliament introduced laws to provide greater access to bank credit for the agricultural sector and ensure equitable distribution of wealth and resources of production and by:

a) *Nationalizing banks and*

b) *derecognizing erstwhile princes in a bid to take away their Privy purses, which were promised in perpetuity - as a sop to accede to the Union - at the time of India's independence.*

Parliament reasoned that it was implementing the Directive Principles of State Policy but the Supreme Court struck down both moves. By now, it was clear that the Supreme Court and Parliament were at loggerheads over the relative position of the fundamental rights vis-a-vis the Directive Principles of State Policy. At one level, the battle was about the supremacy of Parliament vis-a-vis the powers of the courts to interpret and uphold the Constitution.

At another level the contention was over the sanctity of property as a fundamental right jealously guarded by an affluent class much smaller than that of the large impoverished masses for whose benefit the Congress government claimed to implement its socialist development programme. Less than two weeks after the Supreme Court struck down the President's order derecognizing the princes, in a quick move to secure the mandate of the people and to bolster her own stature Prime Minister Indira Gandhi dissolved the Lok Sabha and called a snap poll.

For the first time, the Constitution itself became the electoral issue in India. Eight of the ten manifestos in the 1971 elections called for changes in the Constitution in order to restore the supremacy of Parliament. AK Gopalan of the Communist Party of India (Marxist) went to the extent of saying that the Constitution be done away with lock stock and barrel and be replaced with one that enshrined the real sovereignty of the people.[538] The Congress party returned to powers with a two-thirds majority. The electorate had endorsed the Congress party's socialist agenda, which among other things spoke of making basic changes to the Constitution in order to restore Parliament's supremacy.

Through a spate of amendments made between July 1971 and June 1972 Parliament sought to regain lost ground. It restored for itself the absolute powers to amend any part of the Constitution including Part III, dealing with fundamental rights[539] Even the President was made duty bound to give his assent to any amendment bill passed by both houses of Parliament. Several curbs on the right property were passed into law. The right to equality before the law and equal protection of the laws (Article 14) and the fundamental freedoms guaranteed under Article 19[540] were made subordinate to Article 39 (b) & (c) in the Directive Principles

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536. Quoted in Granville Austin, Working a Democratic Constitution, The Indian Experience. Oxford University Press, New Delhi, 1999, p. 235.

539. The Constitution (Twenty-fourth amendment) Act 1971.

540. Freedom of speech and expression, the right to assemble peacefully, the right to form unions and associations, the right to move freely and reside in any part of India and the right to

of State Policy.[541] Privy purses of erstwhile princes were abolished and an entire category of legislation dealing with land reforms was placed in the Ninth Schedule beyond the scope of judicial review.[542]

5.4.2 Position before the Keshvananda case

Parliament's authority to amend the Constitution, particularly the chapter on the fundamental rights of citizens, was challenged as early as in 1951. After independence, several laws were enacted in the states with the aim of reforming land ownership and tenancy structures. This was in keeping with the ruling Congress party's electoral promise of implementing the socialistic goals of the Constitution [contained in Article 39 (b) and (c) of the Directive Principles of State Policy] that required equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few. Property owners - adversely affected by these laws - petitioned the courts. The courts struck down the land reforms laws saying that they transgressed the fundamental right to property guaranteed by the Constitution. Piqued by the unfavourable judgements, Parliament placed these laws in the Ninth Schedule[543] of the Constitution through the First and Fourth amendments (1951 and 1952 respectively), thereby effectively removing them from the scope of judicial review.

Parliament added the Ninth Schedule to the Constitution through the very first amendment in 1951 as a means of immunizing certain laws against judicial review. Under the provisions of Article 31, which themselves were amended several times later, laws placed in the Ninth Schedule - pertaining to acquisition of private property and compensation payable for such acquisition - cannot be challenged in a court of

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practise any profession or trade are the six fundamental freedoms guaranteed under Article 19. The right to property was also guaranteed in this section until 1979 when it was omitted by the Forty-fourth amendment during the Janata part regime.

541. The Constitution (Twenty-fifth amendment) Act 1971.

540. The Constitution (Twenty-sixth amendment) Act 1971 and The Constitution (Twenty-ninth amendment) Act 1972, respectively.

543. Originally, the Constitution guaranteed a citizen, the fundamental right to acquire -hold and dispose of property under Article 19F. Under Article 31 he could not be deprived of his property unless it was acquired by the State, under a law that determined the amount of compensation he ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law. Article 31 has been modified six times - beginning with the First amendment in 1951 -progressively curtailing this fundamental right. Finally in 1978, Article 19f was omitted and Article 31 repealed by the Forty-fourth amendment. Instead Article 300A was introduced in Part XII making the right to property only a legal right. This provision implies that the executive arm of the government (civil servants and the police) could not interfere with the citizen's right to property.

law on the ground that they violated the fundamental rights of citizens. This protective umbrella covers more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. The Ninth Schedule was created with the primary objective of preventing the judiciary - which upheld the citizens' right to property on several occasions - from derailing the Congress party led government's agenda for a social revolution.[544]

Property owners again challenged the constitutional amendments which placed land reforms laws in the Ninth Schedule before the Supreme Court, saying that they violated Article 13 (2) of the Constitution.

Article 13 (2) provides for the protection of the fundamental rights of the citizen[545] Parliament and the state legislatures are clearly prohibited from making laws that may take away or abridge the fundamental rights guaranteed to the citizen. They argued that any amendment to the Constitution had the status of a law as understood by Article 13 (2). In 1952 *Sankari Prasad Singh Deo v. Union of India*[546] and 1955 *Sajjan Singh v. Rajasthan*[547], the Supreme Court rejected both arguments and upheld the powers of Parliament to amend any part of the Constitution including that which affects the fundamental rights of citizens. Significantly though, two dissenting judges in *Sajjan Singh v. Rajasthan* case raised doubts whether the fundamental rights of citizens could become a plaything of the majority party in Parliament.

5.4.3 Position after the Keshavanada case – Emergence of the Basic Structure Concept

Inevitably, the constitutional validity of these amendments was challenged before a full bench of the Supreme Court (thirteen judges). Their verdict can be found in eleven separate judgements.[548] Nine judges signed a summary statement which records the most important conclusions reached by them in this case. Granville Austin

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544. Later on, laws relating to the nationalisation of certain sick industrial undertakings, the regulation of monopolies and restrictive trade practices, transactions in foreign exchange, abolition of bonded labour, ceiling on urban land holdings, the supply and distribution of essential commodities and reservation benefits provided for Scheduled Castes and Tribes in Tamil Nadu were added to the Ninth Schedule through various constitutional amendments.

545. Article 13 (2) states- "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." The term Part refers to Part III of the Constitution Which lists the fundamental rights of the citizen.

546. Sankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458

547. Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

548. Kesavananda Bharati; Sripadaga Javaru v. State of Kerala and Another 1973 (4) SCC 225ft.

notes that there are several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgements.[549] Nevertheless, the seminal concept of 'basic structure' of the Constitution gained recognition in the majority verdict.

All judges upheld the validity of the Twenty-fourth amendment saying that Parliament had the powers to amend any or all provisions of the Constitution. All signatories to the summary held that the Golaknath case had been decided wrongly and that Article 368 contained both the powers and the procedure for amending the Constitution.

However they were clear that an amendment to the Constitution was not the same as a law as understood by Article 13 (2). It is necessary to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament:

a) It can make laws for the country by exercising its legislative powers[550] and

b) It can amend the Constitution by exercising its constituent powers.

Constituent powers is superior to ordinary legislative powers. Unlike the British Parliament which is a sovereign body (in the absence of a written constitution), the powers and functions of the Indian Parliament and State legislatures are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdictions. The general framework for making these laws is provided by the Constitution. Parliament alone is given the powers to make changes to this framework under Article 368.[551] Unlike. ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament.

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549. Austin, Working a Democratic Constitution, p.265.

550. By virtue of the powers conferred upon it in Articles 245 and 246, Parliament can make laws relating to any of the 97 subjects mentioned in the Union List and 47 subjects mentioned in the Concurrent List, contained in the Seventh Schedule of the Constitution. Upon the recommendation of the Rajya Sabha (Council of States or the Upper House in Parliament) Parliament can also make laws in the national interest, relating to any of the 66 subjects contained in the State List.

551. However certain constitutional amendments must be ratified by at least half of the State legislatures before they can come into force. Matters such as the election of the President of the republic, the executive and legislative powers of the Union and the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution amending provisions themselves, contained in Article 368, must be amended by following this procedure.

Another illustration is useful to demonstrate the difference between Parliament's constituent powers and law making powers. According to Article 21 of the Constitution, no person in the country may be deprived of his life or personal liberty except according to procedure established by law. The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the fundamental right to life by abolishing death penalty, the Constitution may have to be suitably amended by Parliament using its constituent powers.

Most importantly seven of the thirteen judges in the Kesavananda Bharati case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent powers was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.

5.4.4 Basic Features of the Constitution According to the Kesavanada Verdict

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either. Sikri, C.J, explained that the concept of basic structure included:

- *Supremacy of the Constitution*
- *Republican and Democratic form of Government*
- *Secular character of the Constitution*
- *Separation of Powers between the Legislature, Executive and the Judiciary*
- *Federal character of the Constitution*

Shelat, J. and Grover, J, added two more basic features to this list:

- *The Mandate to build a Welfare State contained in the Directive Principles of State Policy*
- *Unity and Integrity of the Nation*

Hegde, J. and Mukherjea, J. identified a separate and shorter li.st of basic features:

- *Sovereignty of India*
- *Democratic Character of the Polity*
- *Unity of the Country*
- *Essential Features of the Individual Freedoms Secured to the Citizens*
- *Mandate to Build A Welfare State*

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

- *Sovereign Democratic Republic*
- *Parliamentary Democracy'*
- *Three organs of the State*

He said that the Constitution would not be itself without the fundamental freedoms and the directive principles.[552] Only six judges on the bench (therefore a minority view) agreed that the fundamental rights of the citizen belonged to the basic structure and Parliament could not amend it.

The minority view

The minority view delivered by Justice A.N. Ray (whose appointment to the position of Chief Justice over and above the heads of three senior judges, soon after the pronunciation of the Kesavananda verdict, was widely considered to be politically motivated), Justice M.H. Beg, Justice K.K. Mathew and Justice S.N. Dwivedi also agreed that Golaknath had been decided wrongly. They upheld the validity of all three amendments challenged before the court. Ray, J. held that all parts of the Constitution were essential and no distinction could be made between its essential and non-essential parts. All of them agreed that Parliament could make fundamental changes in the Constitution by exercising its powers under Article 368.

In summary the majority verdict in Kesavananda Bharati recognised the powers of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of Sankari Prasad (1952) by restoring the supremacy of Parliament's

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552. His Holiness Kesavananda Bharati Sripadagafavaru v. State of Kerala and Another 1973 (4) see pp. 637-38.

amending powers, in effect it strengthened the powers of judicial review much more.[553]

5.4.5 Basic Structure concept reaffirmed- the Indira Gandhi Election case

In 1975, The Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the Thirty-ninth amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the powers to resolve such election disputes.' Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.

Amendments were also made to the Representation of Peoples Acts of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, 1975 in order to save the Prime Minister from embarassment if the apex court delivered an unfavourable verdict. The malafide intention of the government was proved by the haste in which the Thirty-ninth amendment was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day. The Rajya Sabha (Upper House or House of Elders) passed it the next day and the President gave his assent two days later.' The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10. When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.

Counsel for Raj Narain who was the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the

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553. The majority view declared certain parts of the Twenty-fifth amendment invalid especially those relating to Article 31 (c) and upheld the Twenty-ninth amendment- for a detailed account see Austin, Working of a Democratic Constitution, pp. 265ft.

Constitution as it affected the conduct of free and fair elections and the powers of judicial review. Counsel also argued that Parliament was not competent to use its constituent powers for validating an election that was declared void by the High Court.

Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the powers of the judiciary to adjudicate in the current election dispute.[554] One judge, Beg, J. upheld the amendment in its entirety. ·Mrs. Gandhi's election was declared valid on the basis of the amended election laws. The judges grudgingly accepted Parliament's powers to pass laws that have a retrospective effect.

