CHAPTER III
JUDICIAL ACTIVISM IN INDIA: HISTORICAL PERSPECTIVE

Like the other constitutions of the world, the phenomenon of judicial activism has also been observed under the Constitution of India. An analysis of the Indian experience will reveal that the origin of judicial activism in India dates back sometime to the post – constitution period of 1950 when the Supreme Court’s activist decisions in Romesh Thappar v. State of Madras,\(^1\) Brij Bhushan v. State of Delhi\(^2\) and Champakam Dorairajan v. State of Madras,\(^3\) invalidated the laws passed by the Parliament. Consequently, the Parliament passed the Constitution (1\(^{st}\) Amendment) Act, 1951 to counter the judicial decisions and also to make its position stronger. The newly added Ninth Schedule through the Constitution (1\(^{st}\) Amendment) Act, 1951 made Acts named therein beyond the challenge of courts for infringement of fundamental rights guaranteed in Articles 14,19 and 31.

Incidents of judicial activism are also visible during the pre–independence colonial era. Examples of judicial activism are available in the various judgements of the Privy Council which had the jurisdiction to review the decisions of the Company’s courts and the Crown’s courts in colonial India. In The High Commissioner for India v. I.M. Hall,\(^4\) the Privy Council incorporated the principles of ‘reasonable opportunity to the heard’ within the meaning of Section 240 (3) of

\(^{1}\) AIR 1950 SC 124
\(^{2}\) AIR 1950 SC 129
\(^{3}\) AIR 1951 SC 226
\(^{4}\) AIR (35) 1948 PC 121, para 21 and 22
the Government of India Act, 1935. Similarly in *Emperor v. Sibnath Banerjee*, the Privy Council held that the Court can investigate the validity of orders passed under Section 59 (2) of the Government of India Act, 1935 though burden is heavy on the person challenging the order. Judicial review of the Privy Council however ended with the abolition of its jurisdiction in 1949.

Traces of judicial activism are also observed in the various judgements given by the Federal Court constituted under the Government of India Act, 1935. In one such instance in *Niharendu Dutt Majumdar v. Emperor*, the Federal Court held that mere criticism or even ridicule of the Government does not amount to sedition unless the Act was calculated to undermine respect for the Government so as to make people cease to obey it so that only anarchy can follow. But the Privy Council overruled this decision in *Emperor v. Sadashiv Narayan Bhalerao*, and held that the offence of sedition was not confined to only incitement to violence or disorder. The offence consists in actual exciting or attempting to excite in other certain bad feelings towards the Government. However, the Federal Court constituted under the Government of India Act, 1935 mainly played the role of a literal interpreter. This was because the Constitution of 1935 had no specific chapter on the Bill of Rights and wide discretionary powers were conferred on the executive.

Judicial activism in India, in its truest sense, dates back to the commencement of the Constitution. Hence the study of judicial activism in India

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7 29 AIR 1942 FC 22
8 AIR (34)1947 PC 82
9 Ibid at paras 7, 9, 12
from the historical perspective is confined from the period 1950 to 1977, the period of 1978 onwards being the post–emergency era or the present perspective. To make the historical study convenient, it is proposed to discuss the phenomenon of judicial activism in India under two headings: -

A. Pre–emergency era (1950 to 1974) – The discussion under the pre–emergency era is further classified into two phases: -

a. Nehruvian era (1950 to 1964); and

b. Post–Nehruvian era (1965 – to 1974); and


Pre – Emergency Nehruvian Era (1950 to 1964)

The pre–emergency Nehruvian era was the period when India reborn as a Sovereign Democratic Republic was setting its goals to achieve a ‘Welfare State’ securing to its citizens justice–social, economic and political. An enthusiastic Pandit Jawaharlal Nehru, as the first Prime Minister of India was so determined to implement his welfare schemes that he believed that neither the Supreme Court nor any other Court could stand in the way of his welfare legislations. This is evident from his words angrily declared in the Constituent Assembly Debates:-

“No Supreme Court and no judiciary can stand in judgment over the sovereign will of the Parliament representing the will of entire community. If we go wrong here and there, it can point it out but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way.”

10 The words ‘Socialist, Secular’ were later added by the Constitution (42nd Amendment 1976) See VIII Constituent Assembly Debates, p. 247.
Not only the politicians but also the courts seemed to be under the sway of parliamentary supremacy. Such judicial passivism was mainly due to three reasons. Firstly, the Nehruvian era judges of the Supreme Court were drawn from amongst the judges of the Federal Court and various High Courts of India appointed during the colonial government. These judges firmly believed in the supremacy of the Imperial Parliament which acted as the ultimate authority of the colonial government in India. Secondly, the Nehruvian era courts believed that law was what was declared by the Parliament and it was the duty of the courts to interpret the law as it is and uphold it. Such judicial passivism is based on the Anglo–Saxon tradition which asserts that a judge does not make law; he merely interprets. “Law is existing and eminent; the judge merely finds it. He merely reflects what the legislature has said. This is the photographic theory of the judicial function.”

Thirdly, the Nehruvian era parliamentarians were statesman and men of unity and integrity. They were politicians who had participated in the national movement and therefore carried the halo of sacrifice. “Between the politicians and the judges, the politicians enjoyed much greater prestige.” The Nehruvian era politicians not only commanded respect from the people but also from the courts. The courts, therefore, exercised judicial restraint in invalidating the legislations passed by the Parliament. Thus during the pre-emergency Nehruvian era we find judicial activism in India being influenced by a towering personality like Pandit Jawaharlal Nehru.

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13 Chief Justice P.N. Bhagwati, “Judicial Activism in India,” 10/10/11
www.law.wisc.edu/alumni/.../17-1/gargove - 17 - 1 – 3. pdf
Similarly, judicial activism in US had been influenced by towering personalities like Thomas Jefferson, George Washington etc.

Thus, during the Nehruvian era, the predominant approach of the Indian judiciary was positivist. The Court interpreted the constitutional text literally by applying the same restrictive canons of interpretation as applied to ordinary statutes.\(^{15}\) Judicially, the principle was laid down by Mukherjee, J in *Chiranjit Lal v. Union of India* \(^{16}\) wherein the Court observed, “In interpreting the provisions of our Constitution we should go by the plain words used by the Constitution makers.”\(^{17}\) The courts looked towards Article 367 (1) for interpreting the Constitution.

Adopting a literal interpretation of the Constitution the courts have refused to look beyond the words provided in the Constitution or take recourse to the spirit of Constitution as an aid to interpreting the Constitution.\(^ {18}\) In this regard the courts have looked towards Article 367 (1) for interpreting the Constitution. Article 367 (1) provides “Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372 apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.”\(^ {19}\)


\(^{16}\) AIR 1951 SC 42

\(^{17}\) Ibid at p. 58


Durga Das Basu, a jurist supports the literal interpretation of the Indian Constitution on the ground that though the Indian Constitution is capable of being interpreted by the courts like any other law, is specifically ensured by the Constitution itself by the incorporation of Article 367 (1).\(^{20}\) M.P. Jain, another jurist though agrees that the Constitution itself incorporates the principle of statutory construction through Article 367 (1) but differs that the judicial approach to the Constitution is no longer solely and exclusively one of statutory interpretation.\(^{21}\)

It is true that with the changing times, the declaratory theory which requires the judges to declare law and not to make law has become outdated and abandoned. The law creative role of a judge is very well acknowledged in modern times. This is because of the growing influence of American Realism. “American realism had its core in a reaction to the ‘black–letter’ approach to the law which advocates the formal syllogistic application of law to the facts an approach sometimes labelled as ‘formalism’ or the ‘mechanical’ approach to jurisprudence.”\(^{22}\)

Though the courts assumed the role of the literal interpreter the Nehruvian era saw the rudimentary phase of judicial activism in India. According to Prof S.P. Sathe:

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“The Supreme Court of India started off as a technocratic court in the 1950’s but slowly starting acquiring more power through constitutional interpretation. Its transformation into an activist court has been gradual and imperceptible.”

The gradual transformation of the Supreme Court from technocratic courts into activist courts during the Nehruvian era is discussed under the following headings.

**Interpretation of Fundamental Rights - Literal to Progressive Interpretation**

During the Nehruvian era, the interpretation of fundamental rights underwent a slow but gradual change from literal to progressive interpretation. This was particularly true in respect of the fundamental rights like freedom of press, personal liberty and protective discrimination for backward classes.

**Freedom of Press** – “Before independence, Nehru had no doubt that governance grew out of honest criticism and even after he assumed power Nehru articulated the libertarian view that it was better to have ‘a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press’.” Nehru’s initial views on the freedom of press finds support in the judgments of the Supreme Court delivered during the Nehruvian era. These judgments mark the beginning of judicial activism on the freedom of press in India as it contradicted the Government’s policy on press. The Supreme Court adopting an activist approach interpreted freedom of speech and expression as implying freedom of press which included both publication and circulation of news and

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views. The Court invalidated laws imposing pre–censorship either by curtailing or prohibiting publication \(^{25}\) or circulation\(^{26}\) as violative of the freedom of press enshrined in Article 19 (1) of the Constitution of India.

In fact, it was the *Sakal Newspapers case* \(^{27}\) which in the truest sense can be said to be the first case of judicial activism on the freedom of press. In *Sakal Newspapers case* the Central Government through the Newspaper (Price and Page) Act, 1956 and the Daily Newspaper (Price and Page) 1960 interfered with the right of a newspaper to publish any number of pages for dissemination of news and views, the number of pages depending upon the price charged to the readers. Prior to the promulgation of the Order every newspaper was free to charge whatever price it choose and thus had a right unhampered by any state regulations to publish news and views. This liberty was obviously interfered with the Order which provides for the number of pages according to the particular price charged. The fixation of price according to the number of pages published effected the circulation of some newspapers by making the price so unattractively high for a class of its readers. The Act and the Order made therein acted as a double–edge knife since in the name of regulating the commercial aspects of a newspaper it directly affected the dissemination of news and views of the newspaper.

It was in *Sakal Newspapers Private Ltd v. Union of India* \(^{28}\) that the Apex Court through J. R. Mudholkar, J. pointed out that the Constitution made a subtle

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25 In *Sakal Newspapers Private Ltd. v. Union of India*, AIR 1962 SC 305  
27 AIR 1962 SC 305  
28 AIR 1962 SC 124
distinction between the regulation of dissemination of news and views and the regulation of commercial aspects of the newspapers. The regulation of commercial aspects of newspapers could be done on the grounds mentioned under Article 19 (6)\(^{29}\) whereas the freedom of speech and expression could be restricted only in the interest of the specific grounds mentioned in classes under Article 19 (2).\(^{30}\)

Similar views were expressed by the Supreme Court in *Bennet Coleman*\(^{31}\) case during the post-Nehruvian era. In *Bennet Coleman and Co. v. Union of India*,\(^{32}\) the validity of the Newsprint Control Order which fixed the maximum number of pages as 10 pages that a newspaper could publish was challenged as violative of fundamental rights guaranteed in Article 19 (1) (a) and Article 14 of the Constitution. The Government defended the measure on the ground that it would help small newspapers to grow and to prevent a monopolistic combination of big newspapers. The Court held that the newsprint policy was not a reasonable restriction within the ambit of Article 19 (2). The newsprint policy abridges the petitioner’s right to freedom of speech and expression. The newspapers are not allowed their right of circulation. They are not allowed right of pages growth.

But later on Nehru advocated for a regulated press. Consequently the Constitution was amended in 1951 to add ‘public order’, ‘friendly relation with foreign states’ and ‘incitement to an offence’ as three more grounds of restrictions on the freedom of speech and expression under Article 19 (2). The Nehru

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\(^{29}\) Article 19 (6) authorizes the State to regulate freedom of trade, business, occupation and profession in the interest of general public

\(^{30}\) Article 19 (2) authorizes the State to regulate freedom of speech and expression in the interest of public order

\(^{31}\) *Bennet Coleman and Co. v. Union of India, AIR 1973 SC 106*

\(^{32}\) AIR 1973 SC 106
Government’s policy for a regulated press was based on the following foundations – firstly, that the press consisting mainly of large chains of newspapers concentrating on mass circulation was monopolistic in nature; secondly, that the press was nuisance and a threat to law and order; thirdly, that it lacked commitment to the goals of the nations; and fourthly, that it lacked accountability. Consequently, the Constitution was amended in 1951 to add ‘public order’ ‘friendly relation with foreign states’ and ‘incitement to an offence’ as three more grounds of restriction on the freedom of speech and expression under Article 19(2) through the Constitution (1st Amendment) Act, 1951.