5.4.6 Basic Features of the Constitution according to the Election case verdict

Again, each judge expressed views about what amounts to the basic structure of the Constitution: According to Justice H.R. Khanna, democracy is a basic feature of the Constitution and includes free and fair elections. Justice K.K. Thomas held that the powers of judicial review is an essential feature. Justice V.V. Chandrachud listed four basic features which he considered unamendable:

- *Sovereign Democratic Republic Status*
- *Equality of Status and Opportunity of an Individual*
- *Secularism and Freedom of Conscience and Religion*
- *Government of Laws and not of men i.e. the rule of law*

According to Chief Justice A.N. Ray, the constituent powers of Parliament was above the Constitution itself and therefore not bound by the principle of separation· of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections. Ray, C.J. held that ordinary legislation was not within the scope of basic features.

Justice K.K. Mathew agreed with Ray, C.J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary. Justice M.H. Beg disagreed with Ray, C.J. on the grounds that it would be unnecessary to have a Constitution if Parliament's constituent powers were said to be

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554 The Supreme Court struck down Section 4 of the Thirty-ninth amendment Act, i.e. Article 329A of the Constitution as it existed in 1975.

above it.[555] Judicial powers were vested in the Supreme Court and the High Courts and Parliament could not perform them. He contended that supremacy of the Constitution and separation of powers were basic features as understood by the majority in the Kesavananda Sharali case. Beg, J. emphasised that the doctrine of basic structure included within its scope ordinary legislation also.

Despite the disagreement between the judges on what constituted the basic structure of the Constitution, the idea that the Constitution had a core content which was sacrosanct was upheld by the majority view.

5.4.7 The Kesavananda Review Bench

Within three days of the decision on the Election case Ray, C.J. convened a thirteen judge bench to review the Kesavanada verdict on the pretext of hearing a number of petitions relating to land ceiling laws which had been languishing in high courts. The petitions contended that the application of land ceiling laws vioiated the basic structure of the Constitution. In effect the Review bench was to decide whether or not the basic structure doctrine restricted Parliament's powers to amend the Constitution. The decision in the Bank Nationalisation case was also up for review. Meanwhile Prime Minister Indira Gandhi, in a speech in Parliament, refused to accept the dogma of basic structure.[556]

It must be remembered that no specific petition seeking a review of the Kesavananda verdict filed before the apex court- a fact noted with much chagrin by several members of the bench. N.N. Palkhivala appearing for on behalf of a coal mining company eloquently argued against the move to review the Kesavananda decision. Ultimately, Ray, C.J. dissolved the bench after two days of hearings. Many people have suspected the government's indirect involvement in this episode seeking to undo an unfavourable judicial precedent set by the Kesavananda decision. However no concerted efforts were made to pursue the case.

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555. A comparison with the Westminster model would bring out the subtleties involved in this matter more clearly. The United Kingdom does not have a written Constitution like India or the USA The British Parliament is a sovereign body and there is very little difference between constitutional law and ordinary law in that country. The Indian Parliament owes its existence to a written Constitution that was put together by another sovereign body, namely, the Constituent Assembly. Parliament's powers (including the powers to amend) are not sui juris but essentially derived from this Constitution. Therefore it cannot be said to occupy a position superior to the Constitution.

556. Speech in Parliament- October 27, 1976: see Indira Gandhi: Selected Speeches and Writings, vol. 3, p.288.

The declaration of a National Emergency in June 1975 and the consequent suspension of fundamental freedoms, including the right to move courts against preventive detention. diverted the attention of the .country from this issue.

5.4.8 Sardar Swaran Singh Committee and the Forty-second Amendment

Soon after the declaration of National Emergency, the Congress party constituted a committee under the Chairmanship of Sardar Swaran Singh to study the question of amending the Constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the Constitution including the Preamble, through the Forty-second amendment (passed in 1976 and came into effect on January 3, 1977). Among other things the amendment:

(a) gave the Directive Principles of State Policy precedence over the Fundamental Rights contained in Article 14 (right to equality before the law and equal protection of the laws), Article 19 (various freedoms like freedom of speech and expression, right to assemble peacefully, right to form associations and unions, right to move about and reside freely in any part of the country and the right to pursue any trade or profession) and Article 21 (right to life and personal liberty). Article 31C was amended to prohibit any challenge to laws made under any of the Directive Principles of State Policy;[557]

(b) laid down that amendments to the Constitution made in the past or those likely to be made in future could not be questioned in any court.on any ground;

c) removed all amendments to fundamental rights from the scope of judicial review and

d) removed all limits on Parliament's powers to amend the Constitution under Article 368.

5.4.9 Basic structure doctrine reaffirmed· the Minerva Mills and Waman Rao Cases

Within less than two years of the restoration of Parliament's amending powers to near absolute terms, the Forty-second amendment was challenged before the

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557. Article 31C stated that laws passed to implement the Directive Principles of State Policy could not be challenged in courts on the ground that they violated any fundamental right. Prior to the Forty second amendment this clause was applicable only to Article 39 (b) & (c) of the Directive Principles which dealt with equitable distribution of wealth and resources of production.

Supreme Court by the owners of Minerva Mills (Bangalore) a sick industrial firm which was nationalised by the government in 1974.[558]

Mr. N.A. Palkhivala, renowned constitutional lawyer and counsel for the petitioners, chose' not to challenge the government's action merely in terms of an infringement of the fundamental right to property. Instead, he framed the challenge in terms of Parliament's powers to amend the Constitution. Mr. Palkhivala argued that Section 55 of the amendment[559] had placed unlimited amending powers in the hands of Parliament. The attempt to immunize constitutional amendments against judicial review violated the doctrine of basic structure which had been recognized by the Supreme Court in the Kesavananda Bharati and Indira Gandhi Election Cases. He further contended that the amended Article 31C was constitutionally bad as it violated the preamble of the Constitution and the fundamental rights of citizens. It also took away the powers of judicial review.

Chief Justice Y.V. Chandrachud, delivering the majority judgement (4:1), upheld both contentions. The majority view upheld the powers of judicial review of constitutional amendments. They maintained that clauses (4) and (5) of Article 3611 conferred unlimited powers on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitutien's basic structure. The judges, who concurred with Chandrachud, C.J. ruled that a limited amending powers itself is a basic feature of the Constitution.

Bhagwati, J. the dissenting judge also agreed with this view stating that no authority howsoever lofty, could claim to be the sole judge of its powers and actions under the Constitution.[560] The majority held the amendment to Article 31 C unconstitutional as it destroyed the harmony and balance between fundamental rights and directive principles which is an essential or basic feature of the Constitution.[561] The amendment to Article 31C remains a dead letter as it has not been repealed or

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558. Minerva Mills Ltd. v Union of India (1980) 3 SCC 625.

559. The Constitution (Forty-second amendment) Act 1976 [corresponding to Article 368 (4) & (5)J

560. Such a position seems contrary to the philosophy of separation of powers it characterize the structure of governance in Indian Constitution provides for a scheme of checks and balances between the three organs of government.

561. Bhagwati, J, upheld its validity and concurred that the government's takeover of the sick mill was valid.

deleted by Parliament. Nevertheless cases under it are decided as it existed prior to the Forty-second amendment.

In another case relating to a similar dispute involving agricultural property the apex court, held that all constitutional amendments made after the date of the Kesavananda Bharati judgement were open to Judicial review.[562] All laws placed in the Ninth Schedule after the date of the Kesavananda Bharati judgement were also open to review in the courts. They can be challenged on the ground that they are beyond Parliament's constituent powers or that they have damaged the basic structure of the Constitution. In essence, the Supreme Court struck a balance between its authority to interpret the Constitution and Parliament's powers to amend it.

5.5 Strength and Weaknesses of Law made by Judiciary

The 1egislature, the Judiciary and the Executive are three separate organs or agencies of the State entrusted with the sovereign powers of governance of the State by rule of law-meaning, under and in accordance with the Constitution of India as by law established and laws framed there under and in accordance therewith. Since, however, the task of governance of the State by rule of law is not entrusted entirely to one organ or agency exclusively - but it is a multi-faceted task entrusted to all the three organs or agencies of the State. mandated to function in co-operation with one another - undercurrents of conflict are likely to be felt when the function of one organ or agency intrudes on that of the other or the manner of performance and perceptions differ. Since both legislation and administration of justice - including its enforcement are the prime components of rule of law and directly concern the governance of the country, the possibility of a conflict, in particular, in the filed of law-making may be more pronounced in the area of “judicial review”, a function specifically entrusted by the Constitution to the judiciary under Art. 141 - to test the validity of a legislation on the touchstone of the Constitution and declare it as valid or invalid. In doing so. the judiciary interprets the concerned legislation in the context of the provisions of the Constitution under which it is challenged and proceeds to formulate, declare and lay down its own statement of law, in the form of a judicial pronouncement, on the subject. Judicial review is thus the most effective instrument of governance of the State by administration of justice established way back in 1903 by Chief Justice John

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562. Womon Rao v Union of India (1981) 2 SCC 362. The Supreme Court decided this case along with that of Minerva Mills. Bhagwatl, J. who was in the minority again Incorporated his opinions on both cases in a single judgment.

Marshall, who held the belief that legislative enactments be subservient to the Constitution and it was the function of the Court alone to decide whether the legislation was valid or not. *Marbury v. Madison*.[563]

Thus a question arises - when the Legislature enacts the legislation but the judiciary finally determines its validity - who really makes the law? It is the constitutional function of the Legislature to enact and make legislation but does the judiciary also make the law? Can Judges make law? Do Judges make law? Should Judges, make law? This study is an attempt to outline and deal with these questions broadly within the limits permit by time and space available for a topic of vast magnitude[564].

5.5.1 Can Judges make law?

(a) To deal with this issue, several misconceptions need to be cleared.

(i) The general impression that the business of governance of the State is cast upon one particular organ or agency of the State under the Constitution, is erroneous. In the complexity of situations which the modern day Government has to face, often one organ or agency of the State may be required to function as another[565]. In *Jayantilal v. FN Rana*[566] the Supreme Court has acknowledged the fact that - "It cannot be assumed that the Legislative functions are performed by the Legislature. The Executive functions by the Executive and the Judicial functions by the Judiciary. The Constitution has not made any absolute and rigid division of functions between the three agencies of the Stated Although it is indeed possible to characterize with precision that any particular agency of the State is executive, legislative or judicial — but it cannot be predicted that a particular function exercised by any individual agency is essentially of the character which the agency bears." This view has been reaffirmed by the Supreme Court in *S. S. Bola v. B. D. Sardana*[567]where the Supreme Court had said that the founding fathers of the Constitution have distributed the sovereign

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563. 5 U.S. 137 (1803).

564. M.S. Phiroza Anklasaria, "Judicial Law Making- Its Strength and Weaknesses", AIR 2012 Jour. 83

565. Halsbury laws – Vol. 7 Art. 409

566. AIR 1964 SC 655

567. AIR 1997 SC 3121

powers of the People of India among all the three organs or agencies of the State, to be exercised without assigning any specific task to any specific agency as "Trustees of the People of India". As such, the judiciary and particularly. the Supreme Court of India, can be said to be duly authorised and empowersed to participate in the governance of the country by judicial law-making in the manner and to the extent specified by the Constitution of India.

(ii) Under Art. 141 of the Constitution of India, law declared by the Supreme Court is binding on all Courts and tribunals in India and decrees and orders of the Supreme Court are "enforceable" under Art. 142, pursuant to the Supreme Court (decrees and or orders) Enforcement Order. 1954 (C. 0. 47). Art 144 mandates that all authorities, civil and judicial must act in aid of the Supreme Court. In fact the right, tinder Art. 32 to move the Supreme Court for violation of any fundamental right, is itself a fundamental right *Kochunni v. State of Madras*[568] and under Art. 32(2) the Supreme Court powers to issue any one or more of the prerogative writs, for "enforcement" any fundamental right - besides which it can also resort to the law of contempt, when necessary (Art. 129). Therefore, the law pronounced, proclaimed and/or declared by the judiciary in India and the Supreme Court in particular - namely "judicial law" - is as much a part of the law of the land, as legislation and therefore one may say that Legislation is not the only source of law in India. Law under Art. 13(3) (a) of the Constitution of India is defined inclusively. Hence, Judge made or judicial law "declared" (pronounced/proclaimed) under Art. 141 of the Constitution being both binding and enforceable is law as defined in the Constitution.

In the case *Tika Ram and Others v. State of UP & Others*[569] The Court took the view in paragraph 10 that when this Court had declared a particular statute to be invalid, the Legislature had no powers to overrule the judgment. However, it has the powers to suitably amend the law by use of proper phraseology removing the defects pointed out by the Court and by amending the law inconsistent with the law declared

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568. AIR 1959 SC 725
569. 2009 (8) SC J 37

by the Court so that the defects which were pointed out were never on statute for enforcement of law. Such an exercise of powers to amend a statute is not an incursion on the judicial powers of the Court but as a statutory exercise on the constituent powers to suitably amend the law and to validate the actions which have been declared to be invalid.