**Equality permits Reasonable Classification** - The Nehruvian era courts adopted an activist approach in promoting an egalitarian Indian society. Like the Japanese Supreme Court and the American Supreme Court, the Indian Supreme Court had deduced the principle of reasonable classification in order to restructure an egalitarian Indian society. The Japanese Supreme Court had deduced the principle of reasonable classification from the guarantee in Article 14 (1) of the Japanese Constitution which says that “all the people are equal under the law”. The principle of reasonable classification was applied by the Japanese Supreme Court in the Parricide Case where it acknowledged that “differential treatment can be allowed for rational reasons.” The American Supreme Court had deduced the principle of reasonable classification from the Fourteenth Amendment which says that, “No State shall make or enforce any law which deny to any person within its

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33 Rajeev Dhavan & Thomas Paul, (eds.), *Nehru and the Constitution*, (New Delhi: The Indian Law Institute, 1992), p. xliii (see introduction)
35 (1973) Grand Bench No. 697
jurisdiction the equal protection of the law.” 36 The American Supreme Court had applied the principle of reasonable classification in Brown v. Board of Education37 to invalidate a law which barred the Negroes from public schools of the North since they were widely regarded as “racially inferior” and “incapable of education”. Justice Felix Frankfurter believed that with respect to rights mentioned under “equal protection of the laws” there could no longer be one law for whites and another for blacks.38

The Indian Supreme Court had deduced the principle of reasonable classification from Article 14 of the Constitution which says that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of the India.”39 In Ameerunnissa Begum v. Mahboob Begum40 a five judge bench of the Supreme Court through B.K. Mukherjee, J. observed:

“A legislature which must, of necessity, have the power of making special laws to attain particular objects must have large powers of selection or classification of person and things upon which such laws are to operate. Hence mere differentiation or inequality of treatment does not per se amount to discrimination...” 41

Like the Supreme Court, the Indian High Courts had adopted an activist approach in promoting the principle of reasonable classification through its decisions. In one such decision42, the High Court of Hyderabad was of the opinion

37 (1954) 347 U.S. 483
39 Article 14 of the Constitution of India
40 AIR 1953 SC 91
41 Ibid at para 11
42 Abdul Rehman v. Pinto, AIR 1951 Hyd. 11
that “equality cannot have a universal application for identical treatment in unequal circumstances would amount to inequality. In another decision the High Court held that, “a reasonable classification was held not to be permissible but also necessary if society is to progress.”  

In the later years, during the post Nehruvian era, the Indian Supreme Court challenged the traditional concept of equality based on reasonable classification in *E.P. Royappa v. State of Tamil Nadu*. Instead it laid a new concept of equality which was against any form of arbitrariness.  

**Protective Discrimination for Backward classes** - Jawaharlal Nehru, one of the greatest egalitarian of his age firmly believed that the social inequalities created by the Hindu caste system was opposed to the ideal of equality enshrined in the Preamble. Nehru’s vision of the Indian Constitution as an instrument of social reconstruction and social revolution is repeatedly invoked by the pro-active justices of Indian Supreme Court to achieve the egalitarian and socialistic goals of the Constitution in the aid of the dispossessed and deprived.  

But politics in India is being driven by the competition for backwardness. In the competition for backwardness, the claim is made not only by castes and tribes but also religious minorities who recognize the advantages to be gained from being

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43 *Jagjit Singh v. State*, AIR 1954 Hyd. 28  
44 AIR 1974 SC 555  
46 Ibid at p. 119  
47 Andre Beteille, “Tribes and Castes,” *The Assam Tribune*: Guwahati, Tuesday, 24th June, 2008, p.6. The author is Professor Emeritus of Sociology, Delhi School of Economics and National Research Professor
designated as backward. Such a claim is unfortunately forwarded by the Government in favour of vote bank politics. From the times of Nehru, the Indian judiciary has adopted an activist approach to see that Nehru’s vision of social and economic justice and the constitutional provisions for protective discrimination in this regard are not misused.

In one of its judgement the Mysore High Court has held that the identification of backward classes for protective or compensatory discrimination should not be arbitrary but should be based on intelligible differentia. In this regard a Division Bench of the Mysore High Court through S.R. Das Gupta, C.J. observed:

“The decision of the Government that certain classes are “socially and educationally backward” is open to challenge in a Court of law. The Court can consider whether the classification by the Government is arbitrary or is based on any intelligible and tenable principle.”

Similar views were expressed by the Indian Supreme Court in M. R. Balaji v. State of Mysore, wherein the Mysore Government order which further classified the ‘backward classes’ into ‘backward classes’ and ‘more backward classes’ was held to be bad in law and not justified under Article 15 (4). A five judge bench of the Supreme Court through Gajendragadkar, J was of the view that “backwardness” as envisaged by Article 15 (4) must be social and educational, and not either social

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48 Ibid
49 Article 15 (4) and 16 (4) of the Constitution of India provides for protective discrimination for backward classes
50 In Ramakrishna Singh v. State of Mysore, AIR 1960 Mys. 338
51 In Ramakrishna Singh v. State of Mysore, AIR 1960 Mys. 338 at para 23
52 AIR 1963 SC 649
or educational. Though caste may be the sole test for ascertaining as to whether a particular class is backward or not.  

The Court’s view is completely in tune with Nehru who expressed his unwillingness to accept an exclusive economic test of backwardness by ascertaining that “‘socially’ is a much wider word including many things and certainly including ‘economically’;”. Rejecting ‘economically’ in Article 15 (4), Nehru vehemently asserted that the aim of compensatory discrimination was not to assist every economically poor classes but to help only those who were, both socially and economically backward due to the discriminatory social structure.  

“Immediately after Balaji came the Devadasan case before the Supreme Court where the Court was required to adjudge the validity of the ‘carry forward’ rule.” In Devadasan, the Supreme Court struck down the ‘carry forward’ rule as unconstitutional as it created reservation exceeding 50% by carrying forward the unfilled reserved posts to the succeeding years. The Apex Court made it clear that protective discrimination for backward classes should not be at the cost of the legitimate rights of other communities. “It should not be excessive so as to create a monopoly or to interfere unduly with the legitimate claims of other communities.”

53 Ibid at para 20  
55 Paramananda Singh, loc. cit.  
57 T. Devadasan v. Union of India, AIR 1964 SC 179  
58 T. Devadasan v. Union of India, AIR 1964 SC 179
In this regard, the majority of the five judge bench through J.R. Mudholkar, J observed:

“If the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would be open then for a member of a more advanced class to complain that he has been denied equality by the State.” 59

**Right to personal liberty** - Immediately after the inauguration of the Constitution during the Nehruvian era the Indian Supreme Court was confronted with the question of interpretation of the words ‘personal liberty’ in the very famous *Gopalan case* 60 where the validity of the Preventive Detention Act, 1950 was challenged. The main issue was whether Art 21 envisaged any procedure required to be fulfilled by a law depriving a person of his personal liberty? And whether such procedure should be fair and reasonable?

In answering the above questions, a majority of five out of six judge bench of the Supreme Court (the majority consisting of M.H. Kania, C.J.I., Saijid Fazl Ali, M. Patanjali Sastri, Mehr Chand Mahajan, B.K. Mukherjea and S.R. Das J.J) the majority (Fazl Ali, J contradicting) imported the Dicean definition of liberty which favoured protection only in case of total loss of freedom. In interpreting the words ‘personal liberty’, the majority court distinguished between Article 19 and 21. As per Kania, C.J., Article 19 implies protection from partial loss of freedom whereas Article 21 implies protection only from complete loss of freedom. According to the Apex Court, Article 19 implies protection from partial loss of freedom whereas Article 21 implies protection only from complete loss of freedom. Since in the

59 Ibid at para 12
instant case, there was only partial loss of freedom there was no violation of Article 21 which implies protection only from complete loss of freedom.\footnote{Ibid at para 12} The majority Court (as per Kania C.J., Patanjali Sastri, B.K. Mukherjea and Das JJ.) refused to accept the contention that the the ‘procedure’ under Article 21 has to be ‘just’ fair and reasonable’, which were the principles of natural justice.\footnote{A.K. Gopalan v. State of Madras, AIR 1950 SC 27 at para 18} Similarly, the word ‘law’ was defined in the sense of lex (state – made law) and not ‘jus’.\footnote{Ibid at para 109}

The Apex Court also pointed out the differences between the phrases ‘procedure established by law’ in Article 21 and ‘due process of law’ used in the Fifth Amendment of the Constitution of USA. The Fifth Amendment (1791) of the Constitution of USA provides that “No person shall be deprived of his life or liberty without due process of law.”\footnote{M.V. Pylee, Constitutions of the World, 3\textsuperscript{rd} ed., Vol., 2, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2006), p. 2800} The Court contended that if the Constitution makers wanted to preserve in India the same protection as given in America there was nothing to prevent the Constituent Assembly from adopting that phrase.\footnote{J. N. Pandey, The Constitutional Law of India, 46\textsuperscript{th} ed., (Allahabad: Central Law Agency, 2009), pp. 231 – 232} The Court’s views were similar to the views expressed by Mr. Z.H. Lari, an honourable member of the Constituent Assembly who expressed that since the word ‘liberty’ under Article 21 was preceded by the word ‘personal’ there was a difference between the enjoyment of ‘personal liberty’ under the Indian Constitution and the enjoyment of ‘liberty’ under the American Constitution.\footnote{Views expressed by Mr. Z.H. Lari, Member Draft Constitution, Constituent Assembly of India seen in Constituent Assembly Debates, (Official report). Book No. 2, Vol. VII, p. 855, reprinted by Lok Sabha Secretariat, (New Delhi, 4\textsuperscript{th} reprint 2003)} The enjoyment of
‘personal liberty’ under Article 21 of the Indian Constitution is similar to the enjoyment of liberty under Article 31 of the Japanese Constitution \(^{67}\) which is more specific.\(^{68}\)

But the narrow restrictive interpretation of personal liberty in Gopalan’s case was later modified by the Supreme Court in its subsequent decisions. During the Nehruvian period, *Kharak Singh v. State of UP*, \(^{69}\) was the first case of judicial activism on the right to liberty.

In *Kharak Singh*, the Court held that ‘personal liberty’ was not only limited to bodily restraint or confinement to person only but something more than mere animal existence. It extends to all those limits and faculties by which life is enjoyed. It equally prohibits the mutilation of the body or amputation of an arm or leg. The Court referred to the American decisions in *Munn v. Illinois* \(^{70}\) and *Wolf v. Colorado* \(^{71}\) to establish such violation as a violation of a common law right of a man as an ultimate essential of ordered liberty as the very concept of civilization.\(^{72}\)

The majority of judges (through K. Subba Rao, and J.C. Shah JJ.) held that ‘personal liberty’ is a compendious term including within itself all the varieties of rights which go to make up the personal liberty of a man other than those mentioned in Article 19.\(^{73}\)

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\(^{67}\) Article 31 of the Japanese Constitution provides that “No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.”

\(^{68}\) Mr. Z. H. Lari, loc. cit.

\(^{69}\) AIR 1963 SC 1295

\(^{70}\) (1876) 94 U.S. 113 (142); 24 Law Ed. 77

\(^{71}\) (1948)338 U.S. 25 Ref; 93 Law Ed. 1782

\(^{72}\) In *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 at paras 14, 18

\(^{73}\) Ibid at para 7
During the post–Nehruvian period, the scope of the right to ‘personal liberty’ further widened so as to include the right to travel abroad as a part of the right to personal liberty.\textsuperscript{74}

**Check on Arbitrary Powers of the Executive**

The principles of constitutionalism were introduced for the first time by the Nehruvian era courts. But it was directed mainly against the executive. The courts at the time dared not question the sovereignty of the Parliament and its law–making power.

In the absence of any constitutional restrictions, the Court applied the Wednesbury’s principles to examine the validity of the administrative orders of the executive. This was done in *Makhan Singh Tarsikka v. State of Punjab*\textsuperscript{75} where the majority of seven judges bench of the Supreme Court applied the Wednesbury’s principles to examine the validity of a Presidential order under Article 359.

In *Makhan Singh’s* case\textsuperscript{76} the main issue was whether personal liberty of a citizen could be put to stake during emergency. Whether a Presidential proclamation under Article 359 (1) can deprive a citizen from seeking a remedy in a court of law to enforce his ‘personal liberty’? Whether judicial review of such Presidential order under Article 359 (1) is barred under the Constitution of India?

Relating to the above questions the Supreme Court made a very cautious approach in *Makhan Singh’s* case. It interpreted that a Presidential Proclamation

\textsuperscript{74} In *Satwant Singh v. Assistant Passport Officer, New Delhi*, AIR 1967 SC 1836  
\textsuperscript{75} AIR 1964 SC 381  
\textsuperscript{76} AIR 1964 SC 381
under Article 359 (1) can preclude a citizen from enforcing his fundamental rights mentioned in the order. But an order made under Article 359 (1) is not immune from judicial review. The validity of a Presidential order under Article 359 (1) can be questioned on the ground that the detention had been ordered malafide or suffered from excessive delegation or that the fundamental rights deprived have not been mentioned in the Presidential order.\footnote{Ibid at para 36, 37, 38}

Thus, in \textit{Makhan Singh’s} case though the Supreme Court gave a literal interpretation of a Article 359 (1) it upheld its power of judicial review of a Presidential order made under Article 359 (1) by applying the principles of administrative law.

Through judicial activism, the courts of the Nehruvian era have held that the common law doctrine of ‘The King can do no wrong’ has become outdated and is inapplicable in India. Though the Court approved the distinction made between the sovereign functions and the non sovereign functions of the State in its earlier decisions in \textit{Steam Navigation Company’s case} \footnote{In \textit{Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India} (1861) 5 Bom HCR App.1} and the same view was again reiterated in \textit{Vidhyawati case} \footnote{\textit{State of Rajasthan v. Vidhyawati}, AIR 1962 SC 933}, B.P. Singh, C.J. made an important observation that the common law immunity rule based on the principle that ‘The King can do no wrong’ has no application and validity in this country. In this context, His Lordship observed as follows:
“There should be no difficulty in holding that the state be as such liable for tort and in respect of a tortuous act committed by servant and functioning as such, as any other employer...in India, ever since the time of East India Company, the sovereign has been held liable to be sued in tort or contract, and the Common Law immunity never operated in India. Now that we have by our Constitution established a republican form of Government and one of the objects is to establish a Socialist State... there is no justification, in principle or in public interest, that the State should not be held liable vicariously for the tortuous act committed by servant.”  

‘The Court’s decision in Vidhyawati case was a precursor of a new trend in the area of State liability. “An interesting aspect of the Vidhyawati case is that though it has taken a broader view of state liability in a welfare state like India and indirectly tried to suggest that the state will be vicariously liable for tortuous acts of its servants for discharging sovereign as well as non–sovereign functions, it is to be noted very carefully that the Court neither specifically overruled the test of sovereign function to determine the state’s vicarious liability, nor did it refer to it, nor did it expressly mention that the function, in discharge of which the act was committed in the instant case, was non–sovereign.” However, Vidyawati case was an instance of judicial activism where the Indian judiciary tried to evolve new principles to make the state vicariously liable to compensate for any wrong committed by its employees through violation of fundamental rights.

In almost all democratic countries, a new trend of wider State liability is now accepted including Britain where the doctrine of common law immunity

80 State of Rajasthan v. Vidhyawati, AIR 1962 SC 933 at para 15
originated. Before 1947, the British Crown was immuned from any liability for
torts committed by its servants because of the common law maxim that the ‘King
can do no wrong’. This position was changed by the Crown’s Proceedings Act
1947. The genesis of the Crown’s Proceedings Act, 1947 lay in abolishing the
general immunity in tort which had been an anomaly of the Crown’s legal position
for more than a hundred years. However, there were certain exceptions, like
defence of the realm, maintenance of armed forces and postal services.

The common law rule of ‘doctrine of pleasure’ is partially applicable under
the Indian Constitution. Unlike in Britain, the courts have held that an Indian civil
servant could always sue the Crown for arrears of salary. During the Nehruvian
era the courts have held that the pleasure of the President or the Governor was
controlled by the constitutional safeguards provided under Article 311 which
includes the principles of natural justice and that the doctrine of pleasure is
subject to the fundamental rights.

The Indian Parliament acts as a Sovereign Body

During the Nehruvian era the Indian Parliament acted as a sovereign
Parliament. It acted as a sovereign law–making body whose law–making power
could not be questioned by anybody including the courts. Under the influence of

82 M.P. Jain, Indian Constitutional Law, 5th ed.,
83 H.W.R. Wade & C.F. Forsyth, Administrative Law, 10th ed.,
84 Wade, Administrative Law, (1982) at p. 698 seen in M.P. Jain, loc. cit.,
85 In State of Bihar v. Abdul Majid, AIR 1954 SC 245 at para 9
86 In Motiram v. North Eastern Frontier Railway, AIR 1964 SC 600, at para 21, 22, 64, p. 609
87 In Union of India v. P.D. More, AIR 1962 SC 630;
General Manager, S. Railway v. Rangacharee, AIR 1962 SC 36 at para 15, 16
British theory of parliamentary sovereignty the Nehruvian era courts hesitated to give decisions against the Indian Parliament. This in turn further enhanced the power and position of the Indian Parliament which can be analyzed under the following headings.

**Importance of Directive Principles enhanced**  - “During the freedom struggle Nehru had repeatedly advocated revolutionary changes in the power and economic structures built by the British and responsible for the impoverishment of India.”  

Post–independence, the Nehruvian government adopted a policy for restructuring the agrarian structure and revamping the land relations in India. The framers of the Indian Constitution accommodated Nehru’s thesis in Articles 38 and 39 of the Directive Principles.  

“The Directive Principles of State Policy have never been intended to be retained merely as pious obligations.”

In fact, the Directive Principles of State Policy, set forth in Articles 38 to 51 aim at realising the Constitution’s goal of a welfare state where there is both economic justice and social justice as visualised in the Preamble.

However, the difficulty in the implementation of these ideals of economic and social democracy was realised from the time of framing the Constitution. Constitution advisor, B.N. Rau had recommended the classification of rights into two parts, one dealing with fundamental principles of state policy as unjusticiable

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89 Ibid at p. 87

and other with fundamental rights as justiciable.91 “The proposal relating to the incorporation of non-justiciable rights in the Constitution did not initially find favour with some members of the Sub-Committee on Fundamental Rights.”92 Concerns were raised at the first meeting of the Sub-Committee held on February 27, 1947 where Alladi Krishnaswami Ayyar saw no use in laying down in the Constitution precepts which would remain unforceable or ineffective.93 Similar views were expressed by Masani, Ambedkar and other members of the Constituent Assembly.

“Nehru may be described as a nation-builder, reformer, ardent democrat and flawed administrator.”94 He was determined to implement his agrarian reforms as envisaged in Article 38 and 39 of the Directive Principles whose implementation faced two hurdles:

(i) That Articles 38 and 39 were non-justiciable;
(ii) That the egalitarian goal values in Articles 38 and 39 were clashing with the right to equality in Article 14.

In order to overcome this difficulty, Parliament amended the Constitution in 1951. The insertion of the Ninth Schedule in the original Constitution through the Constitution (1st Amendment) Act, 1951 further enhanced the importance of Directive Principles. The Court readily validated the Nehruvian era legislations on

93 Select Documents II, 4 (ii) (b), p. 69 seen in ibid at p. 321
the assumption that such legislations were for the purpose of achieving one of the Directive Principles. For instance in *State of Bihar v. Kameshwar Singh* the Court relied on Article 39 for validating the Bihar Land Reforms Act, 1930 passed for a public purpose under Article 31. Similarly, the Bihar Preservation and Improvement of Animals Act, 1956 slaughter of cows and calves and other cattle capable of work has been upheld because it was meant to give effect to Article 48 of the Constitution.96

Importance of the Directive Principles was further enhanced when the Court harmoniously interpreted it with restrictions mentioned under clauses (2) to (6) of Article 19. A restriction under clauses (2) to (6) of Article 19 was considered to be a reasonable restriction on the enjoyment of freedoms under Article 19 when it promoted the objectives embodied in the Directive Principles. Thus, in the *State of Bombay v. F.N. Balsara*, the Supreme Court gave weight to Article 47 which directs the State to bring about prohibition of consumption of intoxicating drinks except for medical purposes. In order to support its decisions the Court has held that the restriction imposed by the Bombay Prohibition Act, 1949, was a reasonable restriction on the right to engage in any profession or to carry on any trade or business.

When these welfare legislations came into conflict with the fundamental rights, the Court refrained from judicial review on the ground that such welfare

95 AIR 1952 SC 252, p. 290
97 AIR 1951 SC 318, p. 328
legislations by their inclusion in the Ninth Schedule was immunized from any judicial review. This consequently increased the Parliament’s law-making power.

**Ninth Schedule and Parliament’s Amending Power** - The Ninth Schedule no doubt enhanced the importance of directive principles but it also raised a controversy. It immunized the welfare legislations implementing the directive principles out of the purview of judicial review. At the same time it indirectly enhanced the amending power of the Parliament to a great extent. Unfortunately, the judiciary legalized the enhancement of the Parliament’s amending power under Article 368 to the extent of violating or abridging the fundamental rights described in Part III. Like the British Parliament, the Indian Parliament was considered to be a legislative assembly as well as a constituent assembly.

A question was raised before the Apex Court in 1951 as to whether the Parliament could use its constituent power under Article 368 so as to take away or abridge a fundamental right.98 The Supreme Court through an unanimous decision of five judges (consisting of M.H. Kania, C.J.I., M. Patanjali Sastri, B.K. Mukherjea, S.R. Das and N. Chandrasekhara Aiyar, JJ.) held that the constituent power was not subject to any restrictions.99 This interpretation of Shankari Prasad’s case was followed by the majority judges (consisting of P.B. Gajendragadkar, C.J.I., K.N. Wanchoo, M. Hidayatullah, Raghubar Dayal and J.R. Mudholkar JJ.) in Sajjan Singh v. State of Rajasthan.100 The majority (J.R.

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99 In Shankari Prasad v. Union of India, AIR 1951 SC 455at para 13, p. 459
100 AIR 1965 SC 845
Mudholkar J. contradicting) held that the power to amend the Constitution conferred
by Article 368 includes even the power to take away fundamental rights under Part
III.\(^{101}\) As such it excludes judicial review of such constitutional amendments
infringing the fundamental rights. On the other hand, J.R. Mudholkar J. dissenting
held that the language of Article 368 is plain enough to show that the action of
Parliament in amending the Constitution is a legislative act like the one in exercise
of its normal legislative power.\(^{102}\) As such it includes judicial review of such
constitutional amendments.

There is no doubt that the Supreme Court’s decisions in Shankari Prasad’s
case and Sajjan Singh’s case has greatly enhanced the Parliament’s amending power
under Article 368. Because of the consequences of Supreme Court’ decision in
Shankari Prasad Singh case and Sajjan Singh case, Parliament had the power to take
away fundamental rights and it was feared that a time might come when we would
gradually and imperceptibly pass under a totalitarian rule.\(^{103}\) There is also no doubt
that the Ninth Schedule which had been drawn up in 1951 by the Congress
government to push through its land reforms without objections from a conservative
judiciary has been flagrantly abused by the legislature.\(^{104}\) In the subsequent years,
the Ninth Schedule became the ‘laundry-bag’ to grant immunity to any legislation
though meant to cater to specific vote banks at the cost of the interests of other
sections of the population.

\(^{101}\) Ibid at para 19, p. 848
\(^{102}\) Ibid at p. 863
\(^{104}\) “Constitution Supreme,” \textit{The Telegraph}, 13 January 2007, p.6
Parliamentary privilege versus freedom of press - The members of the Indian Parliament enjoy certain privileges under Article 105 (1), 105 (2) and 105 (3) of the Constitution of India. Article 105 (1) guarantees a member freedom of speech in the Parliament and immunity from courts in respect of anything said or any vote given by him in Parliament or any Committee thereof. Article 105 (2) guarantees a member liability in respect of the publication by or under the authority either of the House of Parliament in any report, paper, votes or proceedings. Article 105 (3) guarantees other privileges to be enjoyed by the members similar to those enjoyed by the members of the House of Commons in England. These ‘other privileges’ under Article 105 (3) are not codified in the Constitution and are left to be defined by Parliament by law. Similar privileges are enjoyed by the members of the State Legislatures under Article 194 of the Constitution of India.