Even by the general definitions of law contained in the judicial dictionaries and lexicons - Judge made law or judicial law, is law Black (7th Ed. 1999) refers to law as aggregate of legislation judicial precedents and legal principles. Roscoe Pound in one of his essays[570] talks of two kinds of law. One, an imperative rule laid down by a law making organ of a politically organized society deriving its force from the authority of the sovereign (legislation) and the other, being a rational or ethical idea of the rule of right or justice, deriving authority from its intrinsic reasonableness - which is "recognized" as law, though not made by the sovereign. By Blackstone's definition, law is a rule of civil conduct, prescribed by the Supreme Court powers of the State, commanding what is right and prohibiting what is wrong (Blackstone's Comm.) At its simplest, law is a manifestation of principles of justice equity and good conscience[571] Though in some legal systems, judicial law is not law, but only evidence of law under the Indian legal system, judge made law/judicial law – is law.

The point, to be noted about judicial law making as against legislation enacted by the Legislature, is that - whist the legislative powers are expressly defined and circumscribed by the Constitution (Arts. 245 - 246 r.w. 7th Schedule) - judicial law - making is not so expressly restricted. The Supreme Court under Art. 32 can pass all such orders as may be necessary in the facts of the case to grant relief against violation of a fundamental right contained in Part III of the Constitution and/or pass such other orders as it "deems fit to do complete justice" between the parties under Art. 142. Thus for instance, under the combined powers of Arts. 32 and I4 in *Golaknath v. State of Punjab*[572] the Supreme Court innovated the doctrine of "prospective overruling" - so that its past decisions on the same subject remained unaffected by the prospective change in law: while in *Paramjit Kaur v. State of Punjab*[573] the Supreme Court conferred powers on the Human Rights Authority far

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570. (more about nature of law-1935 at 513-515)
571. Dalima Cement v. Union of India 1996 (10) SCC 104.
572. AIR 1967 SC 1643.
573. 1999 (2) SCC 131

beyond the scope of the powers authorised by the Human Rights Act. 1993 itself-under which the said body is constituted.

The Constitution places implicit faith and trust in judicial law making. Good Judges make good law and bad Judges make bad law but both, remain on the statute book as law binding and enforceable until changed or corrected. Exercise of such wide powers and discretion by the judiciary requires maturity and strong character manifested by a good sense of selflessness, responsibility, rectitude and balanced discretion so that the instrument of judicial review is not used only direct correct the legislature alone but when required, it can also be turned inwards and used against the judiciary itself, specifically when judicial law making misconstrues vital provisions of the Constitution and tends to found the very source from which judicial law making emanates. The best example of such beneficent exercise judicial review, in overturning of the case of S. *P. Gupta v. Union of India*[574] the larger bench judgment of the *Supreme Court in Advocates on Record Assam v. Union of India*[575]. Such cases are warning that judicial dictums cannot always be equated with judicial wisdom.

(iii) Simply stated "rule of law" means as Aristotle says- "Government of laws and not of men" - which in turn would mean governance of the country by and in accordance with the Constitution and the laws meaning absence of unreasonableness, unfairness and arbitrariness. The prime function of the judiciary and particularly the Supreme Court is to "administer justice". Administration of justice *inter alia* means (i) to rule to govern. (ii) by deciding disputes and controversies between the parties and (iii) in the due course of such performance — to formulate, to declare and thus, lay down the law (as per Arts. 141, 142. and 32 of the Constitution). Therefore, the judiciary is en titled to a larger share of respect in the matter of governance of the State by rule of law because "Judges rule by authority of reason and not by reason of authority" Judiciary is the first along its equals and formulating. declaring and laying down the law is its most significant function and an in dispensable contribution in the governance of the State by rule of law.

(b) Legislators make law by legislation

Judges make law by judicial review thereof (under Art. 141) and pursuant thereto, by passing such orders in the matter, as may provide "complete justice" to the

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574. AIR 1982 SC 149
575. AIR 1994 SC 268.

parties (Art. 142). One restriction appears to be implicit "Judicial review" is defined as "scrutiny of legislation on the touchstone of the Constitution"[576] Scrutiny of the legislation is principally its interpretation from the point of view of ascertaining that it does not violate any provision of the Constitution, particularly the Fundamental Rights enshrined in Part III. In several judgments including *Kesavananda Bharati Keshavananda Bharti v. State of Kerala*[577] the Sui Ciurt has declared judicial review as a "Constituent powers" and a vital part of the basic structure of the Constitution, beyond and out of reach of the powers of amendment of the Constitution, so that it cannot be abrogated and/or taken away and any attempt to do, so would be void and of no effect. Looked at strictly as defined by the Supreme Court and from the point of view of Art. 141 of the Constitution which empowers the Supreme Court to "declare" the law - judicial review is essentially a powers to interpret the legislation with a view to ensure that it - (i) does not violate, any provisions of the Constitution and particularly its basic tenets and features, and/or (ii) that it is in furtherance of the aims and objects of the Constitution set out as directive Principles in Part IV of the Constitution[578]. Hence a "judicial mind" applied to "review" a legislation cannot substitute its own view for it or attempt to change it to what it considers to be better. The powers to legislate is given to the Legislature and not to the judiciary. The judiciary has only to ensure that the legislature does not exceed its bounds or limits and that the legislation is largely in consonance with and certainly not contrary to or violative of the provisions of the Constitution and its basic features and tenets. This is obvious from the fact that the country is ruled by legislation enacted by the Legislature (Arts. 245-246 r.w. 7th Schedule) and not by judicial law making which is a powers essentially to oversee the validity of the legislation and not to substitute it. This view is born out by the fact that the Judges take oath[579] that they "will bear true faith and allegiance to the Constitution of India as by law established". Judicial review is therefore an instrument intended to protect and safeguard the Constitution and Judges for that reason are aptly called "the watch-dogs of the Constitution". Judicial law making is concerned with and essentially restricted to interpretation of the Constitution and the laws and conflict with the Legislature becomes inevitable when judicial law making transgresses such limits. Judiciary participates in the

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576. Dalima Cement v. Union of India, AIR 1997 SC 3127
577. AIR 1973 SC 1461
578. State of Gujrat v. Mirzapur Jamat, AIR 2006 SC 213
579. Third Schedule, part IV of Indian Constitution.

governance of the country by ensuring that such governance is in accordance with the Constitution and the laws made there under. Judicial law making cannot replace legislation and skirmishes related to routine and mundane matters (such as making or framing of Service rules and regulations in the course of day to day administration of Government affairs) are most unfortunates. Judicial law making is not expected to interfere with legislation which is enacted/framed by a vast body constitutionally constituted - having its own peculiar problems of administration. It stands to reason that exercise of judicial law making liberally would amount to interference in administration which would possibly provoke frequent amendments to the Constitution (Art. 368) and may even adversely affect the stability of the Constitution and the day to day administration of the country.

The very best example of judicial review and judicial law making by interpretation which protected the Constitution and its basic features and tenets - against any possibility of encroachment by the Legislature, is contained in the brief history of the law 'preceding' the case of Kesavananda Bharati. In *Sankari Prasad v. Union of India*[580] it was held that "law" as defined in Alt 13(2) of the Constitution meant law made in exercise of "ordinary legislative powers" and not such constitutional amendments as are made in exercise of "Constituent powers". This meant that Art. 13(2) did not come in the way of Constitutional amendments, which could take away or abrogate even the Fundamental Rights in Part III. However, in *Golaknath v. State of Punjab*[581] the Supreme Court reversed this view and held that law in Art. 13(2) also included constitutional amendments and therefore, any amendment of the Constitution which took away or abrogated the fundamental rights would be void, like any other ordinary legislation. To overcome the decision in Golaknath, sub-clause (4) was added to Art. 368 by the 24th Amendment Act, so as to restore the position prior to Golaknath, where under the Parliament could even amend the Fundamental Rights in Part III. The 24th Amendment Act came to be challenged in Kesavananda Bharati. All Judges who participated in the decision of Kesavananda Bharti held that under Art. 368 even the Fundamental Rights can be amended. However, H. R. Khanna, J. on the true and correct interpretation of Art. 368 held, *inter alia*, that - amendment means that the old Constitution survives and only changes are to be made and the changes to be made must be such, that the "Old

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580. AIR 1965 SC 845
581. AIR 1973 SC 1643

Constitution" does not lose its identity. Old Constitution means the Constitution as originally framed by the founding fathers, to be identified by its basic structure and framework. Justifying the powers of amendment as absolutely necessary to effect important changes to the Constitution and to adapt the system to the requirements of the changing times and conditions Khana. J. held that any change to be brought about by an amendment must not be such as to alter and altogether change the basic structure and framework of the Constitution under the guise of making an amendment thereto. Thus for instance, changes can be made by the powers of amendment under Art. 368 but certainly not such as to change the very form of the Government from a democracy to a dictatorship or a hereditary monarchy. Again, the role of H. R. Khanna in *ADM, Jabalpum v. S. Shukla*[582], can never be forgotten. On the emergency being imposed pursuant to Art. 352 of the Constitution, the notorious MISA (1971) was enacted which suspended Art. 21 and permitted arrest without trial. The learned Judge spoke up for the common man, holding that such law makes deep inroads into basic human freedoms which are of prime position among the various human values of life and detention without trial is anathema to all those who love personal liberty and have abiding faith in the rule of law and the sanctity of personal liberty. Vesting of powers of detention without trial in the Executive, is to make the same authority both Judge and prosecutor. The learned Judge rejected the contention that Art. 21 is the sole repository of the right to life and personal liberty. Rule of law postulates Government under la and not under will of the ruler. In the evolution of the society from tooth and claw to civilized existence, right to life and liberty represents a facet of human values cherished by mankind and "it is not a gift of any Constitution". Respect for Government means respect for rule of law, which again means rule according to the Constitution and the laws. Quoting from Professor Macdonald - the learned Judge pointed out that the "wonderland beauracracy" resists judicial review of administrative action and if that is allowed to go unchecked, a vital section of Government powers would escape legal control and become arbitrary Even in the absence of Art. 21, the State has no authority to deprive a person of his life and liberty and that is the distinction between a lawless society and a society governed by rule of law. Right to life and liberty is a natural and preexisting right and by Art. 21 it is only enshrined as a fundamental right. It cannot be taken away arbitrarily or rendered

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582. AIR 1976 SC 1207

vulnerable under Art. 359. Rule of law requires approval by the Parliament and must then be granted by Parliament within limits. Where there is deprivation by Government of something that belongs to an individual, specific legislation is necessary to make such encroachment on personal rights (Art. 171). The learned Judge, ruled that before encroaching upon ones right to life and liberty - powers must first be conferred specifically on an authority to do so and the law must prescribe the procedure for exercise of such right. Though Art. 21 impinges on the second requirement, it does not provide for the first (para 189). The learned Judge has extolled the value of the Writ of Habeas Corpus as the most important character of a democratic State under rule of law - because it questions the legality of the restraint and calls for justification of detention. Writ of Habeas Corpus is thus the most unique writ in the armoury of our laws and the best and sufficient defence of personal freedom. The learned Judge regretted his dissent in the matter from the views held by his brother Judges and said that independence to decide cases “as they should be decided” is far more valuable to constitutional values than “unanimity secured by its sacrifice”. Appealing to the brooding spirit of the law and the intelligence of the future - the learned Judge ended by faith and belief that “a later decision may correct the error into which the Court had been betrayed”.

Thus, by judicial review Khanna, J. read so much meaning, sense and substance in the cold letters of Arts. 368 and 359 of the Constitution and by such judicial law meaning, granted and restored to the people, Government by rule of law, as mandated under the Constitution of India. It is truly said by Lord Hands that liberty lies in the hearts of men and when it dies there, no Constitution no law and no Court can save it, nor save the people from political enslavement, social stagnation and mental servitude. Khanna. J. by judicial review of the 24th Amendment Act and the notorious MISA sent a strong and clear message that the Constitution is not a play - thing of the party in powers. It has glorious and in— destructible character of permanence. The country owes a debt of gratitude to such judicial law - making by its great Judges.

(c) (i) However, on question other than those relating to the basic structure of the Constitution and such as would not without good and sufficient reason affect the common man by taking away or curtailing his natural and/or fundamental rights and freedoms the Supreme Court has adopted a cautious and non-interfering approach. as can be seen from some of the following illustrations :

Courts have recognized the fact that powers to legislate has been entrusted by the Constitution to the Parliament (Arts. 245-246 r.w. 7th Schedule) and Government cannot be directed to make legislation on any subject. Thus in *Maharishi Avdesh v. Union of India*[583], the Supreme refused to issue a writ directing Government to frame a common Civil Code including Moslems or to give directions regarding rights of Moslem women. Similarly, where there is no violation of any fundamental right *English Medium Students v. State of Karnataka*[584], or the matter is purely of a political nature like appointment of a CM of a *State through Venkatachalam v. Rabri Devi*[585] or where the matter rests on the information or knowledge of the Government and its assessment of the situation of law and order or public order like whether an emergency declared should be continued or not *Bhutnath v. State of W.B.*[586], Courts have respected and conceded that it is the Government and not the Court that rules the country and the instrument of judicial review is available only to protect and safeguard the Constitution and not so as to substitute the decision or opinion of the Government. by that of the Courts. For this good reason. Courts have steadfastly refused to interfere with economic policy directions issued by the *Peerless General Insurance v. RBI*[587] or with price fixation *Sitaram Sugar v. Union of India*[588] or in the administration of the Stock Exchanges *Om Prakash v. Delhi Stock Exchange*[589] or in the administration of *Co-operative Societies Bhandara Dist. Co-op. Bank v. State of Maharashtra*[590]. The Supreme Court has also kept away from interfering with or disturbing findings of expert bodies like the Pay Commission *Vasudeva Nair v. Union of India*[591].

(ii) And yet, where a fundamental right is violated or mala fides are apparent - the Supreme Court has stepped in and acquitted itself creditably. Thus in *Bennett Coleman v. Union of India*[592] the Supreme Court found it necessary to intervene and protect the fundamental right of a citizen under Art, 19(i) (a) to free speech and expression, which correctly said includes the right of the

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583. *1994 Supp. (1) SCC 733*
584. *AIR 1994 SC 1702*
585. *(1997) 5 SCALE 632*
586. *AIR 1974 SC 806*
587. *AIR 1992 SC 1033*
588. AIR 1990 SC 1277
589. *(1994) 2 SCC 117*
590. *AIR 1993 SC 59*
591. 1991 Supp. (2) SCC 134
592. *l972 2 SCC 788*

people "to read". Entertaining the Writ of the shareholders of tile Company - the Supreme Court overcame its own self imposed limitation not to interfere with an administrative order passed under a statute (Essential Commodities Act. 1955) particularly pursuant to policy of tile Government (for controlling the sale and distribution of newsprint - called the News Print Control Order, 1962). Reading in-depth substance and meaning in Arts. 19(1)(a) and 14, the Supreme Court held that although the powers of the Government to import newsprint and control its distribution cannot be denied - such distribution must be equitable and fair. The newspapers have to be left free to determine the number of their pages, their circulation and their new editions to be printed within a quota to be fairly fixed. Compulsory reduction of a news paper to ten pages treates unequal as equals in violation of Art. 14 and also offends their right of free speech and expression under Art. 19(1)(a). "Freedom of the press" enables news papers to have any volume of circulation and includes the rights of the citizens to speak. publish and express their views and also embodies the right of the people "to read". No restriction sought to be continued during Emergency would he valid and sustainable, unless it was imposed prior to the Emergency under valid legal authority. In the Mandal Commission matter *Indira Sawhney v. Union of India*[593], the Supreme Court felt it necessary to intervene in the policy of the Government making reservations for Backward Classes in the services of the State, on complaints that such reservations were not justifiable excessive and violated the fundamental rights of the general classes tinder Arts. 14 and 16 of the Constitution. In both these cases, since violation of a valuable fundamental right was alleged - the Supreme Court intervened despite the bland contention on behalf of the Government that "it was a matter of policy".

(iii) There are cases where it becomes obligatory on the part of the Supreme Court' to interfere (if only to perform its task of administration of justice) where political or executive corruption has reared its head and or sheer incompetence or administrative apathy has caused or is likely to cause substantial loss and injustice. Thus in *Vineet Narain v. Union of India*[594], where after the discovery of "the Jain Diaries", the sluggish investigations by the CBI and the revenue

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593. AIR 1993 SC 477
594. AIR 1998 SC 889

authorities appeared to be intended to protect the political executive in powers and to scuttle its proper outcome - the Supreme Court under the combined reading of Arts. 32 and 142 innovated the procedure of "continuing mandamus" to bring the investigations on their proper track and to proceed expeditiously, so as to bring the guilty to book. In *Jagruti Parshad v. Union of India*[595] where a complaint made by a body of shareholders against the management likely to cause them grave loss, was supported covertly by Government's determined inaction and apathy - the Supreme Court appointed an independent Chartered Accountant to look into the matter and make a report, so that appropriate action may be taken. Rulings of this kind indicate that where the Government fails, the Supreme Court comes to the rescue and thereby effectively participates in the governance of the country through its function of administration of justice.

(iv) In matters relating to law and order and public order, the Supreme Court does not have first hand experience and in such cases generally refuses to intervene. In *Naga People's Movement v. Union of India*[596] tile Supreme Court refused to succumb to the argument that introduction of the Armed Forces (Special Powers) Act, 1958 in the disturbed areas of Assam was a colourable measure, really intended to impose an Emergency under Arts. 352 and 356 of the Constitution. On a proper construction, *inter alia* of Art. 355 and recognizing the need for a strong centre, the Supreme Court upheld the validity of the legislation as having been enacted under Entry 2/2A of List I (providing for deployment of armed forces of the Union in aid of the civil powers of the State) and not being legislation under Entry I of list II (for maintenance of public order). The legislation was upheld by the Supreme Court as not posing any threat to the fundamental rights of the citizens under Arts. 14, 19, or 21, but on the contrary to aid the Civil powers of the State and so as to avoid the possibility of issuance of a Proclamation of Emergency under Art. 356. In the celebrated cases of the *State of Rajasthan v. Union of India* [597] and *Waman Rao v. Union of India*[598] A challenging the 38th Amendment of the Constitution making the Presidents satisfaction final, conclusive and non-

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595. (1998) 9 SCC 68
596. AIR 1998 SC 431
597. AIR 1977 SC 1361, 1414
598. IR 1981 SC 271

justifiable under Art. 352 the Supreme Court refused to interfere, except on the ground that the satisfaction was mala fide, in which case it was no satisfaction at all. In the field of judicial law - making the case of *S. R. Bommai v. Union of India*[599], cannot be left Out. Recognizing the democratic set up and the federal structure of our Constitution, on a neat point of construction of Art. 356, the Supreme Court laid down that powers under Art. 356 was drastic and should be exercised only in exceptional circumstances (and that after a previous warning to the State concerned as recommended by the Sarkaria Commission) - when "the Government of the State cannot be carried on according to the Constitution". Any exercise of such powers for extraneous considerations - eg. that the Ruling party in the State has suffered a massive defeat in the elections at the Centre, or even to secure good governance of the State and save it from, consequences of financial stringency or corruption - is not permissible, provided that the Ruling party in the State continues to enjoy majority. The Supreme Court ruled that Art. 356 cannot 1e used to settle political scores or make political gains and even armed rebellion cannot invite action under Art. 356. Action under Art. 356 should be restrained until measures under Art. 355 are first exhausted. Lifting the veil the Supreme Court emphasised that when an ostensible political issue harboured within it a legal issue - it was necessary to reach and decide the legal issue. It was held, that the report of the Governor of the State to the President that the Government of the State cannot be carried on according to the Constitution, because the democratic, secular and or federal fabric of the State is endangered, provides sufficient satisfaction for issuance of the Proclamation under Art. 356. Sawant and Kuldip Singh, 33 went so far as to say that when the Proclamation does not pass muster and is held to be invalid - the whole Legislative structure of the State must be restored. By laying down the law spelling out specifically the circumstances under which powers can be exercised under Art. 356. the Supreme Court has set at rest the fears of Dr. Ambedkar that "there is a possibility of the provision being abused or employed for political purposes" *State of Rajasthan v. Union of India*[600], so as

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599. AIR 1994 SC 1918
600. AIR 1977 SC 1361, 140

to give powers to the Centre to override the States at its will and pleasure and thereby destroy the federal /democratic structure of the State.

Thus Judges can make law under the provisions of the Indian Constitution and have all the powers to do so under Arts. 141, 142, 32 and 226. Every cold and terse letter of legislation is interpreted, explained, carefully formulated and applied by a disciplined pronouncement of the law to the facts of each case, for the purpose of administration of justice, according to the rule of law. Judicial law making is therefore, indispensable to administration of justice. Without it the non— speaking legislation (so to say) will yield nothing but chaos.

5.5.2 Do Judges make law?

It is not only in Constitutional matters that judicial law making is evident and appreciable. Judicial law making is seen at its best and purest form when there is no specific legislation or procedural restraints of res-judicata, stare decisis, precedents etc. Cases in torts and equity provide good examples of pure judicial law - making. Cases such as - *Vishaka v. State of Rajasthan*[601], where guidelines are made by the Supreme Court for protection of working women against sexual harassment at work places); Union *Carbide Corpn. v. Union of India*[602] where the principle laid down is that the "polluter pays" in the case of liability arising from gas leakage); *Mehta MC v. Union of India*[603] where the Supreme Court laid down standards tolerable for automobile emission); *Satish Chandra v. State of U.P.*[604] where principles were laid down for reducing atmospheric pollution); *T. N. Godarvanman v. Union of India* [605] where principles are laid down for the protection and conservation of forests); Workmen, *Birla Textiles v. K. K. Birla*[606] wherein directions are given for shifting and, closure of hazardous industries) etc., are good examples of judicial law making in the filed of social and environmental awareness. There are areas where there is no legislation at all or any specifically applicable laws and the Supreme Court is more than justified in laying down the guidelines principles to deal with the cases as part of its function of administration of

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601. AIR 1997 SC 3011
602. AIR 1992 SC 248
603. (1999)6 SCC 12
604. 1992 Supp (2) SCC 94
605. (1999) 9 SCC 151
606. (1999) 3 SCC 475

justice, so as to ensure that in future the same situation will not go unnoticed under the law. Thus, in *Indian Council of Social Welfare v. State of A.P*[607]., Supreme Court gave directions to prevent malpractices in adoption of Indian children by foreigners. In *Sakshi v. Union of India*[608] the Supreme Court gave directions to prevent sexual abuse of children; and in Mehta *M. C. v. State of T.N.*[609] the Supreme Court prohibited employment of children in hazardous industries like match factories - etc. There is massive case law in social and environmental fields and Courts are often accused as being "activists" or acting as "super administrators". For one, such social and environmental body of law of law making does not come in the way of legislation, because there is no legislation on these subjects and in any event, such law making is entirely regulatory in nature and intended to urgently deal with the situation in hand and inspire future legislation to take note of it. It is properly apart of administration of justice particularly, where the Executive has failed. The beneficent effect of judicial law making of this kind is discernible in the governance of those States where there is either no law to deal with the situation complained of or where the existing law is simply not enforced. Here judicial law laid down is discernible in the form of justice done.

5.2.3 Should Judges make law?

Bare test of the law comprised in a statute is terse and cryptic - better called - "non-speaking". Judicial law making infuses it with substance and meaning which is otherwise not apparent on the face of it. So far as the Constitution is concerned - judicial law making is essentially interpretative in nature. In other areas, judicial law making is generally, governed by strong common sense, practicability and the need to resolve the dispute and/or to grant some effective relief - to the extent permissible. Judicial law making is thus concerned with both interpretation of the law and its applicability to the facts of the case and therefore, it is inevitable and absolutely necessary as a part of the judicial function of administration of justice. However, good meaning and depth must be considered in the following, among other, issues involved in judicial law making, namely.