Freedom of press received a progressive interpretation during the pre–emergency Nehruvian period. But when the freedom of press came into conflict with the parliamentary privileges the latter got upper hand. The courts curtailed the freedom of press when it contradicted the legislative privilege under Article 105 (2) and 194 (2) which prohibits the publication of any report, paper, votes or proceedings without the authority of the House. This was done in Surendra v. Nabakrishna,\(^\text{105}\) where an editor of a newspaper was held guilty of contempt of House by the Orissa High Court for publishing a statement of the House without the

\(^{105}\) AIR 1958 Orissa 168
authority of the House. In the above case, the Court referred to the English case of *Stockdale v. Hansford*<sup>106</sup> as a precedent.

Subsequently, the English precedent of 1859 was modified in the later case of *Watson v. Walter*<sup>107</sup> where the English press was held to be immune from the breach of parliamentary privilege if it published a true report of the parliamentary proceedings in its newspaper.

Consequently, in India, the Parliamentary Proceedings (Protection of Publication) Act, 1956 was passed. The Act made the Indian press immune from the breach of a parliamentary privilege if it published a substantially true report of the proceedings of either House of Parliament unless publication of such proceedings was expressly ordered to be expunged by the speaker. The law was given effect to in two cases decided by the Supreme Court. In *M.S.M Sharma v. Sri Krishna Sinha*<sup>108</sup> an action was initiated for breach of privileges in respect of a publication of a speech made in the House that had been expunged by the Speaker. Similarly in *Jatish Chandra Ghosh (Dr.) v. Hari Sadhan Mukherjee*,<sup>109</sup> a member was held guilty for breach of privilege for publishing questions that were disallowed by the Speaker.

The pronouncements of the Supreme Court appear to hold freedom of press as subordinate to the legislative privileges. But when these legislative privileges came into conflict with the fundamental right to life and liberty, the Supreme Court

<sup>106</sup> (1859) 8 LJQB 294; (112 ER 112); (1839) 9 A and E

<sup>107</sup> (1868) 4 IRQB 294; (1868) 4 QB 73; 38 LJQB 34

<sup>108</sup> AIR 1959 SC 395, p. 413. This case is popularly known as the Searchlight case

<sup>109</sup> AIR 1961 SC 613
had a different view. It happened in the case of Keshav Singh, a non-member of the U.P. Legislative Assembly who was held guilty of contempt of the House and sentenced to imprisonment for seven days. Keshav Singh challenged his detention through a habeas corpus petition in the Allahabad High Court. A division bench of the Allahabad High Court granted an interim bail to Keshav Singh till the decision of the case on merit. The House in turn issued warrants for the immediate arrest of Keshav Singh, his counsel and the two judges who had passed the release orders. The Full Court of the High Court in turn stayed the implementation of the Resolution of the House. The House subsequently modified its Resolution withdrawing the arrest of the two judges but asking them to appear before the House to explain their conduct. The High Court again granted a stay against the implementation of the modified Resolution. The stand off led to a Presidential reference to the Supreme Court under Article 143 for its advisory opinion in *re under Article 143.* \(^{110}\) The Supreme Court by a majority 6 to 1 held that the two judges were not guilty of contempt of House by issuing an interim bail order. That under Article 226, the courts in India can examine the validity of detention of a person sentenced by the Assembly under a general or unspeaking warrant.

The above crisis resulted due to the non-codification of ‘other privileges’. Consequently, the House remains the sole judge to decide whether any of its privileges has been infringed and to punish members or outsiders for contempt of its privileges. By not defining the extent of its privileges, which it is obliged to do so,

\(^{110}\) AIR 1965 SC 745, (1965) 1 SCR 413
it is facilitating the expansion of contempt of the House. Rule of law is violated since the definition of other privileges is the sole authority of the Parliament.

“The Parliament has retained greater powers by avoiding codification of the privileges, as contemplated by the Constitution.”\textsuperscript{111} It is therefore suggested that such power should be subjected to judicial review so that there are fewer or no occasions of misuse of such powers. This is essential to prevent unbridled autocracy, arbitrariness and negation of the rule of law when codification remains a distant dream.

**Promotion of Federalism**

Soon after the Constitution took its birth the debate as to whether the Indian Constitution was ‘federal’ or ‘unitary’ or ‘quasi federal’ was current among constitutional pundits.\textsuperscript{112}

“The debate soon lost relevance because everyone realized that it was wrong to pin down federalism to a set model and then examine other Constitutions in comparison to it in order to find out whether it was a federal polity.”\textsuperscript{113}

Prof. K.C. Wheare has described the Indian Constitution as almost ‘quasi–federal’ i.e., a unitary state with subsidiary federal features rather than a federal state

\begin{itemize}
\item Note: The author is judge, Supreme Court of India. The above excerpt is taken from the third K.S. Rajamony Public Law Lecture delivered on 27 – 5 – 2005 at Kochi.
\item \textsuperscript{113} Ibid at p. 198
\end{itemize}
with subsidiary unitary features. Jennings has characterized it as ‘federation with a strong centralising tendency’. Professor V.N. Shukla maintained that the Indian Constitution is federal in nature and that none of the terms of the Constitution violate the essentials of a federal polity. A.K. Chanda, former Controller and Auditor General of India, has described it as “a unitary state in concept and operation.” H.M. Seervai believes that a federal situation clearly existed in India even before it adopted a federal constitution. In the course of such debate it was found that the Indian federation had its own identity which did not conform to the strait–jacket formula of federalism.

Nehru and other nationalist leaders who had actively participated in the national movement had visualized an activist, affirmative and a strong state which would bring social and economic transformation through law. “The Constitution was the vehicle of such transformation”. Since a strong state has a tendency to be oppressive or arbitrary and even transgress the limits of its powers allotted to it by the Constitution. It was on those occasions that the judiciary through its activism stepped in to check the powers of the state and also promote the principles of federalism.

120 Ibid at p. 197
In determining the distribution of legislative powers between the Union and the states in *Calcutta Gas Ltd., v. State of West Bengal* the Supreme Court said that the “widest possible and most liberal interpretation should be given to the language of each entry.” In one of its earlier decision the same principle was laid that “the Court should try, as far as possible, to reconcile entries and to bring harmony between them. When this is not possible only then the overriding powers of the Union Legislature – the non obstante clause applies and the federal power prevails.”

In *State of West Bengal v. Union of India* though the majority view rejected the federal principle which made the state co–ordinate with and independent of the Union as envisaging a constitutional scheme which does not exists in law or in practice but the minority view of Subba Rao, J. held otherwise. In this regard Subba Rao, J. observed:

“The Indian Constitution accepts the federal concept and distributes the sovereign power between the co–ordinate constitutional entities namely, the Union and the States. This concept implies that one cannot encroach upon the governmental functions or instrumentalities of the other, unless the Constitution expressly provides for such interference... This Court has the constitutional power and the correlative duty ... a difficult and delicate one ... to prevent encroachment, either overtly or covertly by the Union on State filed or vice versa and thus maintain the balance of federation.”

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121 Ibid at p. 1045
124 AIR 1963 SC 1241 at para 37
125 Ibid at para 99
The minority view of Subba Rao, J. finds support in the various earlier judgements of the Supreme Court.

In promoting federalism, the Nehruvian era Court tried to uphold the legislative power of both the Union and the states by applying the doctrine of ‘pith and substance’ and ‘colourable legislation’. In *A.S. Krishna v. State of Madras* 126 the Court applied the ‘pith and substance’ of law i.e., the true object of the legislation or a statute, relates to a matter within the competence of legislature which enacted it, it should be held to be intravires even though it might incidentally trench on matters not within the competence of legislature. Similarly, in *State of Bombay v. F.N. Balsara* 127, the Apex Court had applied the doctrine ‘pith and substance’ to determine the constitutionality of the Bombay Prohibition Act, 1949 which prohibited sale and possession of liquors in the state and thus incidentally encroached upon import and export of liquors across custom frontier—a Central subject. It was argued that the prohibition, purchase, use, possession and sale of liquor will effect its import. The Court held the Act valid because “the pith and substance of the Act fell under the State list and not under Union list even though the Act incidentally encroached upon the union powers of legislation.” 128

Similarly, applying the doctrine of colourable legislation in *K.C. Ganapati Narayan Dev v. State of Orissa* 129 the Apex Court has determined the constitutionality of legislation or whether such legislation has transgressed the limits

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127 AIR 1951 SC 318 at para 8; *State of Rajasthan v. G. Chawla*, AIR 1959 SC 544
128 Ibid
129 AIR 1953 SC 375 at para 9, p. 376
of its constitutional powers. When such transgression was patent, manifest or direct it was held to be unconstitutional. But when such transgression was disguised, covert or indirect it was also held to be unconstitutional by the doctrine of colourable legislation. Thus, applying the doctrine of colourable legislation judicial activism has ensured that “you cannot do indirectly what you cannot do directly. If the legislature has power to make law, motive in making the law is irrelevant.”

*State of Bihar v. Kameshwar Singh*\(^1\) is the only case during the Nehruvian period where a law has been declared invalid on the ground of colourable legislation. In this case the Bihar Land Reforms Act, 1950, was held void on the ground that though apparently it purported to lay down principle for determining compensation yet in reality it did not lay down any such principle and thus indirectly sought to deprive the petitioner of any compensation.\(^2\)

Another area where the Nehruvian era Court have ensured federalism is the freedom of trade and commerce. Freedom of trade and commerce is essential for promoting the economic unity of a country. Article 301 ensures both intra–state and inter-state trade within the country. Like the freedom of trade, business, occupation and profession, under the Article 19 (1) (g), the freedom of trade and commerce under Article 301 is not absolute. It is subject to the constitutional restrictions from Article 302 to 305. The Nehruvian era Court has ensured that such restrictions are purely regulatory and compensatory in nature. In *Atiabari Tea Co., v. State of*

\(^{130}\) In *Nageshwar v. A.P.S.R.T. Corporation*, AIR 1959 SC 316, p. 381
\(^{131}\) AIR 1952 SC 252
\(^{132}\) Ibid at para 60, 122, p. 255
the Court invalidated the Assam Taxation (on Goods carried by Roads or Inland Waterways) Act, 1954 as unconstitutional as the imposition of the said tax directly hampered the free flow of trade. Similarly in State of Mysore v. Sanjeeviah the Supreme Court invalidated a rule made under the Mysore Forest Act, 1900 banning sunset and sunrise as a ‘restrictive measure.’ But in Automobile Transport Ltd. v. State of Rajasthan the Apex Court validated the Rajasthan Motor Vehicles Taxation Act, 1951 as a compensatory tax and not a restriction upon the movement of trade and commerce. Similarly, in State of Madhya Pradesh v. Bhailal Bhai the Court invalidated the Madhya Pradesh Sales Tax Act, 1956 which imposed sales tax on imported tobacco but not on locally produced tobacco as discriminatory.

Thus, though the Indian model of federalism differs from the American model and the Canadian model of federalism, it follows the decisions of the American Court and Canadian Court in promoting the principles of federalism. With regard to the enumeration of legislative powers mentioned in the three lists, the Nehruvian era Court have applied the Canadian doctrines of ‘pith and substance’ and ‘colourable legislation’ to ensure that either legislature does not transgress upon the other’s powers. It has also followed the American model of ‘implied powers’ by giving a harmonious construction to either legislature’s power and in promoting the freedom of trade and commerce, the American doctrine of ‘Immunity of Instrumentalities’ is followed. In most of its judicial decisions, the Nehruvian era

\[133\] AIR 1951 SC 232
\[134\] AIR 1967 SC 1189
\[136\] AIR 1964 SC 1006 followed in M/s Western electronics v. State of Maharashtra, AIR 1989 SC 621
Court had held that the taxes levied by the states are compensatory or regulatory in nature. Where the impugned taxation laws directly hampered the free flow of trade it was held to be restrictive in nature and thus violative of Article 301.

During the Nehruvian period, though the Court tried to promote the principles of federalism its decisions were mostly centrist. The Court had given very liberal interpretation of the centre’s power though some decisions were also made in favour of the states. Such liberal interpretation of the centre’s powers was due to the following reasons.

(1) Firstly, the Court seemed to be under the influence of parliamentary sovereignty which prevailed during the Nehruvian period.

(2) Secondly, unlike the constitutions of the USA or Australia or even Canada, the Indian federal government had come first and there were no states or units in existence to demand autonomy or to jealously guard their own rights against the possible inroads by the authority.\footnote{S.P. Sathe, “Nehru And Federalism: Vision And Prospects”, pp. 196 – 213 in Rajeev Dhavan & Thomas Paul (eds.), \textit{Nehru and the Constitution}, (New Delhi: Indian Law Institute, 1992), p. 198} The Indian Federation was established under the Government of India Act, 1935 before the Constitution came into force. The Indian States joining the Indian Federation were later reorganized by States Reorganization Act, 1956. As observed by Granville Austin, there was the relative absence of conflict between the centralizers and the provincialists either over the distribution of powers or revenue or over the effect of the
emergency provisions on the federal structure. The proceedings of the Constituent Assembly revealed none of the deep seated conflicts of interest as evident in Philadelphia in 1787 or like that between Ontario and Quebec. Consequently, the states seemed to accept the superiority of the federal authority during the Nehruvian period.