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607. (1999) 6 SCC 365
608. (1999) 6 SCC 591
609. *AIR 1991 SC 417*

The first requirement is good and soundly drawn up SOR (Statement of Objects and Reasons) which would explain the legislative intent and purpose of the enactment. Interpretation of the Constitution and the civil law, as also its applicability would be easier and more accurate where the SOR is not a mere mechanical reproduction of the provision of the statute but on explanation of the legislative intent. Facts stated in SOR are held to be evidence of legislative judgment, as indicating the thought process of the legislature and cognizance of the prevailing state of affairs, impelling them to enact the law.[610] Secondly, despite the best efforts employed to separate and keep separate the functions of legislative and judicial law making having regard to the common aim and object of both, the Legislature and the judiciary to provide good governance under and in accordance with the Constitution and the laws considerations of over-stepping/encroachment on the functions of one another, are hound to arise and need to be handled with maturity and statesmanship always bearing in mind that - "a system built on the discoveries of many great minds was always of more strength than what is produced by the workings of any one mind, which of itself can do little" Dr. Samuel Johnson. Laying down and development of the law is a collective effort, spread over a period of time and not the product of lone pragmatist. Thirdly. since even observations of the Supreme Court are held to be binding *State of W.B. v. Ashish Kumar*[611], Judgments which travel beyond the facts of the case concerned - tend to fetter the freedom of the later Benches to lay down the correct and exact law applicable according to the facts of the case actually before them and compel the unhappy litigant to suffer the consequences of the broadly applicable precedent to the facts of his case. Thus, while Maneka Gandhi's case[612] could have rested with the observation that rules of natural justice were not complied with in impounding the passport without a hearing the judgment ran into some forty-two paragraphs giving a new dimension to the Royappa case. Similarly, when it was noticed in *Subhash Sharma v. Union of India*[613]. that S. P. Gupta's case (ibid) decided issues not directly arising in the matter, a larger bench was required to be constituted to restore the prior position in the matter as important as independence of the superior judiciary (Advs. On Record Case). Brevity and exactitude in laying down judicial law is as important as it is in legislation. It is a sell' regulatory task, a matter of judicial

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610. State of Gujrat v. Mirzapur etc. Trust, AIR 2006 SC 212
611. AIR 2005 SC 254
612. Maneka Gandhi v. Union of India, AIR 1978 SC 597
613. (1991) AIR SCW 555

discipline - for ambitious men not to convert every occasion into an opportunity to lay down the law attempting to govern by deciding not only the facts of the case but also the affairs of men and matters in future if only in the name of "development" of the law.

Fourthly in the matter of judicial law - making intellectual caliber of the Judge is just as important as integrity. At the level of the superior judiciary, integrity should be something unquestionable hut caliber must be tried, tested and proved, if judicial law making is to be credited with respect. It is unfortunate that the observations of the Court-that additional Judges appointed to the High Court should be made permanent "without sitting in judgment over the quality of their work turned outs have been allowed to remain uncorrected in *Advs, on Record case*. When members of the subordinate judiciary are promoted to the superior judiciary their record of work is taken into account and it is not understandable why such a discriminatory approach is allowed in the case of direct appointees from the Bar.

Fifthly, it is said "man was not content to read theory and act on it. He felt obliged to interpret and interpretation meant corruption At best lie thought it was an imperfect tool through which a small band of powerful people could control a vast number of less powerful people. Its tenets could defeat the masses far more easily than it could exalt them."[614]

Sixthly, judgments must represent and reflect the collective view of all Judges sitting on tic Bench and not be an opinion of one, However persuasive or convincingly leading the others. By converting one and/or convening him of ones own point of view, one on wins over the possibility of dissent of his brothers on the bench; but the judgements as a body of judicial law lacks the strength of the majority view, independently arrived at for which purpose the Division Bench is constituted in the first place. Somebody has said "The problem with proselytizers is that the leave no room for those who disagree with them."

Lastly in India, we equate our Judges a divinity where it comes to administration of justice, judicial law making may lose its sanctity if is found that our Gods have feet of day.

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614. Eric Van Lustbader in his novel "Jian" p. 327.

5.6 Whether the Doctrine of Separation of Power Curtail the Power of Judicial Review?

In the case *State of West Bengal and other v. The Committee for Protection of Democratic Rights, West Bengal and Others*[615] important question arisen i.e. whether the doctrine of separation of powers curtail the powers of Judicial review conferred on the constitutional courts even in situations where the Fundamental Rights are sought to be abrogated or abridged on the ground that exercise of such powers would impinge upon the said doctrine.

In this case Supreme Court held that the guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation of Fundamental Rights. Violation of Fundamental Rights cannot be immunised from Judicial scrutiny on the touchstone of doctrine of separation of Supreme Court or the High Court in exercise of powers under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure or doctrine of separation of powers. But such extra ordinary powers must be exercised sparingly, cautiously and in exceptional situations.

"The doctrine of Separation of powers cannot curtail of powers of judicial review conferred on the constitutional courts specially in situations where the fundamental rights are sought to be abrogated or abridged under the garb of these doctrines."

"Violation of Fundamental Rights cannot be immunised from Judicial scrutiny under Article 226 or under Article 32 on the touchstone of doctrine of separation of powers between the legislature, Executive and the judiciary."

Relying on the recent decision by Bench of the Judges of this court in I.R. Coelho (d) by *LRs. v. State of Tamil Nadu*[616] submitted that the judicial review being itself the basic feature of the constitution, no restriction can be placed even by interference and by principle of legislative enforcement of fundamental rights and protection of the citizens of India. Learned Counsel asserted that in exercise of powers either under Article 32 or 226 of the constitution, the courts are merely discharging their duty of judicial review

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615. AIR 2010 SC 1476
616. AIR 2007 SC 861

and are neither usurping any jurisdiction, nor overriding the doctrine of separation of powers. In support of the proposition that the jurisdiction conferred on the Supreme Court by Article 32 as also on the High Courts under Article 226 of the constitution is an important and integral part of the basic structure of the constitution.

Recently in *State of U.P. and Other. v. Jeet S. Bisht and Anr.*[617] S.B. Sinha, J. dealt with the topic of separation of powers in the following terms :

Separation of powers is a favourite topic for some of us. Each organ of the State in terms of the constitutional scheme performs one or the other functions which have been assigned to the other organ. Although drafting of legislation and its implementation by and large are functions of the legislature and the executive respectively, it is too late in the day to day that the constitutional court's role in that behalf is non - existent. The judge—made law is now well recognised throughout the world. If one is to put the doctrine of separation of powers to such a rigidity, it would not have been possible for any superior court of any country, whether developed or developing, to create new rights through interpretative process.

Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.

The modern view, which is today gathering momentum in constitutional courts the world over, is not only to demarcate the realm of functioning in a negative sense, but also to define the minimum content of the demarcated realm of functioning. Objective definition of function and role entails executing the same, which however may be subject to the plea of financial constraint but only in exceptional cases. In event of any such

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617. MANU/SC/7702/2007 6 SCC 586

shortcoming, it is the essential duty of the other organ to advise and recommend the needful to substitute inaction. To this extent we must be prepared to frame answers to these difficult questions.

If we notice the evolution of separation of powers doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable social and economic entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as institutional engineering therefore forms part of this obligation.

Having discussed the scope and width of the doctrine of Separation of powers, the moot question for consideration in the present case is that when the fundamental rights, as enshrined in Part III of the Constitution, which include the right to equality

(Article 14); the freedom of speech [Article 19(1) (a)] and the right not to be deprived of life and liberty except by procedure established by law (Article 21), as alleged in the instant case, are violated, can their violation be immunised from judicial scrutiny on the touchstone of doctrine of separation of powers between the Legislature, Executive and the Judiciary. To put it differently, can the doctrine of separation of powers curtail the powers of judicial review, conferred on the Constitutional Courts even in situations where the fundamental rights are sought to be abrogated or abridged on the ground that exercise of such powers would impinge upon the said doctrine?

Thus, having examined the rival contentions in the context of the Constitutional Scheme, we conclude as follows:

(i) The fundamental right enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seep for and shall be granted protection by the State.

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Courts under Article 226 of the Constitution the powers of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights. As a matter of fact, such a powers is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of “the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review.

(iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of powers under Article 32 or 226 to uphold

the Constitution and maintain the rule of law cannot be termed as violating the federal structure.

(v) Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the powers of the Judiciary under Article 32 and 226 of the Constitution.

(vi) If in terms of Entry 2 of List II of The Seventh Schedule on the one hand and Entry 2A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, court would be precluded from exercising the same powers which the Union could exercise in terms of the provisions of the Statute. In our opinion, exercise of such powers by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty.

5.7 Whether the Judiciary has exceeded the limits of its Legitimate Functions?

In the case of *University of Kerala v. Council, Principals', Colleges, Kerala and Other*[618] The question of great constitutional importance which has arisen is "whether after getting the recommendations of some expert body by a court order, the Court itself can implement the said recommendations by passing a judicial order or whether the Court can only send it to the Legislature or its delegate to consider making a law for implementation of these recommendations".

The aforesaid question, therefore, raises a great constitutional question about judicial legislation, whether it is permissible at all under our Constitution, and even if it is, what is the extent of judicial legislation?

In my opinion, the interim order of this Court dated 22nd September, 2006, prima facie, amounts to judicial legislation and the question before us is whether this is legally permissible. I am prima facie of the opinion that it is not. As held by this

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618. Civil Appeal No. 887 of 2009 with S.L.P. decided on 11.11.2009.

Court in Divisional Manager, *Aravali Golf Club and Anr. v. Chander Hass and Another*[619]:-

If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce it.

There is broad separation of powers under the Constitution, and hence one organ of the State should not encroach into the domain of another organ. The judiciary should not therefore seek to perform legislative or executive functions.[620]

In *Ram Jawaya Kapur v. State of Punjab*[621] a Constitution Bench of this Court observed:

> *The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.*

Similarly, in *Asif Hameed v. State of Jainmu and Kashmir*[622], a three Judge bench of this Court observed:

> *Before adverting to the controversy directly involved in these appeals we may have a fresh look at the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and*

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619. MANU/SC/4463/2007.
620. Common Cause v. Union of India MANU/SC/7480/2008 : (2008) 5 SCC 511
621. MANU/SC/00ll/l955 : AIR 1955 SC 549
622. MANU/SC/0036/l989 : AIR \Jl989 SC 1899

> *independence of each of its organs. Legislature and executive, the two facets of people' s will, they have all the powers including that of finance. Judiciary has no powers over sword or the purse nonetheless it has powers to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of powers by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of powers is the self imposed discipline of judicial restrain.*

At the outset, we would say that it is not possible for this court to give any directions for amending the Act or the statutory rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

In Constitution there is no such defined and express incorporation of the doctrine of Separation of Power, save and except that the Executive powers of the Union is vested in the President under Article 53(1) and similarly the Executive powers of the State is vested on the Governor under Article 154(1). But so far as legislative and judicial powers are concerned they are not vested on any authority. Under Article 50, one of the directive principles of State policy, State is to take steps to separate the judiciary from the executive in the public services of the State. But this has nothing to do with the vesting of powers.

Under our Constitution the executive is endowed with certain legislative powers, for instance the Ordinance making powers under Article 123 and Article 213. It also has certain judicial powers under Article 103 and Article 192. The legislature is also empowersed to exercise certain judicial powers under Article 105 and Article 195. The judiciary also exercises certain legislative and executive powers under Articles 146, 227 and 229.

In addition, the executive also exercises substantial quasi—judicial powers under several statutory provisions whereby Tribunals have been set up. These Tribunals, with almost the trappings of a Court, decide the lis between the parties. Of

course, the same is subject to well known grounds of interference by writ court under judicial review. The Parliament, the highest legislative body in this Country also exercises quasi—judicial powers in the case of impeachment of judges [Article 124(5) and Article 2171 and also in respect of contempt of legislatures [Article 194(3)].

Justice Pathak explained these principles in *Bandhua Mukti Morcha v. Union of India*[623], and which is of some relevance in the context and which I quote:

It is common place that while the Legislature enacts the law the Executive implements it and the Court interprets it and, in doing so, adjudicates on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself. And yet it is well recognized that in a certain sphere the Legislature is possessed of judicial powers, the executive possesses a measure of both legislative and judicial functions, and the Court, in its duty of interpreting the law, accomplishes in its perfected action a marginal degree of legislative exercise. Nonetheless a fine and delicate balance is envisaged under our Constitution between these primary institutions of the State.

In so far as judicial powers is concerned, no such limitation has been imposed under the Constitution. Rather the conferment of judicial powers under Articles 141, 142, 32 and 226 has been plenary and very wide and enable the Supreme Court to declare the law which shall be binding on all the courts within the territories of India and Article 142 enables the Supreme Court to pass such order as is required to do complete justice in the case.

Following the aforesaid dispensation, it may perhaps be said that the framers of our Constitution never wanted to introduce the doctrine of Separation of Power rigidly to the extent of dividing the three organs into water—tight compartments.

In another case *Common Cause (A Regd. Society) v. Union of India and Others*[624]the question was that whether court can direct legislation. In this case it was held that court cannot direct legislation it was for legislature and not for the court to correct it by suitable amendment.

The court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court.

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623. MANU/SC/O05l/1983 : (1984) 3 SCC 161
624. Writ Petition Civil No. 580 of 2003 decided on 11.04.2008.

In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another org. While law making through interpretation and expansion of the meanings of open textured expressions such as due process of law, 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law... through directions is not a legitimate judicial function.