(3) Thirdly, the Constitution of India itself confers more law-making to the Centre. Except the State List, the Centre enjoys exclusive law-making powers in respect of the Central List and the Concurrent List. The residuary powers are also enjoyed by the Centre. During emergency the Centre acquires the power to legislate even on subjects included in the State List. Consequently, the Court gave interpretation in favour of the Centre’s law-making power in respect of the three Lists enumerated in the Seventh Schedule. This is also the trend in other federal constitutions like USA. The Court in turn strengthen the hands of the Central government to meet the emerging situations of national and international importance.

Post – Nehruvian Era (1965 to 1974)

Historically, the Nehruvian era ended with the death of Pandit Jawaharlal Nehru as the first Prime Minister of India in 1964. But it was the death of his successor, Lal Bahadur Shastri on 11 January, 1966 which actually ended the Nehruvian era for Shastri while being his own man as the Prime Minister had led

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the country in the Nehru tradition.\textsuperscript{139} The assumption of the Prime Minister’s office by Nehru’s daughter, Mrs. Indira Gandhi saw the beginning of a new era that was marked by confrontation over institutional and personal power.\textsuperscript{140} As the new Prime Minister of India, Mrs. Indira increased her personal power by defeating her rivals both within and outside the party. As the leader of the executive, the new Prime Minister increased institutional power of the executive. The executive branch dominated the Parliament whose majority members were the party men of the executive. “The two branches, if still they could be called that, attacked the third branch, the judiciary, intending to end its function as a co–equal branch of government.”\textsuperscript{141}

Consequently, the post–Nehruvian period saw a tug of war between the Executive and the Parliament on one side and the Judiciary on the other side. The Executive through the Parliament asserted its power to restrict the Fundamental Rights and to amend any part of the Constitution. On the other hand, the Supreme Court asserted its power of judicial review over constitutional amendments. The outcome of such confrontation was the judicial innovation of the doctrine of ‘prospective overruling’ and the doctrine of ‘basic structure’.

Another feature of judicial activism during the post–Nehruvian era is the gradual transformation of the Supreme Court from a positivist court to an activist court. The Nehruvian era saw the rudimentary phase of judicial activism in India.

\textsuperscript{140} Ibid at p. 173
\textsuperscript{141} Ibid at p. 174
But during the post–Nehruvian period judicial activism gradually began to acquire a permanent form. The Court gradually began to shed off its technocratic cloak and began to play a more activist role as it entered into the territory of law making. The post–Nehruvian era saw the beginning of an era when judges began to openly acknowledge their law making roles. As Lord Reid, a great English judge said:

“There was a time when it was thought almost indecent to suggest that judges make law; they only declare it. Those with a taste for fairytales seem to think that in a common law in all its splendour and that on a judge’s appointment there descends on him knowledge of the magic words, ‘Open Sesame’. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairytales anymore.”

John Gardner, acknowledges that judge–made law is legally valid because some judge are judges at some relevant time and place announced it, practiced it, invoked it, enforced it, endorsed it, accepted it or otherwise engaged with it. The legitimacy of such law–making role of the judges is supported by Justice P.N. Bhagwati, former Chief Justice of India. According to the learned judge, law making is an inherent and inevitable part of the judicial process and that there is no need for judges to feel shy or apologetic about their law creating roles. On the other hand, author Durga Das Basu criticises judicial innovations on the ground that it would engender bitterness between the Legislature and the Judiciary, if either of them, seeks to checkmate the other, by means of amendment or judicial activism.

144 Ibid at p. 7
During the post–Nehruvian period there was active judicial activism relating to property rights as an activist Supreme Court of India struck down constitutional amendments passed for implementing land reforms of the Government. Consequently, the Supreme Court entered into confrontation with the Government as can be seen in *L.C. Golak Nath’s* case, the *Bank–Nationalization* case, the *Privy Purases* case and the landmark *Kesavananda Bharati* case.

The discussion of judicial activism during the post–Nehruvian era is confined to the Court–Government confrontation in the above cases, the formulation of basic structure by the Court and the supersession which the judges had to face for setting implied limits on the amending power through the basic structure theory.

**Judicial activism relating to property rights and constitutional amendments**

The Indira Gandhi government continued with land reforms policy of the Nehruvian era since these land welfare legislations were placed in the Ninth Schedule, they were made immune from judicial review. These land reform legislations were found to violate the fundamental right to equality under Article 14 and the right to property under Article 19 (1) (g) of the Constitution of India. Consequently, the courts were filled with litigations that challenged these property welfare legislations and the constitutional amendments that placed them in the Ninth Schedule.
Judicial Activism curbs Parliament’s Amending Power

Out of the many, one such litigation was *L.C. Golak Nath and others v. State of Punjab and another*. In *Golak Nath* case, L.C. Golak Nath and other heirs challenged the Punjab Security of Land Tenures Act, 1953 which took their surplus land of their five hundred acres of farmland at Jalandhar. The Act was challenged on the ground that it denied them their constitutional rights to acquire and hold property under Article 19 (1) (f) and practice any profession under Article 19 (1) (g) and to equality before law and equal protection of the law under Article 14. The petition also challenged the Seventeenth Amendment which had placed the Punjab Act, 1953 in the Ninth Schedule and also the First and Fourth Amendments.

*Golak Nath* case was a landmark case of the post-Nehruvian period where the Supreme Court for the first time questioned the supremacy of the Indian Parliament by questioning its amending power under Article 368. Whether it is a constituent power or an ordinary power? If it is a constituent power then the Indian Parliament could make or unmake the Constitution, it could even repeal or replace the Constitution. The main issue involved was whether the Parliament was above the Constitution or the Constitution was above the Parliament?

During the entire Nehruvian period, the Supreme Court was of the view that under Article 368 the Parliament has the constituent power to amend the Constitution. This included the power of abridging or taking away the fundamental rights through Article 368. The above view was expressed by an unanimous Supreme Court (consisting of M.H. Kania, C.J.I, M Patanjali Sastri, B.K.

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146 AIR 1967 SC 1643
Mukherjea, S.R. Das and N. Chandrashekhara Aiyar, JJ.) in *Shankari Prasad Singh Deo v. Union of India.*\(^{147}\) In *Shankari Prasad Singh Deo*\(^{148}\) case, the Court through M. Patanjali Sastri, J. upheld the Constitution (First Amendment) Act, 1951 which inserted Articles 31 A and 31 B in the Constitution of India as intravires and constitutional. The Court was of the view that although “law” must ordinarily include constitutional law, there is a clear demarcation between ordinary law which is made in exercise of legislative power and constitutional law which is made in exercise of constituent power.\(^{149}\) That the terms of Article 368 are perfectly general and empower the Parliament to amend the Constitution, without any exception whatever. In 1964 the same view was reiterated by the Supreme Court in *Sajjan Singh v. State of Rajasthan*\(^{150}\) where the validity of the Constitution (Seventeenth Amendment) Act, 1964 was again challenged. In *Sajjan Singh’s Case*\(^{151}\) Chief Justice Gajendragadkar speaking on behalf of the majority view of the three judges (K.N. Wanchoo, Raghubar Dayal, JJ. and himself) held that the power to amend the Constitution includes even the power to take away fundamental rights under Part III. That a constitutional amendment was not covered by the prohibition of Article 13 (2) and hence judicial review of constitutional amendment are not permissible. However, the minority view of two judges comprising J.R. Mudholkar and M. Hidayatullah, JJ. expressed serious reservations about that interpretation. Justice M. Hidayatullah observed that if our fundamental rights were to be really

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\(^{147}\) AIR 1951 SC 458  
\(^{148}\) Ibid at para 1  
\(^{149}\) Ibid at para 9  
\(^{150}\) AIR 1965 SC 845  
\(^{151}\) Ibid at para 19
fundamental they should not become the plaything of a special majority. Justice J.R. Mudholkar expressed anxiety over erosion of basic features of the Constitution by extravagant use of constituent power.

According to Prof. S.P. Sathe these two dissents opened the door to future attempts to bring the exercise of the power of constitutional amendments under judicial scrutiny. The door was exactly opened during the post–Nehruvian period. In 1967, in *L.C. Golak Nath v. State of Punjab* a deeply divided Supreme Court by a slim majority of six to five judges held that Part III of the Constitution cannot be amended so as to take away or abridge any fundamental rights. That the Parliament will have no power in future from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein. Chief Justice K. Subba Rao on behalf of the majority (S.M. Sikri, J.C. Shah, J.M. Shelat, C.A. Vaidialingam, M. Hidayatullah, JJ and himself) rejected the contention that the power under Article 368 was a sovereign power and not an ordinary legislative power. That a constitutional amendment did not fall within the meaning of the word ‘law’ as described in Article 13 (3) and hence judicial review of constitutional amendments was excluded.

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152 Ibid at p. 862
155 AIR 1967 SC 1643 at para 53, 195
156 Ibid at para 36
But the Chief Justice applied the doctrine of ‘Prospective Overruling’ to operate the decision only prospectively.\footnote{Ibid at para 56} It meant that the 1\textsuperscript{st}, 4\textsuperscript{th} and 17\textsuperscript{th} Amendment will remain valid. It also meant that all cases decided before Golak Nath’s case will remain valid. Golak Nath’s case was a monumental judgement wherein the Supreme Court of India enumerated the judicial principle of prospective overruling giving a beneficial interpretation to the constitutional mandate contained in Article 13 of the Constitution.\footnote{Justice V.G. Palshikar, “Judicial Activism,” AIR 1998 SC (Journal Section) pp. 201 – 205, p. 201} Article 13 mandates that any legislation which conflicts with the fundamental rights guaranteed by the Constitution of India would be void to the extent of conflict.

Emphasising the necessity of the doctrine of ‘prospective overruling’ and acknowledging the law–making involved in it K. Subba Rao, C.J.I observed:

“It is a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisis but confines it to past transactions. It is true that in one sense the Court only declares the law, either customary or statutory or personal law. While in strict theory it may be said that the doctrine involves making of law, what the Court really does is to declare the law but refuses to give retroactivity to it.”\footnote{Ibid at para 48}

Between 1950 and 1967 the country had witnessed an agrarian revolution through the various land reforms legislations that were passed within this period. All these land welfare legislations were upheld by the Court in Shankari Prasad Singh Deo’s case\footnote{AIR 1951 SC 458} and Sajjan Singh’s case.\footnote{AIR 1965 SC 845} on the ground that in order to implement the land reforms policy the Parliament had the power to amend the
fundamental rights and such amendments were outside the judicial scrutiny even if they infringed the said rights. At the same time the Court was aware that if the Parliament had the ultimate power to take away fundamental rights without any exception, a time might come when we would gradually and imperceptibly pass under a totalitarian rule.162

As observed by Sudhir Krishnaswamy, “by declaring that amending power draws from the plenary legislative power of Parliament the Golak Nath majority alludes to the doctrine of parliamentary sovereignty in the United Kingdom; a constitutional principle which is not easily accommodated by the text of the (Indian) Constitution.” 163

“The Golak Nath judgement provoked a strong reaction from the Parliament which amended the marginal title of Article 368 to read ‘power of parliament to amend the Constitution and procedure thereof’ 164 and inserted a new clause (1) which expressly provides for Parliament’s ‘constituent power’165 to amend any of the articles in the Constitution.” 166

Judicial Activism turns Judicial Populism

Property rights again became the issue of confrontation between the Parliament and the Judiciary when two Supreme Court’s decisions – the Bank

163 Sudhir Krishnaswamy, Democracy And Constitutionalism In India – A Study of the Basic Structure Doctrine, (New Delhi: Oxford University Press, 2009), p.6
164 New Marginal title of Article 368 inserted by The Constitution (24th Amendment) Act, 1971
165 Sub – Section (1) in Article 368 inserted by the Constitution (24th Amendment) Act, 1971
166 Same as above (Sub – Section (1) in Article 368 inserted by the Constitution (24th Amendment Act, 1971)
Nationalization case, and the Privy Purses case challenged the government even more sharply. “Nationalizing banks and ending the privy purses of rulers of the former princely states were populist tools in Indira Gandhi’s policy for dominance and in young Congress activist’s scramble for influence.” The advocacy for bank nationalization became more vigorous during the post-Nehruvian period. The plea for nationalization of banks was based on Article 39 of the Directive Principles which provides the distribution of ownership and control of the material resources of the community to the common good and to ensure that the economic system should not result in concentration of wealth and the means of production to the common good. The nationalization of banks was traced to the Congress’s 1954 resolution for a ‘socialistic pattern of society and an ordinance was passed announcing the nationalization of banks on 19 July, 1968. The ordinance was challenged by Rustom Cavasjee Cooper and others who had filed petition in the Supreme Court challenging the President’s competence to promulgate the ordinance and claiming violations of their rights under Articles 14, 19 and 31. Inspite of Attorney General Niren De’s argument that nationalization was a policy decision and therefore not subject to judicial scrutiny, an eight–judge bench issued interim orders restraining the government from removing the chairmen of the banks and giving the banks directions under the Banking Companies Act of 1968. Inspite of the Court’s interim orders, the Parliament passed a law nationalizing banks replacing the ordinance of 4 August, 1969. The constitutionality of the Bank

167 R.E. Rustom Cavasjee Cooper v. Union of India, AIR 1970 SC 564
168 Madhav Rao Scindia v. Union of India, AIR 1971 SC 530
170 Ibid at p. 215
171 Ibid at p. 215
Nationalization Act was challenged before an eleven judge bench (consisting of J.C. Shah, S.M. Sikri, J.M. Shelat, V. Bhargava, G.K. Mitter, C.A. Viadialingam, K.S. Hegde, A.N. Grover, A.N. Ray, P. Jaganmohan Reddy and I.D. Dua, JJ.) of the Supreme Court on 10th February 1970. The main petitioner, Rustom Cavasjee Cooper claimed that the Act violated his fundamental right to equality under Article 14 and his right to property under Article 19 (1) (f) and Article 31 and that the compensation for property taken was inadequate. Speaking on behalf of the majority ten out of eleven judges, Justice J.C. Shah struck down the Act as unconstitutional. He held that though the Court could not scrutinize whether the amount of compensation was adequate or not but the principles of compensation that a legislature could lay down for the taking of property were not beyond judicial scrutiny.\(^{172}\) Justice A.N. Ray, the lone dissenter among the eleven judges however held the opinion that the principles for fixing compensation by the legislature cannot be questioned by the Court on the ground that the compensation paid on the basis of these principles is not just or equivalent compensation.\(^{173}\) In this regard Justice A.N. Ray observed\(^{174}\) that ‘just equivalent’ cannot be the criterion on finding out whether the principles are relevant to compensation or whether compensation is illusory. If the amount fixed is not obviously and shockingly illusory or the principles are relevant to the determination of compensation there is no infraction of Article 13 (2).

\(^{172}\) AIR 1970 SC 564 at para 90
\(^{173}\) Ibid at para 201
\(^{174}\) Ibid at para 204
Rustom Cavasjee Copper’s case was an activist judgment of the post-Nehruvian era wherein the Court questioned the policy-making of the executive and the legislative judgment of the Parliament in laying down the principles for determining compensation for government acquisition of property. It was the decision that showed the government an orange light of caution regarding future take over’s. It was also a reversal of the Court’s earlier decision in Shantilal Mangalaldas case which itself was a reversal of the court’s decision in Bela Banerjee case. In Shantilal Mangalaldas case, the Supreme Court held that the principle for determining compensation laid down in the Bombay Town Planning Act, 1955 cannot be challenged on the ground that it is not just compensation. However, in Bela Banerjee case, the same Court had held that whether the principles laid down by the legislature governing the determination of compensation is just equivalent or not is a justiciable issue.

The Prime Minister, Indira Gandhi immediately reacted to the Court’s decision in Rustom Cavasjee Cooper. Four days after the decision the President promulgated a new ordinance nationalizing the same fourteen banks and two weeks later, the Indira Gandhi government introduced a bill to replace the ordinance. The second nationalization ordinance and the Act did not meet the same fate as its

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175 Rustom Cavasjee Cooper v. Union of India, AIR 1970 SC 564
177 State of Gujarat v. Shantilal Mangalaldas, AIR 1969 SC 634
178 State of West Bengal v. Bela Banerjee, AIR 1954 SC 170
179 AIR 1969 SC 634 at para 51
180 AIR 1954 SC 170 at para 6
181 Rustom Cavasjee Cooper v. Union of India, AIR 1970 SC 564
predecessors since it incorporated the changes based on the Court’s decision in
*Rustom Cavasjee Cooper case.*

**Judicial activism becomes pro–rich**

The *Bank Nationalization case* was soon followed by *The Privy Purses case.* The *Privy Purses case* was another instance where the Parliament’s unlimited power of amendment came into conflict with the judiciary’s power of judicial review. The former princes from the princely Indian states were granted certain government allowances known as ‘privy purses’ for surrendering their ruling powers and joining the Indian Federation.

Nehru, egalitarian, anti–feudal and a socialist was from the very beginning critical of the purse payments which were made free of income tax and in perpetuity. He had even suggested that the princes with purses of two to five lakhs should make a voluntary contribution of fifteen percent of their purse to developmental schemes in their states and invest ten percent in a national plan according to the size of the purse. The response from the princes was uncooperative and even opposed. On the other hand, political pressures increased during 1967 to abolish the ‘privy purses’ of the princes. Though the cause of socio–economic justice was forwarded but in fact the cause was politically clothed, for a number of the ex–princes were anti–Congress or pro– Swatantra (a party in opposition to the Congress).

When a bill to abolish the privy purses could not be

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183 AIR 1970 SC 564
184 AIR 1971 SC 530
185 Granville Austin, op. cit., p. 221
186 Ibid at p. 222
187 Ibid at p. 220
passed the government made a move to abolish privy purses through a Presidential order. The Presidential order was challenged by Madhav Rao Scindia and other princes in *H.H. Maharajadhiraj Madhav Rao Jivaji Rao Scindia Bahadur and Others v. Union of India*\(^\text{188}\) under Article 32. They argued that the President had no power to withdraw the recognition of a ruler once recognized, and that the order violated the constitutional mandates in Articles 291\(^\text{189}\) and 362\(^\text{190}\) (now repealed). “They further argued that derecognizing the ruler’s enmasse was an arbitrary exercise of power for a collateral purpose meaning that the government had attempted to do indirectly what it could not do directly.”\(^\text{191}\) The princes claimed ‘privy purses’ as their property and that abolishing ‘privy purses’ would violate their fundamental rights under Articles 19, 21 and 31.

The majority Supreme Court struck down the Presidential order derecognizing the princes and abolishing their privy purses. The majority six out of the eleven judges held that the power of the President to determine the status of the rulers by cancelling or withdrawing their recognition to effectuate the policy of the Government to abolish the concept of rulership is liable to be challenged under Article 32 of the Constitution.\(^\text{192}\) In recognizing or de–recognizing a person as a ruler, the President does not exercise any political power. He exercises only an

\(^{188}\) AIR 1971 SC 530

\(^{189}\) Article 291 provides that there is an obligation on the part of the Union to pay and a corresponding right in the Rulers to require payment of privy purse

\(^{190}\) Article 362 implies acceptance and recognition of personal rights, privileges and dignities but guarantee under the Article relates to original covenants and agreements


\(^{192}\) AIR 1971 SC 530 at para 97, 108, 109
Such executive function is to be exercised with the aid and advice of the Council of Ministers. The Court also held that the provisions ensuring security of fundamental rights including the right to property should be liberally construed.

The Court’s decisions in Bank Nationalization case and Privy Purses case came at a time when the Congress party had suffered a split in the party. The old guard of the Congress—the Syndicate had joined the ‘Swantantra’ and the ‘Jana Sangh’ to form the ‘Grand Alliance’ to fight the 1971 parliamentary elections. “The two decisions of the Court appeared to be supporting Mrs. Gandhi’s opponents.” They were pro–opposition preference as well as pro–rich. “Being pro-rich was not a good image for the Court and therefore judicial activism on the right to property was unpopular.” Such judicial activism gave an excuse to the government for its failure to implement the economic reforms. It also gave an agenda to Indira Gandhi for the 1971 parliamentary elections. Mrs. Indira Gandhi made an announcement that when returned to power her party would put through constitutional amendments to promote the interests of the many against the few.

The promise was kept soon after Mrs. Indira Gandhi won the 1971 parliamentary elections with an absolute majority; the Parliament passed three constitutional amendments—the Twenty Fourth, the Twenty Fifth, and the Twenty

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193 Ibid at para 94, 96
194 Ibid at para 133
196 Ibid at p. 258
Sixth Amendments. The Twenty Fourth Amendment was intended to remove the difficulties created by the decision of the Supreme Court in *Golak Nath’s case*. The amendment not only restored the amending power of the Parliament but also extended its scope by adding the words “to amend by way of addition or variation or repeal any provision of this Constitution in accordance with the procedure laid down in this Article.” The Twenty–Fifth Amendment, 1971 was passed to remove the difficulties created by the Supreme Court in the *Bank Nationalization case*. The amendment made it clear that neither a deprivation law passed under Article 31 could be challenged on the ground of violating Article 19 nor a law passed for giving effect to the directive principles specified in (b) and (c) of Article 39 can be challenged on the ground of violation of the rights guaranteed in Article 14, 19 and 31. The Twenty–Sixth Amendment was passed to overcome the Supreme Court’s decision in *Privy Purse case*. This Amendment omitted Articles 291 and 362 and inserted a new Article 363–A which abolished the right of privy purse and all rights, liabilities and obligations in respect of privy purses.

The Twenty–Fourth and the Twenty–Fifth Amendments were subsequently challenged in *His Holiness Swami Kesavananda Bharati Sripadagalvaru v. State of Kerala.*

**Constitutionalism through the doctrine of basic structure**

The pro–parliament amendments – the Twenty Fourth and Twenty Fifth Amendments along with the Twenty Ninth Amendments which placed the Kerala Land Reforms Act, 1969 in the Ninth Schedule were challenged by His Holiness

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198 AIR 1973 SC 1461
Swami Kesavananda Bharati Sripadagalvaru before the Supreme Court. In *Kesavananda Bharati case* 199 a majority of seven judges out of the thirteen judge bench upheld the constitutionality of the Twenty Fourth and the Twenty Fifth Amendments by overturning the anti-parliament, anti-amendment decision in *Golak Nath case*. But the majority court ruled that an amendment could not alter the basic structure of the constitution.

As regards the constitutionality of the Parliament’s amending power, the majority (comprising of S.M. Sikri C.J.I, J.M. Shelat, A.N. Grover, K.S. Hegde, P. Jaganmohan Reddy, H.R. Khanna and A.K. Mukherjea, JJ.) held:

"... even before the 24th Amendment Article 368 contained the power as well as the procedure of amendment. The 24th Amendment does not enlarge the amending power of the Parliament. The 24th Amendment merely made explicit what was implicit in the unamended Article 368." 200

As regards the scope of amending power contained in Article 368 Sikri, C.J.I. on behalf of the majority judges held:

"... there are inherent or implied limitations on the amending power of Parliament. Article 368 does not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution." 201

The doctrine of basic structure was based on the limitations implied in the Preamble which aims at justice–social, economic and political. In *Kesavananda Bharati*, the Preamble was held to be a part of the Constitution and though not a

199 Ibid
200 Ibid at para 1152
201 Ibid at p. 1463
source of powers it was considered to be a source of limitations to be imposed on the powers of the constitutional authorities.\textsuperscript{202} “The doctrine of implied limits which has previously been applied in diverse constitutional cases in several other jurisdictions came to be strenuously argued as the basis on which amending power was restricted.”\textsuperscript{203} The doctrine of basic structure or the doctrine of implied limits was advocated primarily for three reasons. Firstly, the doctrine of basic structure has been invoked to prevent the entrenchment of fundamental rights against constitutional amendments as evidenced by historical instances. The doctrine of basic structure had been invoked under the Weimar (German) Constitution. “The German Basic Law sets out that certain portions of law are immune from amendment in order to overcome the defects of the Weimar Constitution exploited during the Hitler years.”\textsuperscript{204} The majority judges argued that unless there are restrictions on the power of amendment ... the danger is that the Indian Constitution may also meet the same fate as did the Weimar Republic at the hands of Hitler.\textsuperscript{205} The use of history for invoking the doctrine of basic structure has not been accepted by all sundry. According to author Durga Das Basu, the doctrine is patently inapplicable for the interpretation of the Indian Constitution though it was applied for the interpretation of the Weimar (West German) Constitution. The West German Constitution, 1949 expressly withholds from amendment the ‘basic rights’

\textsuperscript{202} AIR 1973 SC 1461 at para 102, p. 1504
\textsuperscript{203} Sudhir Krishnaswamy, Sudhir Krishnaswamy, \textit{Democracy And Constitutionalism In India – A Study of the Basic Structure Doctrine}, (New Delhi: Oxford University Press, 2009), p. 25
\textsuperscript{204} R. Sudarshan, “Stateness in the Indian Constitution”, quoted by Sudhir Krishnaswamy, op. cit., p. 22
and some basic federal principles. The Constitution of 1949 describes itself as the ‘Basic Law’ only to be replaced by a constitution adopted by a free decision of the German people. Thus, under the Constitution of 1949, the amending ‘constituent power’ was not vested in the Federal Legislature but was reserved to be exercised, in future, by the free decision of the German people. But unlike the Weimar Constitution, 1949 under the Indian Constitution, the amending constituent power is vested in the Indian Parliament. Hence the importance of the doctrine of basic law under the Indian Constitution was feasible in order to check the Parliament’s amending power becoming unlimited.