The justification given for judicial activism is that the executive and legislature have failed in performing their functions. Even if this allegation is true, does it justify the judiciary in taking over the functions of the legislature or executive? In our opinion it does not, firstly because that would be in violation of the high constitutional principle of separation of powers between the three organs of the State, and secondly because the judiciary has neither the expertise nor the resources for this. If the legislature or executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfill their expectations, or by other lawful means e.g. peaceful demonstrations and agitations, but the remedy is surely not by the judiciary in taking over the functions of the other organs.

In *Ram Jawaya v. State of Punjab*[625] , a Constitution Bench of this Court observed:

The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the state, of functions that essentially belong to another.

Similarly, in *Asif Hameed v. State of Jammu and Kashmir*[626] a three Judge Bench of this Court observed:

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625. MANU/SC/0011/l955
626. MANU/SC/OO36/1989

Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, have all the powers including that of finance. Judiciary has no powers over sword or the purse nonetheless it has powers to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of powers by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of powers is the self imposed discipline of judicial restraint.

5.8 Violation of Doctrine of Separation of powers

In the case *Union of India v. R. Gandhi, President, Madras Bar Association*[627] question was that whether the constitution of the National Company Law Tribunal and transferring the entire company jurisdiction to it, is violative of the doctrine of separation of powers and independence of the Judiciary which are parts of the basic structure of the Constitution. In this case supreme held that Legislature has the competence to make laws providing which disputes will be decided by courts and which disputes will be decided by Tribunals subject to constitutional limitations and in view the principles of Rule of Law and separation of powers. In the present case, the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional Various provisions of Chapters IB and IC of the Act which are defective and unconstitutional,

627. MANU/SC/0378/2010; (2010) 11 SCC

being in breach of basic principles of Rule of Law, Separation of Powers and Independence of the Judiciary to be made operational by making suitable amendments by the Government.

"Legislature has the powers to create Tribunals with reference to specific enactments including companies Act but such constitution must not be violative of the doctrine of separation of powers and independence of the Judiciary which are parts of the basic structure of the Constitution".

Independence of Judiciary

Impartiality, independence, fairness and reasonableness in decision making are the hallmarks of Judiciary. If Impartia1ity' is the soul of Judiciary, "Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values. It is also the discipline in life, habits and outlook that enables a Judge to be impartial. Its existence depends however not only on philosophical, ethical or moral aspects but also upon several mundane things security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the Judiciary) and without (from the Executive).

In *Union of India v. Sankal Chand Himatlal Sheth*[628] a Constitution Bench of this Court explained the importance of 'Independence of Judiciary' thus:

Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for any one to think otherwise.

In *Supreme Court Advocates-on-Record Association and Ors. v. Union of India*[629], J. S. Verma, J. (as he then was) speaking for the majority, described the attributes of an independent judge thus:

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628. MANU/SC/OO65/l977 : 1977 (4) SCC

Only those persons should be considered fit for appointment as Judges of the superior judiciary who combine the attributes essential for making an able, independent and fearless judge. Several attributes together combine to constitute such a personality. Legal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior Judge.

In his concurring opinion, Pandian J. stated that "it is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours." He further stated:

that to have an independent judiciary to meet all challenges, unbending before all authorities and to uphold the imperatives of the Constitution at all times, thereby preserving the judicial integrity, the person to be elevated to the judiciary must be possessed with the highest reputation for independence, uncommitted to any prior interest, loyalty and obligation and prepared under all circumstances or eventuality to pay any price, bear any burden and to meet any hardship and always wedded only to the principles of the Constitution and Rule of Law. If the selectee bears a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of his appointing authority, then the independence of judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights, and privileges, safeguards, conditions of service and immunity. Though it is illogical to spin out a new principle that the keynote is not the judge but the judiciary especially when it is accepted in the same breath that an erroneous appointment of an unsuitable person is bound to produce irreparable damage to the faith of the community in the administration of justice and to inflict serious injury to the public interest and that the necessity for maintaining independence of judiciary is to ensure a fair and effective administration of justice.

In Rai Sahib Ram Jawaya Kapur v. The State of Punjab[630] (2) SCR 225, this Court explained the doctrine of separation of powers thus:

The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very

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629. MANU/SC/OO73/l994 : (1993) 4 SCC 441
630. MANU/SC/0011/1955

well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.

In *Chandra Mohan v. State of UP*[631], this Court held:

The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the powers of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realised that "it is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges." Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Ch. VI of Part VI under the heading "Subordinate Courts". But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre—independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control.

In *Indira Nehru Gandhi v. Raj Narain*[632], this Court observed that the Indian Constitution recognizes separation of powers in a broad sense without however their being any rigid separation of powers as under the American Constitution or under the Australian Constitution. This Court held thus:

It is true that no express mention is made in our Constitution of vesting in the judiciary the judicial powers as is to be found in the American Constitution. But a division of the three main functions of Government is recognised in our Constitution. Judicial powers in the sense of the judicial powers of the State is vested in the

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631. AIR 1966 SC 1987

632. MANU/SC/O304/1975 : 1975 Supp SCC 1

Judiciary. Similarly, the Executive and the Legislature are vested with powers in their spheres. Judicial powers has lain in the hands of the Judiciary prior to the Constitution and also since the Constitution. It is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature or that the powers of the Legislature or the Executive should pass to or be shared by the Judiciary.

The doctrine of separation of powers has also been always considered to be a part of basic structure of the constitution.

Parliament cannot be the judge of limitation of its powers to amend the Constitution. Such function is to be exercised by an independent organ viz., Judiciary. In the case *I.R. Coelho By LRs. v. State of Tamil Nadu and Others*[633] Supreme Court held that: It is permissible for the Legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31 but subject to right of citizen to assail it on the enlarged judicial review concept. The Legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the Court after the enunciation of the basic structure doctrine. The constitutional amendments are subject to limitations and if the question of limitation is to be decided by the Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitations cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary.

Essentially, it is the consequence of amendment which is relevant than its form to determine constitutional validity of the Ninth schedule laws on the touchstone of basic structure doctrine, to be adjudged by applying the direct impact and effect test, i. e. rights test.

In another case *National Legal Service Authority v. Union of India and Others*[634] Supreme Court has held that there is a recognition to the hard realty that without protection for human rights there can be no democracy and no justification for democracy. In this scenario, while working within the realm of separation of powers (which is also fundamental to the substantive democracy), the judicial role is

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633. AIR 2007 SC, 8617
634. Writ Petition Civil no. 400 of 2012 decided on 15.04.2014.

not only to decide the dispute before the court, but to uphold the rule of law and ensure access to justice to the margnialized section of the society.

In *Shamnad Basheer v. Union of India*[635] court held that : Sub – Section 2 (b) of section 85, which provides for a qualification qua a member of Indian Legal Services who held the post of Grade I of service or of higher post at least five years to the post of Vice-Chairman is declared unconstitutional, being an affront to the separation of powers, independence of judiciary and basic structure of the Constitution.

In the case *Madras Bar Association v. Union of India*[636] court held that : The Madras Bar Association is the petitioner in this case as well. A challenge was made to the constitutional validity of the National Tax Tribunal. The challenge pertains to the formation of the Tribunal, its constitution and violation of basic structure of the Constitution qua the powers of judicial review vested in the High Court. By the majority judgment, the creation of the Tribunal was held constitutionally valid, but not its composition, being anathema to the basic structure of the Constitution of India. By a separate judgment, while concurring with the result qua the composition of the Tribunal it was held that the very creation itself as unconstitutional.

The Supreme Court in the said judgment once again dealt with in extenso the concept of independence of judiciary, basic structure and the powers of judicial review and the earlier decision rendered in *Union of India v. Madras Bar Association*[637], was referred to with approval. It also recorded its understanding of the judgment referred supra with reference to the stature of members of Tribunal, which has been created to supplant the functions of the High Court. It has been held that the members of the Tribunals discharging judicial functions could only be selected from among those who possess expertise in law and competent to discharge judicial functions. The role of a technical member is meant to use his expertise in the relevant field and not otherwise. We are satisfied that the aforesaid exposition of law is in consonance with the position expressed by this court while dealing with the concept of Separation of Powers, rule of law, judicial review.

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635. W.P. No. 1256 of 2011 decided on 10-03-2015.
636. (2014) 10 SCC 1
637 (2010) 11 SCC 1)

In the case of *All India Central Universities Officers Confederation and Others v. Union of India and Others*[638] court held that Creation and abolition of posts and regularisation are purely executive functions. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot also to itself the powers of the executive or legislature. There is broad separation of powers under the Constitution, and the judiciary, to, must know its limits.

5.9 Conflict between Legislative and Judiciary Powers

Conflict between legislature and the judiciary has often given rise to anxiety and grave concern to the Governments at the Centre and the States The executive heaves a sigh of relief when the conflict gets resolved or the matter is put in the cold storage after initial heat over the powers each of these wings of the State enjoys under the Constitution subsidies. There are a number of cases where friction between the two has arisen. The recent case where the relationship between the judiciary and legislature came under strain pertains to the Tamil Nadu Legislative Assembly and the High Court of Madras in March 1998 when an AIADMK member is reported to have hit the Minister of Agriculture on the floor of the House. In yet another case similar conflict arose facts of which are discussed below.

Three petitions were filed in the Supreme Court of India by journalists against arrest warrants issued by the Speaker of the Tamil Nadu Legislative Assembly for alleged breach of privilege of the House as well as against summons to receive reprimand. The petition filed by one S. Selvam was dismissed because he refused to offer an apology to the Speaker, as suggested by the Court. The two other petitions were by K.P. Sunil, a former correspondent of the Illustrated Weekly of India and one S.K. Sunther, the Editor of Kovai Malai Murasu against whom arrest warrant was issued.[639]

The article "Tamil Nadu Assembly fast gaining notoriety" allegedly lowered the dignity of the House. It appears that on 17-12-1991, the Privileges Committee of the Tamil Nadu Legislative Assembly accepted the

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638. W.P. (C) Nos. 3034/1999. decided on 2-3-2015

639. An Article "Tamil Nadu Assembly Fast gaining notoriety" of Illustrated weekly, issue September 21–27, 1991.

apology of Mr. Sunil and decided not to proceed further in the matter. This decision was further confirmed on 5th February, 1992 but the committee decided to reopen the matter on or around 28th February, 1992. The Editor of the Weekly was exonerated as he was not the Editor at the relevant time. The reason for reopening the matter was non-publishing of the regret by Mr. Sunil in the Illustrated Weekly. On the other hand, the petitioner claimed that he was never asked to publish regret and that reopening of the matter was without any creditable or cogent reasons and the action was therefore arbitrary.

As far as Mr. S.K. Sunther was concerned, he was alleged to have committed contempt of the Tamil Nadu Legislative Assembly by publishing a false report in Tamil Nadu Evening of February 5, 1992 stating that an AIADMK Member of the Legislative Assembly had attacked a DMK Member of the Assembly in the State Assembly. In spite of the written request of Mr. Sunther, the Privileges Committee declined to examine the two Members of the Legislative Assembly concerned. Mr. Sunther claimed that the report published by him had not been denied by the MLA who was allegedly attacked in the House. In the circumstances, Mr. Sunther questioned the validity of action of the Privileges. Committee and also alleged that the procedure followed was not fair[640].

In both the above cases, the Supreme Court stayed the warrants of arrest against the journalists.

In Mr. Sunil's case, a notice had been issued to the Secretary of the Legislative Assembly. In a statement issued on 27th April, 1992, the Speaker asked the Assembly Secretariat not to accept any notice issued by the Supreme Court. The Speaker also stated that the Tamil Nadu Legislative Assembly will not take cognizance of the stay granted by the Supreme Court since the Judiciary and Legislature were independent of each other and that the order of the Supreme Court was not binding on the Legislative Assembly. Thereupon, Mr. Sunil urged the Supreme Court to issue appropriate directions to the concerned authorities not to execute the arrest warrants. It was argued on behalf of the petitioner that the Speaker's action would destroy the very

640. Subash C. Jain, "The Constitution of India Select Issue and Perception" (2000).

foundation of rule of law. It was further argued that any violation of the court's order was liable to be prevented by the Union of India by exercise of its executive powers. On 7th May, 1992, the Court clarified that under article 144 of the Constitution, all authorities, civil and judicial, in the territory of India were required to act in aid of the Supreme Court and that it had no reason to apprehend that they would take the risk of willful disobedience of the court's orders. The Court did not consider it necessary to pass any further directions in the matter. Accordingly, the Court expected all the authorities in the State including the Home Secretary, the Director General of Police and the Police Commissioner, Madras to comply with its order staying warrants of arrest and the order requiring Mr. Sunil to appear before the House to receive reprimand[641].