Secondly, the doctrine of basic structure was invoked to overcome the exclusion of express limits on the amending power of Parliament. The doctrine of express limits or judicial review to restrict the amending power of the Parliament was negated after the Golak Nath decision through the Constitution (24th Amendment) Act, 1971. The 24th Amendment gave unlimited power to the Parliament to amend by way of addition, variation or repeal any provision of the Constitution. The doctrine of basic structure was invoked to curb such unlimited amending power of the Parliament. “The court replaced explicit limits on amending power with implied limits whereby the plenary amending power of Parliament could be exercised so long as it did not ‘damage or destroy the basic features’ of the Constitution.”

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206 Article 79 (3) of the West German Constitution, 1949  
207 Article 146 of the West German Constitution, 1949  
Thirdly, the doctrine of basic structure was invoked to justify the harmonious existence of Article 368 along with the other provisions of the Constitution and with the Preamble in particular. According to Sudhir Krishnaswamy \(^{209}\), the implied limits on amending power emerge when one reads Article 368 together with the other provisions of the Constitution. It was argued that the amending power in Article 368 could not extend to alter the values espoused in the Preamble to the Constitution and all the rights guaranteed by the Constitution. In this regard S.M. Sikri, C.J.I. observed:

“... The expression ‘amendment of this Constitution’ in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles.” \(^{210}\)

Sudhir Krishnaswamy refers the Court’s interpretation as ‘structural interpretation’ of the constitutional document as a whole that offers more compelling reasons for the court to uphold a particular interpretation of the scope of the amending power. \(^{211}\)

The doctrine of basic structure received both support and criticism. Durga Das criticises the doctrine of basic structure by questioning whether there is any juristic foundation for assuming that some parts of the Constitution or the core of it or its framework is excluded from the amending power through an inherent

\(^{209}\) Ibid at p. 28  
\(^{210}\) AIR 1973 SC 1461, p. 1463  
\(^{211}\) Sudhir Krishnaswamy, op. cit., p. 28
limitation. The doctrine has also been criticised by writers like P.K. Tripathi, Sunder Raman and R. Ramachandran.

On the other hand, the doctrine has been supported by jurists like S.P. Sathe, Upendra Baxi, M.P. Jain, V.N. Shukla and Palkhivala. According to S.P. Sathe, “Kesavananda Bharati’s case was a revolutionary decision and belied all the theoretical assumptions held till then. It virtually meant that the Court would have the last say in respect of the Constitution.” According to V.N. Shukla the fact that the judiciary has a say in the matter of amendment of the Constitution is the most notable aspect of the doctrine of basic structure. Similar views were shared by Upendra Baxi. According to M.P. Jain, the majority judges in Kesavananda sought to protect and preserve the basic features of the Constitution against the onslaught of transit majorities in Parliament. An unqualified amending power could mean that a political party with a two-third majority in Parliament, for a few years, could make any changes in the Constitution even to the extent of establishing a totalitarian state to suit its own political exigencies. Soli J. Sorabjee finds that in the

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217 V.N. Shukla, Constitution of India, op. cit., p. 897
218 Upendra Baxi, Courage, Craft and contention, 64 ff (1985) seen in V.N. Shukla op. cit., p. 897, (see footnote 62)
Indian context there are tangible and substantial gains resulting from the basic structure doctrine and a bulwark against further erosion of basic fundamental rights.\textsuperscript{220}

The doctrine of basic structure is counter-majoritarian. It promotes the concept of a limited government where the Parliament along with the other two organs enjoys limited powers under the Constitution. The doctrine of basic structure has been adopted in other parts of the sub-continent. The doctrine has been adopted by the Supreme Court of Bangladesh in \textit{Anwar Hussain Chowdhury’s} case. The doctrine has been referred to but not adopted by the Supreme Court of Pakistan. The doctrine has, however, been rejected by the Sri Lankan Supreme Court.

\textbf{Supersession of Judges and a Grievous Blow to the Independence of Judiciary}

An immediate reaction to the Kesavananda’s decision was the supersession of judges who formulated the doctrine of basic structure and thus subjected the Parliament’s amending power to constant judicial scrutiny. On 25 April 1973 the day after the Keshavananda decision, Justice A.N. Ray had been appointed as the new Chief Justice of India in place of Chief Justice Sikri who was due to retire the following day. The appointment of Justice A.N. Ray was against the convention of seniority according to which Shelat, Hegde and Grover were next in line for the position of Chief Justice.

\textsuperscript{220} Soli J. Sorbjee, “Evolution of the Basic Structure Doctrine: Its implications and impact on Constitutional amendments,” excerpt from lecture delivered at Oslo University, Norway, 6\textsuperscript{th} October, 2008, pp. 1 – 6, p.6, 23/10/2008, \texttt{http://docs.google.com/Doc?id=dct39c8c101f38gp3cf}

\textsuperscript{221} \textit{Anwar Hussain Chowdhury v. Bangladesh}, 1989 BLD (AD) (Spl) 1
The decision of Indira Gandhi’s Government to appoint Justice A.N. Ray as the new Chief Justice of India superseding three other senior most judges received severe criticisms from the Bench and the Bar. According to Justice H.R. Khanna, one of the majority judges the decision of Mrs. Indira Gandhi’s government had struck a grievous blow to the independence of the judiciary.\textsuperscript{222} Another majority judge Shelat predicted that the supersession would make judges suspicious of one another, including in the high courts as judges considered how their opinions might affect their advancement.\textsuperscript{223}

Adverse reactions to the supersession had also come from the other members of the legal community. “The day after the supersession, M.C. Setalvad, M.C. Chagla, former judge of the Bombay High Court, V.M. Taikunde, former Chief Justice J.S. Shah, former Chief Justice of the Gujarat High Court K.T. Desai and Palkhivala sent a statement to the government saying that the supersession was a manifest attempt to undermine the Court’s independence.”\textsuperscript{224}

The Bar was also critical of the supersession of judges and suggested changes in the appointment procedure. At an ‘All India Convention of Lawyers on the Independence of the Judiciary’ held in August 1973, the Supreme Court Bar Association resolved that the government being the most frequent litigant before the Supreme Court and high courts was not the proper authority to assess the merits of a

\textsuperscript{224} Ibid at p. 285
judge. *Instead the Supreme Court judges must be appointed by a committee consisting of the Supreme Court’s five senior judges and two members of the Bar. That the convention of appointing the senior most judge as the Chief Justices of the Supreme and the High Courts should be followed except in cases of proven incapacity.*

Mrs. Indira Gandhi, however, supported the supersession of judges. She believed that an uncommitted judiciary would not create hurdles to economic reforms needed expeditiously. That Justice A.N. Ray was a reliable liberal and the best judge among the bench. That it was atrocious to believe that freeing from the seniority convention would affect the judiciary’s independence.

Justice A.N. Ray was considered as a forward looking judge since he was a dissenter who had ruled for the Government in the *Bank Nationalization* case, the *Privy Purse* case and also in the *Keshavananda Bharati* case. The appointment of a dissenting judge superseding other senior judges raised doubts about the Government’s assessment of the merits of a judge.

The supersession of judges bears a strong resemblance to the Great Depression period of the 1930’s in the U.S. when President Roosevelt attempted to overcome the judicial obstruction to his choice. Roosevelt’s court packing bill, however, encountered strong opposition in the nation as subverting the independence of the highest Court and it failed to pass into law. The bill failed

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225 Ibid at p. 288
but changed the attitude of the judges of the Supreme Court. “Justice Owen Roberts, who held the decisive swing vote position, changed his previously held view of opposition on an important New Deal regulation relating to minimum wages thus enabling the Court by 5 to 4 to hold it valid.” According to T.R. Andhyarujina this was the famous “stitch in time that saved the nine” in judicial history of the U.S.  

**Judicial Activism during Emergency Era (1975 to 1977)**

The period between 1975 to 1977 popularly known as the emergency period was the darkest hour of the Indian democracy. The brief period of twenty one months saw two emergencies running parallel to each other. The first emergency was proclaimed under Article 352 on the grounds of external aggression when India fought with Pakistan in 1971 for the liberation of Bangladesh. The second emergency was proclaimed during the summer of 25 June 1975 again under Article 352 but on the grounds of ‘internal disturbance’.  

The infamous emergency call of ‘India is Indira’ or ‘Indira is India’ reflects the high watermark of executive arbitrariness during the emergency period. “Indira Gandhi attempted to rewrite the nation’s laws with the help of the Parliament where the Congress controlled over a two-third majority.”

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227 Ibid  
228 Ibid, T.R. Andhyarujina is a senior advocate and former Solicitor – General of India.  
229 The words ‘internal disturbance’ are now substituted by the words ‘armed rebellion’ by the Constitution (44th Amendment) Act, 1976  
through draconian laws like the Maintenance of Internal Security Act (MISA), 1971 and the conservation of Foreign Exchange and Preventing of Smuggling Activities Act, 1974 commonly known as the COFEPOSA.”

“The government justified the emergency as necessary not only to preserve order but also to save democracy, protect the social revolution and preserve national integrity—in sum, to preserve the seamless web.” Ironically, democracy was subverted with the arrest of political leaders like Jayprakash Narayan, Raj Narain, Morarji Desai, Charan Singh, Jivatram Kripalni, Atal Bihari Vajpayee, Lal Krishna Advani and numerous other communist leaders, organization like the Rashtriya Swayamsevak Sangh and other opposition political parties were banned and censorship imposed on press.

During the emergency, activism of the Supreme Court suffered a blow as the Court meekly submitted itself to executive arbitrariness. It was the Indian high courts who displayed a remarkable and robust independence in upholding the personal liberties of detainees who were arrested illegally or arbitrarily during the emergency period of 1975 to 1977.

**Doctrine of Basic Structure revisited**

Justice Jagmohan Lal Sinha’s 12 June 1975 catalytic ruling in the Indira Gandhi election case was an instance of judicial activism of the Allahabad High

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232 Ibid at p. 295

Court against the executive hegemony. Shanti Bhushan was the lawyer of Raj
Narayan who later became the law minister during the Janata government in 1977.

One glaring example of executive arbitrariness during the emergency period
was the passing of the Thirty Ninth (Constitution) Amendment Act, 1975. The
Amendment was passed in order to validate with retrospective effect the election of
Mrs. Indira Gandhi on the grounds of ‘corrupt practice’ which constitutes one of the
disqualification as defined in The Representation of People’s Act, 1951 known as
the ‘Election Law’. The election of Mrs. Indira Gandhi was declared invalid by the
Allahabad High Court on two corruption charges in the conduct of her election
campaign. Firstly, she had availed the services of an IAS officer Yashpal Kapoor to
make campaign arrangements. Secondly, she had used the state police to build a
dais and had used the electricity from the state electricity department for her
amplifying equipment. The Allahabad High Court declared her election null and
void and unseated her from her seat in the Lok Sabha. The High Court also banned
her from contesting any election for an additional six years.