In the case of Mr. Sunther, the Tamil Nadu Assembly at an emergency session convened on 4th May, 1992, adopted a resolution directing the Secretary of the Assembly not to appear before the Court. However, in a letter signed by the Secretary of the Assembly, the relevant information regarding the members of the Privileges Committee who were present in the meeting was handed over to the Supreme Court through the counsel. The then Attorney General, Mr. G. Ramaswamy is reported to have argued that since the Secretary of the Assembly had given the relevant information to the Court, the matter may be treated as closed. The Court appears to have taken exception to certain portions of the Assembly resolution and the Attorney General is reported to have stated that the resolution was clearly a contempt of the Court. The Court decided to examine the validity of the resolution of the Assembly and issued notices to the Speaker of the Tamil Nadu Assembly, the Chairman of the Privileges Committee, the Secretary of the Assembly, the Tamil Nadu Government and the Union Government asking them to file their replies within four weeks on the question of validity of the resolution. The hearing of the case was adjourned to 11th August, 1992, but the case does not appear to have come up before the Court after May 8, 1992. The series of orders of the Supreme Court are reflected in *S.K. Sunther & Anr. v. Hon'ble*

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641. Subash C. Jain, The constitution of India, Select Issue and perception, 2000, p. 149-153

the Speaker, Tamil Nadu Legislative Assembly & Ors.[642] The resolution of the Legislative Assembly is reproduced at the end of this chapter. The material parts of the resolution read as under:

"Article 212 of the Constitution of India makes it clear that the Courts cannot question the validity of any proceedings merely on the ground that procedure has not been followed.

Further, this House wishes to make it clear that neither the Secretary Generals of Lok Sabha and Rajva Sabha nor the Secretaries of the Assemblies and Councils of State have so far accepted the directions issued by the Supreme Court or other Courts beyond their jurisdiction and appeared before any Court. This House, therefore, resolves that the Secretary, Assembly, who implements the orders of the House need not receive the notice from the Supreme Court and appear before it on 5-5-92.

Likewise, the House also resolves that in respect of all the privilege cases concerning this House which are before the Supreme Court neither any member of this House nor the Assembly Secretary nor other officers of this Secretariat need take cognizance of any notice, summons or other orders or other directions."

5.9.1 The Legal Position

The relevant provision relating to powers, privileges and immunities of State Legislatures and their members has been mentioned in the constitution.[643] The article is reproduced below :

(1) Object to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

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642. 1992(1) SCALE pp. 1236-1241
643. Article 194, Constitutional Law of India.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 26 of the Constitution (Forty-fourth Amendment) Act, 1978."

In this regard a specific schedule to the Constitution of India reads as under:[644]

"Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State."

In terms of clause (3) of the article 194, none of the State Legislatures appears to have enacted law for the purpose of defining its powers, privileges and immunities.

In *M.S.M. Sharma v. Sri Krishna Sinha*[645], the editor of an English daily called 'Searchlight' was alleged to have published proceedings of the Legislative Assembly of Bihar which had been ordered to be expunged and accordingly, a show-cause notice was issued to him as to why appropriate action should not be recommended against him for breach of privilege of the Speaker of the Assembly. The petitioner moved the Supreme Court of India against proposed action by the Committee on Privileges alleging that it was in violation of the petitioner's fundamental rights to freedom of speech and expression under article 19(1) (a) and to the protection of his personal liberty under article 21. The Five-Judge Bench of the Court (Justice K. Subba Rao dissenting) held that article 19 (1)(a) and article 194(3) had to be reconciled and the only way of reconciling the same was to read article 19(l)(a) as subject to the latter part of article 194(3). The petition was accordingly dismissed. However, in a later case where conflict between the High Court of Allahabad and the Legislative Assembly of Uttar Pradesh was involved, a

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644. Entry 39 of List II (State List) in the Seventh Schedule.
645. AIR 1959 SC 895

reference made by the President under article 143 of the Constitution (In re Under Article 143 of the Constitution of India[646], hereinafter referred to as Keshav Singh's case), the Seven-Judge Bench held that; a citizen moved the court and complained that his fundamental right under Article 21 had been contravened, it would plainly be the duty of the Court to examine the merits of the said contention and that inevitably raised the question as to whether the personal liberty of the citizen had been taken away according to the procedure established by law. The Court further held as under:

"If in a given case the allegation made by the citizen is that he has been deprived of his liberty not in accordance with law, but for capricious or mala fide reasons, this court will have to examine the validity of the said contention and it would be no answer in such a case to say that the warrant issued against the citizen is a general warrant and a general warrant must the stop all further judicial inquiry and scrutiny. In our opinion, therefore, the impact of the Fundamental Constitutional right conferred on Indian citizens by article 32 and the construction of the latter part of Article 194(3) is decisively against the view that a powers or privilege can be claimed by the House though it may be inconsistent with article 121. In this connection, it may be relevant to recall that the rules which the House has to make for regulating its procedure and the conduct of its business have to be subject to the provisions of the Constitution under Article 208(1)."

The aforesaid view was expressed by the Court in the advisory capacity in a reference under article 143 of the Constitution. This view has been further reiterated by the courts in *P. Sudhirkumar v. The Speaker, A.P. Legislative Assembly*[647]. In this case, the Court directed notice to be issued to the Speaker of the Assembly through the Secretary for showing cause as to why contempt proceedings should not be initiated against him for violation of the court's order. Thus, where there is conflict between the privileges of the Legislature and the Fundamental Rights of a citizen, the Court is unlikely to refuse judicial review of the action of the authorities concerned including the Legislatures. The action of the Supreme Court in staying the warrants of arrest against the journalists concerned in the pending proceedings is also

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646. AIR 1965 SC 745
647. 1989 (2) SCALE p. 611

based on its previous rulings in the reference under article 143 and in P. Sudhirkumar's case.

Again, recently in the Thamaraikkani's case Expand it and take as[648] conflict arose between the Tamil Nadu State Legislative Assembly and the High Court of Madras over summons issued to the Speaker and Secretary of the Assembly. The Speaker took the stand that he will net accept summons from the Court as it involved sovereignty and privilege of the House.[649] The facts of this case are discussed in greater detail by C.K. Jain, former Secretary - General of the Lok Sabha in reference of Legislature and Judiciary: Debating their relationship[650]". There has been a perennial conflict not only in India but also in England about the respective rights and privileges of Members of Parliament and the Judiciary.

In India, under the written Constitution, the three organs of the Government, viz. the Legislature, judiciary and the executive, have to function within their respective powers and none of them can exceed its powers. Whether any one of these organs has exceeded its powers or not is a matter of interpretation in several decisions of the Supreme Court. It has been held that the Supreme Court is the ultimate interpreter of the Constitution and its interpretation is binding on all courts and tribunals and authorities in this country. Under Article 141 of the Constitution, the law declared by the Supreme Court is binding on all parties. So, if there is any doubt that any particular organ of Government has exceeded its powers, the interpretation ultimately rests with the Supreme Court. The powers granted by the Constitution to the Members of Parliament and the Assembly are subject to' other provisions of the Constitution. They cannot act arbitrarily; nor can they deprive the citizens of their fundamental rights arbitrarily.

There is a provision in the Constitution for codifying the law relating to he privileges and if Parliament makes such a law that will be a law within he meaning of article 13 of the Constitution validity of which can be tested before the Supreme Court in the same manner as any other legislation.[651] So,

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648. March, 1998.
649. The Hindu, 14th April, 1999, p.l1.
650 The Tribune, Chandigarh, July 6, 1999, p.8; and The Pioneer, July 5, 1999, p. 7, under the caption "Privilege v. Law"
651. Kesha v. Singh's CBI/SPE) (1998) 4 SCC 626 at p. 761

the scheme of he Constitution does not contemplate that Parliament or a State -legislature is not at all liable to be questioned for any violation of law. Since rule of law is the corner-stone of the Constitution of India. Though legislatures in India have plenary powers within limits prescribed by the material and relevant provisions of the Constitution, further, the following observations of the Supreme Court in *Kesha v. Singh's* case are very pertinent:

> *" ... just as the right of the Judicature to deal with matters brought before them under Art. 226 or Art. 32 cannot be subjected to the powers and privileges of the House under Art. 194(3), so the rights of the citizens to move the Judicature and the rights of the advocates to assist that process must remain uncontrolled by Art. 194(3). That is one integrated scheme for enforcing the fundamental rights and for sustaining the rule of law in this country."*

In *P.V. Narasimha Rao v. State,*[652] it has been held that however, no action would lie against a legislator for any thing said in the Legislature or any vote given by him in Parliament. Though the opinion in Keshav Singh's case is advisory, still it is as good as binding on the Government. The question as to whether advisory opinion is a binding on the Government or on other courts was elaborately argued in the matter of Cauvery Water Disputes Tribunal[653], and it was reiterated that "the advisory opinion is entitled to due weight and respect and normally it will be followed." It time that instead of leaving the privileges of the Members of Parliament and State Legislatures vague, these be codified in the interest of smooth relations between the Judiciary and the Legislatures as well as in the interest of citizens' fundamental rights.

However, the consistent stand of Committee/Conference of Presiding Officers of legislative bodies in India has been that there is no need for codifying the privileges of the Legislature. According to 4th Report of the

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652. CBI/SPE) (1998) 4 SCC 626 at p. 729
653. AIR 1992 SC 522 at p. 558

Committee of Privileges,[654] if Parliamentary privileges were codified, they will lose the in their application to the circumstances as and they arose. The Parliamentary privileges will then become subject to fundamental rights as enshrined in the Constitution and they will come within the ambit of judicial scrutiny and determination. According to the said Committee, absence of codification was not responsible for confrontation between the Legislature and Judiciary. The Committee further conceded that it was necessary to evolve a mechanism to ensure against misuse or abuse of privileges. The Committee expressed the view that the Legislature's powers to punish for contempt was more or less akin and analogous to the powers given to the courts to punish for their contempt. Even the Contempt of Courts Act, 1971 did not specify the matters which constituted contempt and in a given case, this had to judged according to the facts and circumstances of each case. Similarly, the Committee felt that what constituted a breach of privilege r contempt of Court could best be decided according to the facts and circumstances of each case rather than by specifying them in so many orders.[655]

The Conference of Presiding Officers of Legislative Bodies in India in emposium held in New Delhi on 12th October, 1996 identified the following main areas of conflict between the Legislature and the Judiciary:

(a) *Existence, extent and scope of Parliamentary privileges and powers of Legislatures to punish for contempt,*

(b) *Interference in the proceedings of Parliament/Legislatures,*

(c) *Decisions given by the Presiding Officers of Legislatures under the Anti-defection law; and*

(d) *Decisions given by the Presiding Officers of Legislatures in administration of their Secretariats.*

The Conference of Presiding Officers noted that although the Constitution (Forty-fourth Amendment) Act, 1978 omitted reference to the

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654. 10th Lok Sabha held on 19th December, 1994

655. Committee on Privileges, 10th Lok Sabha, 4th Report, Lok Sabha Secretariat, August, 1994.

British House of Commons for the purpose of determining the powers and privileges of Houses of Parliament in India, in the absence of enactment of any law defining them, these privileges, in effect, remained. House of Commons at the commencement of the Constitution.

With a view to reducing the conflict between the Legislature and Judiciary, the Committee of Presiding Officers on Measures to Promote Harmonious Relations between the Legislatures and the Judiciary[656] recommended that the Presiding Officers should not be made party personally in a suit pertaining to the administrative matters of their Secretariats. The suit, in turn, could be filed against the concerned Legislature through the Secretary of the Legislature who could represent the Legislature in the Court and if necessary, appear personally in the case. The Committee, however, did not favour the enlargement of the scope of article 361 to provide the same protection to the Presiding Officers as enjoyed by the President of India and the Governors of States.

The view-point of the Committee on Privileges of the Lok Sabha as well as the Committee/Conference of Presiding Officers or Legislative Bodies in India to the effect that there was no need to codify the privileges of the Legislature, is understandable as it is based on the apprehension that it will give rise to more judicial interference. On the other hand, from the point of view of citizens, the codification of privileges of Legislatures may be highly desirable, a view-point which is strongly supported by the press and the media. Till the Parliamentary privileges are codified, the hope of the citizens lies in the restraint to be exercised by the Legislatures. It is a matter of satisfaction that there have not been too many cases where the Legislature was called upon to exercise its powers for punishing for the breach of privilege and contempt of the Houses. The strength of the democracy too lies in the existence of harmonious relations among different organs of the State, in particular, Legislature and Judiciary.

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656. Lok Sabha Secretariat, January, 1994, pp.10 and 11

5.10 The National Judicial Appointments Commission Act, 2014

The National Judicial appointments commission (NJAC) bill passed by parliament in August, 2014 has received president ascent. The new law facilitates the setting up of a commission for appointment of judges, replacing the 20-year-old collegiums system, which has been under service criticism. It paves the way for the setting up of NJAC, which will appoint and transfer judges to the Supreme Courts and the 24 High Courts. The bill, 124th amendment to the Constitution, grants Constitutional status to the NJAC and its composition which will be headed by the Chief Justice of India. As many as 16 of the 29 states have ratified the bill. Any Constitution amendment bill requires ratification by at least 50 percent of the state legislatures. Beside the CJI, the judiciary would be represented by two senior judges of the Supreme Court. Two eminent personalities and the law Minister will be the other members of the body.

This act to regulate the procedure to be followed by the National Judicial appointments commission for recommending persons for appointment as the Chief Justice of India and other judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected there with or incidental thereof.

5.11 System of Checks and Balances

Today, a new interpretation of the doctrine has been evolved. It seeks to emphasize upon the functional division of powers. The principle of delegation of legislative functions is not regarded inconsistent with the doctrine. Emphasis is laid on the balance of powers and a system of checks. No single agency of the State should emerge as dominant one by assuming greater powers in its hands and each of them should exercise a check upon the other so that none of them exceeds the authority vested in it by the Constitution. The very purpose of the doctrine is to prevent concentration of powers in any one of these three agencies and also to prevent them from making encroachments upon the other's activities so that autocracy may not replace rule of law. All the these organs must act in complete coordination with each other without interfering the functioning of the other organ. Considering the

present meaning of the doctrine in this perspective the Indian Constitution can rightly claim to represent it.

Chandrachud, J., took the same view when he observed that the political usefulness of the doctrine is now widely recognised. No Constitution can survive without a conscious adherence to its fine checks and balances. Just as courts ought not to enter into problems, enshrined in the 'political thicket'. Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which has in' it the precept innate in the prudence of self-preservation, that discretion is the better part of valour.[657]

Perhaps, in view of the above meaning of the doctrine evolved in modem tithes, the Supreme Court in the Kesavanand Bharti's case[658] changed its opinion and pointed out that both the supremacy of the Constitution and separation of powers are constituents of the basic structure of the Indian Constitution. The view has been reaffirmed by the Court in *Smt. Indira Nehru Gandhi v. Raj Narain Singh*[659] Beg, J., observed : "this Constitution has a basic structure comprising the three organs of the Republic the Executive, the Legislature and the Judiciary. It is through each of these organs that the sovereign will of the people has to operate and manifest itself and not through only one of them. Neither of these separate organs of the Republic can take over the functions assigned to the other. This is the basic structure of scheme of the Government of the Republic laid down in this Constitution. [660]

The Supreme Court in the case of *Asif Hamid v. State of J. and K*[661], has observed that "Judicial review is a powerful weapon to restrain, unconstitutional exercise of powers by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of powers is the self-imposed discipline of judicial restraint." But, in *Krishan Kumar v. Union of India,*[662] the Constitution Bench of the Supreme Court observed "In the matter of expenditure includible in the Annual

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657. AIR 1975 SC 2294
658. AIR 1973 SC 1461
659. AIR 1975 SC 2299
660. Ibid., at p. 2336
661. AIR 1989 SC 1899
662. 1990 (4) SCC 207.

Financial Statement this Court has to pass any order or give any directions because of the division of functions between the three co-equal organs of the Government under the Constitution" not, any court can issue a direction to a Legislature to enact a particular law. Similarly, a court cannot direct an executive authority to enact a law which it has been empowersed to do under the delegated legislative authority. [663]

But in *I.R. Coelho (dead) by L.R.S's v. State of Tamil Nadu,*[664] the Supreme Court observed that the Constitution is living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of law. The principle of constitutionalism is now a legal principle .which requires control over the exercise of governmental powers to ensure that it does not destroy the democratic principles including the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers. It requires a diffusion of powers, necessitating different independent centers of decisions-making. The principle of constitutionalism under-pin the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for law protecting fundamental right to be impliedly repealed by future statutes. The protection of fundamental constitutional right through the common law is main feature of common law constitutionalism. According to Dr. Amartya Sen, the justification for protecting fundamental right is not on the assumption that they are higher rights but that protection is the best way to promote a just and tolerant society. According to Lord Steyn, Judiciary is the best institution to protect fundamental right, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law. Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England, where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, courts

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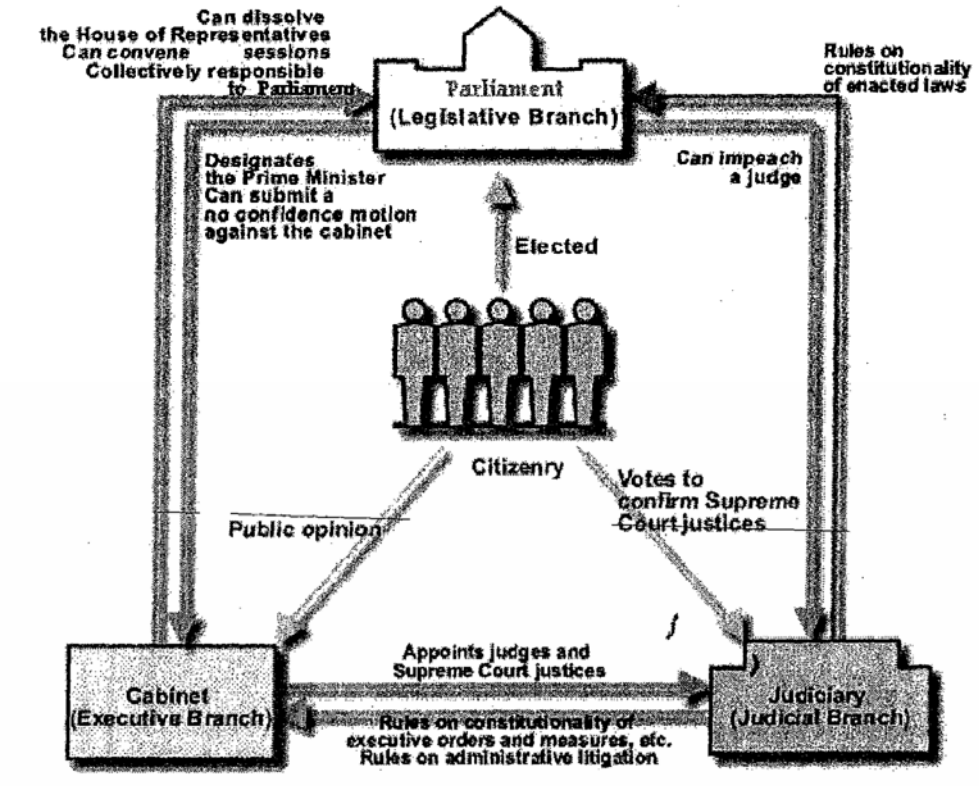
663. Employee's Welfare Association v. Union of India, AIR 1990 SC 334.
664. AIR 2007 SC 861.

may be forced to modify the principle of parliamentary sovereignty. For example, in cases where judicial review is sought to be abolished. By this, the Judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the government is maintained.

To prevent one branch from becoming supreme, protect the opulent minority from the majority and to introduce the way which is best suitable in Indian phenomen and to suggest government system that employed a separation of powers with balance of the powers of each branches.



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Checks and Balances

Typically this can be accomplished through a system of "checks and balances", the origin of which, like separation of powers itself, is specifically credited to Montesquieu. Checks and balances allow for a system based regulation that allows one branch to limit another, such as the powers of Legislatures to alter the composition and jurisdiction of the federal courts. In India, the doctrine of separation of powers has been accepted with the principle of checks and balances.

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665. www.google.co.in/search/separation_of_powers/image

Though the Constitution of India does not recognize the doctrine of separation of powers in absolute manner, framers have meticulously differentiated functions of various organs of the Government. Each organ has to function within its own sphere demarcated under the Constitution. The principle of "checks and balances" obtaining in our democracy play vital role in respect of separation of powers. The doctrine of separation of powers has been held by the Supreme Court of India as one of the basic features of the Constitution, which cannot be impaired even by amending.[666]

A distinction may be necessary between essential and incidental powers of an organ of Government. Government is not a machine, but a living thing. Its life is dependent upon cooperation of its organs, which are interdependent. An organ may exercise some of the incidental powers of another organ. However, no organ of Government is supreme as per discussion of democracy. Each organ is limited to the exercise of the powers confided to it under the law of its creation.

On the issue of Cabinet, the Supreme Court of India has said, is a hyphen which joins, or a buckle which fastens, the Legislative part of the State to its executive part. The Constitution of India under Article 50, however, defines separation of the Judiciary from the Executive. The vitality and importance of the doctrine of separation of powers lies not in any rigid separation of functions, but in a working synthesis with the guarantee of judicial independence.

Article 32 of the Constitution makes the Supreme Court the ultimate guardian of the Fundamental Rights of the citizens and clothes it with the powers to issue the writs for their enforcement. Article 142 guarantees wide powers to apex court to make orders as necessary in the interest of justice or matter before it. In addition Constitution confers powers to make decisions under articles 131 to 136. Article 142 contains no words of limitation and has enabled the court to intervene in a wide variety of cases starting with *Union*

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44. *Kesavananda v. State of Kerala, AIR 1973 SC 1461, Smt. Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299*

Carbide Corpn. v. Union of India[667]**,** in which Supreme Court has made significant strides to maintain the rule of law, which is the bedrock of our Constitution.

Judicial review is a powerful weapon to restrain any unconstitutional exercise of powers by the Legislature and the Executive is subject to judicial restraint. The only check on the exercise of powers by the judiciary, however, is the self-imposed discipline of judicial restraint. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize vis-a-vis any matter which under the Constitution lies within the sphere of Legislature or the Executive, provided those authorities do not transgress their constitutional limits or statutory powers.[668]

It is said that there is a shift from the traditional judicial role to judicial activism, from passivity to creativity, in that the courts are taking judicial notice of the changing needs of the society and evolving new tools for redressing public wrongs. Public Interest Litigation based on the enlarged concept of locus standi, has developed on account of judicial activism. In boundless matters, the courts have moulded reliefs, be they cases concerning the deprived or disadvantaged sections of the society, prisoners, environmental degradation, closure of polluting industries in Delhi, encroachments and unauthorised constructions, immediate medical aid by Government hospitals to seriously injured persons, reparations to riot-victims, professional college admissions, contempt involving disobedience or imperviousness to court orders, corruption in high places, or malfeasance of public servants including Ministers involving breach of public trust, etc. As we are aware, the Supreme Court had very recently held that exemplary damages could be awarded for oppressive, arbitrary and unconstitutional actions by public servants, and imposed the same on two former Ministers though this decision in Mr. Satish Sharma's case was recently overturned by the Supreme Court of India.[669] The Supreme Court had also awarded to a

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667. (1991) 4 SCC 584
668. Asif Harmed v. State of J&K, AIR 1989 SC 1899
669. The Pioneer, August 4, 1999, p. 4

former Chief Minister a symbolic one day imprisonment for his administrative inaction involving con-tern1' besides punishing civil servants for the same.

Undoubtedly, the maxim "the King can do no wrong" or absolute immunity of the Government is not recognized in our legal system, Independence and impartiality are two basic attributes essential for proper discharge of judicial functions. In fact, 'judicial activism' is nothing but Judiciary's insistence that the rule of law must guide the legislature and the Executive in enacting or enforcing the laws of the land. Judicial review is a constitutionally embraced concept, nay, a basic feature of our Constitution,[670]; *S.P. Sampath Kumar v. Union of India*[671], *Subhash Sharma v. Union of India*[672]. Indian Judicial review, a powers born on the first principles of democracy's constitutionalism, is today an area of great promise.[673]

However, it must also be kept in view that the actual governance of the country is certainly the sphere of the Executive which is accountable to Parliament. Neither the Executive nor the Judiciary should exceed their legitimate functions. Only then the two organs of the State can function harmoniously. There should be no occasion for one organ of the State to usurp powers of the other organ so as to lead to constitutional crisis. Self-restraint is the key to the whole issue.

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670. Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789
671. AIR 1987 SC 386
672. AIR 1991 SC 631
673. Judicial Review as a part of Rule of Law.