The matter came in appeal before the Supreme Court’s vacation judge, V.R.
Krishna Iyer who on 23 June, 1975 granted a conditional stay ruling that the
electoral disqualification stands eclipsed during the stay.\(^{234}\) Justice Krishna Iyer
also remarked that the high court’s ruling, however ultimately weak it may prove ...
does not involve the petitioner in any of the graver electoral vices set out in Section
123 of the Representation of the People’s Act.\(^{235}\) He further added that draconian

\(^{234}\) AIR 1975 SC 1590, para 25
laws do not cease to be law in courts but must alert a wakeful and quick-acting legislature.\textsuperscript{236} The stay order was a kinder reaction unknown to Justice Krishna Iyer, whose judicial integrity is beyond question, and the advice offered to her was not warranted in judicial discourse and in any case proved disastrous to the Court later on.\textsuperscript{237} 

Justice Krishna Iyer’s stay order and advice gave an opportunity and a reason for Indira Gandhi’s government to pass the protective amendments – the Thirty Eighth and the Thirty Ninth amendments. The Thirty Eighth Amendment, 1975 excluded judicial review of emergency whether made on external, internal or financial threats. The Second Amendment, the Thirty Ninth protected Mrs. Gandhi’ prime ministry by pre-empting any Supreme Court that might result from its hearings on her election case, which were to begin four days after the bill’s introduction on 7 August, 1975.\textsuperscript{238} The amendment inserted a new clause Article 329 – A which provided that the disputes as to elections of the Prime Minister and the Speaker of the Lok Sabha could be decided only by an ‘authority’ or ‘body’ established by Parliament by law and no longer by the Supreme Court. The amendment also took from the Supreme Court and placed in a body to be established by Parliament the authority to resolve disputes concerning the elections of the President and the Vice–President. The amendment also placed in the Ninth Schedule and thus beyond judicial review, three laws dealing with elections: the

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\textsuperscript{236} Ibid
\textsuperscript{237} Upendra Baxi, \textit{The Indian Supreme Court and Politics}, (Lucknow: Eastern Book Company, 1980), p. 51
\textsuperscript{238} Granville Austin, op. cit., p. 319
\end{flushright}

The amendment bill received strong opposition in the Parliament. Parliamentarian, Mohan Dharia called the amendment bill as a surrender of parliamentary democracy to the coming dictatorship.\textsuperscript{239} Constitutional jurist, S.P. Sathe refers the bill as ‘a very personalized amendment ... to protect one person’s interests.’\textsuperscript{240}

The constitutional validity of the Constitution (Thirty Ninth) Amendment Act, 1975 was challenged before the Supreme Court in \textit{Indira Nehru Gandhi v. Raj Narain}\textsuperscript{241}. The majority three judges out of five (comprising H.R. Khanna, K.K. Mathew, Chandrachud JJ.) held clause (4) of Article 329–A inserted by the Constitution (Thirty Ninth Amendment) Act, 1975 is unconstitutional.\textsuperscript{242} As per H.R. Khanna, J., the Constitution (Thirty Ninth Amendment) Act, 1975 which intended to take away judicial review of all election matters to the post of Prime Minister was held to violate the theory of basic structure.\textsuperscript{243} The election of the Prime Minister, Mrs. Indira Gandhi was, however, upheld on merits.\textsuperscript{244}

As observed by Professor Upendra Baxi, the instinct of self preservation persuaded the judges to tread this path as it did not want to annoy the executive in

\begin{itemize}
\item \textsuperscript{239} Lok Sabha Debates, Fifth series, Vol. 54, no. 12, col.10, seen in Granville Austin, \textit{Working a Democratic – Constitution – A History of the Indian Experience} (1999), (New Delhi: Oxford University Press, 8\textsuperscript{th} impression, 2011), p. 320
\item \textsuperscript{241} \textit{AIR 1975 SC 2299}
\item \textsuperscript{242} Ibid at para 213, 329
\item \textsuperscript{243} Ibid
\item \textsuperscript{244} Ibid at para 213, 345 and 682
\end{itemize}
whose hands its appointment rests.\textsuperscript{245} The supersession of judges in 1973 after the Kesavananda Bharati’s decision hung in the minds of the majority judges. Constitutional authority, H.M. Seervai applauded the decision as the finest hour in the life of the Supreme Court as the decision provided social legitimacy to the basic structure doctrine.\textsuperscript{246} Constitutional jurist, S.P. Sathe also believes that the doctrine provided legitimacy to the basic structure limitation upon the constituent power of Parliament.\textsuperscript{247}

The doctrine of basic structure was revisited to invalidate an amendment which was primarily passed to uphold the Indira Gandhi’s election to the post of Prime Minister. The very short interval of four days within which the Parliament committed to the executive passed the Constitution (Thirty Ninth Amendment) Act, 1975 shows the desperation of the executive to uphold her election to the post of Prime Minister in spite of a contrary verdict by the judiciary.

**Judiciary under pressure**

As observed by jurist Upendra Baxi, from the onset of the Emergency, there was a diffuse and subtle ... feeling pressing upon the Court ... that its actions were being watched by the regime and there were hints that judicial power might be curbed in the days to come.\textsuperscript{248} The judiciary seem to be under pressure soon after

\textsuperscript{245} Upendra Baxi, *The Indian Supreme Court and Politics*, (Lucknow: Eastern Book Company, 1980), p. 46
\textsuperscript{248} Upendra Baxi, *The Indian Supreme Court and Politics*, (Lucknow: Eastern Book Company, 1980), p. 34
the Presidential proclamation of 26 June, 1975 when a submissive judiciary (particularly the Supreme Court) exercised restraint in playing its role as the guardian of civil liberties under an authoritarian rule of executive.

A day after the Presidential Proclamation of 26 June, 1975 came the Presidential Order of 27 June, 1975. The Presidential Order suspended the right of the citizens for the enforcement of their right to equality under Article 14, right to life and liberty under Article 21 and the right to safeguards against arbitrary arrest and detention under Article 22. Consequently, petitions applying for writ of habeas corpus were flooding the dockets in the high courts. One such habeas corpus writ petition was filed in *Shiv Kant Shukla v. ADM (Additional District Magistrate) Jabalpur* 249 in the Madhya Pradesh High Court. A division bench of the Madhya Pradesh High Court (comprising of A.P. Sen and R.K. Tankha) on 1 September, 1975 ruled that habeas corpus was an instrument to protect against illegal imprisonment and that its constitutionality cannot be abridged either by the executive in the manner provided by Article 359 of the Constitution.

Similar judgments were ruled in the high courts of Delhi, Karnataka, Bombay (Nagpur Bench), Allahabad, Madras, Rajasthan, Madhya Pradesh, Andhra Pradesh, Punjab and Haryana. The Government of India appealed against these rulings to the Supreme Court where they were clubbed together into one case thereafter referred to as ‘Shiv Kant Shukla or Habeas Corpus case’.

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249 AIR 1976 SC 1207
In *Addl. Dist. Magistrate, Jabalpur v. Shivkant Shukla* 250 a majority bench of four out of five judges (comprising A.N. Ray, C.J.I, M.H. Beg, Y.V. Chandrachud and P.N. Bhagawati, JJ.) (H.R. Khanna J. dissenting) held that in view of the Presidential order dated 27 June, 1975 no person had any locus standi to move any writ petition under Article 226 before a high court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by malafide, factual or legal error or is based on extraneous consideration. Article 21 was considered to be the sole repository of the right to life and person liberty and that any claim to a writ of habeas corpus was enforcement of Article 21 which was barred by the presidential order. 251

However, the minority view of Justice H.R. Khanna held that Article 21 cannot be considered to be the sole repository of the right to life and personal liberty. 252 Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or personal liberty without the authority of law. That is the essential postulate and basic assumption of the rule of law in every civilised society. 253

The Supreme Court's decision in *Shivkant Shukla* left an indelible scar on the face of the Supreme Court. 254 The most important right to life and liberty saw

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250 AIR 1976 SC 1207 at para 220, AIR 1976, CRI L.J. 945
251 Ibid at para 127, p. 1242
252 Ibid at para 220
253 Ibid at para 220
its total demise in *Shivkant Shukla*. Constitutional authority like H.M. Seervai had severely criticised the positivist approach of the Supreme Court in *Shivkant Shukla’s* case though he was the same person who had till now supported the positivist interpretation of the Constitution in *A.K. Gopalan’s* case.

Unfortunately, the judicial philosophies of the majority judges had upheld the authoritarian rule against the rule of law during the emergency. In this regard Chief Justice A.N. Ray had expressed that the suspension of right to enforce fundamental right has the effect that the emergency provisions in Part XVIII are by themselves the rule of law during the times of emergency. Justice M.H. Beg went further to express that it is no use appealing to the concept of the rule of law since it is just inapplicable to the situation (emergency). Such a situation is governed by the emergency provisions of the Constitution and these provisions contain the rule of law for such situation.

Justice M.H. Beg is known to make the fatuous remarks:

“We understand that the care and concern bestowed by the state authorities upon the welfare of detenus who are well housed, well–fed and well–treated, is almost maternal. Even persons have to take appropriate preventive action against those children who may threaten to burn down the house they live.”

Justice H.R. Khanna, the only judge who dissented, had to pay a price by his supersession for the post of Chief Justice of India when Chief Justice, A.N. Ray

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255 Ibid at p. 108
257 AIR 1976 SC 1207 at para 93
258 Ibid at para 353
259 Ibid at p. 1319
Justice M.H. Beg who was next in line was appointed as the new Chief Justice in January 1977. Justice H.R. Khanna immediately resigned.

But Justice Khanna’s dissent also made him a hero, revered still for his courage. The New York Times on 30 April, 1976 not only saluted his judgement but also said that a monument needed to be erected in the name of the man who was the ultimate embodiment of justice, democracy and rule of law.

**Transfer of Judges and Independence of Judiciary**

The Supreme Court’s decision in the Habeas Corpus case was soon followed by the transfer of high court judges who had ruled against the Indira Gandhi government in preventive detention cases. “During the emergency period, sixteen high court judges were transferred from one high court to another. It was widely believed that the Government did so as a punitive measure to punish those judges who had dared to give judgements against it.” The transfer order created a sense of fear and panic in the mind of judges. But the Government defended the transfers for the purpose of ‘national integration’.

Transferring high court judges enjoys the constitutional mandate of Article 222 of the Constitution of India. Article 222 provides that the President may, after

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263 Granville Austin, op. cit., p. 344


265 Granville Austin, op. cit., p. 345
consultation with the Chief Justice of India, transfer a judge from one high court to any other high court. It was widely believed that Chief Justice A.N. Ray was hardly consulted in the matter of transfer of the high court judges. Chief Justice A.N. Ray had to sign the transfer orders or resign.\textsuperscript{266}

The transfers made during the emergency period were a departure from the convention followed earlier. Since 1950, some twenty five judges had been transferred with the Chief Justice’s concurrence and with the personal consent of the judge transferred. The practice later developed into a convention affirmed to by the Parliament in 1963 and recommended by the Chief Justices of India at their 1974 annual conference.\textsuperscript{267}

One such transfer notification dated 27 May 1976 was challenged by Justice Sankalchand Himatlal Sheth who was transferred from the Gujarat High Court to the Andhra Pradesh High Court. The writ petition filed in the Supreme Court came to be known as \textit{Sankalchand Himatlal Sheth v. Union of India}.\textsuperscript{268} In \textit{Sankalchand Himatlal Sheth’s} case questions arose as to what shall be the nature of consultation between the President and the Chief Justice in transferring a judge from one high court to another? Whether the ‘consent’ of the transferred judge is required in transferring him from one high court to another under Article 222 (1)? Giving a literal interpretation of Article 222 (1) the Supreme Court by a slim majority of three judges out of two held that Article 222 (1) does not require the ‘consent’ of the

\textsuperscript{266} Granville Austin, \textit{Working a Democratic – Constitution – A History of the Indian Experience} (1999), (New Delhi: Oxford University Press, 8\textsuperscript{th} impression, 2011), p. 344

\textsuperscript{267} Granville Austin, loc. cit., p. 345

\textsuperscript{268} AIR 1977 SC 2328
judge in transferring him from one high court to another.\textsuperscript{269} As regards ‘consultation’ the majority view (comprising Y.V. Chandrachud, V.R. Krishna Iyer and S. Murtaza Fazl Ali, JJ.) held that such ‘consultation’ under Article 222(1) meant ‘full and effective consultation’ and not a mere formality.\textsuperscript{270} But the majority judges were quick to point out that ‘consultation’ did not mean ‘concurrence’.\textsuperscript{271}

The Supreme Court’s decision in \textit{Sankalchand} was another instance which made the executive powerful as it got the court’s sanction to punish a judge by transferring him from one high court to another in the guise of public interest. Consequently this undermined the judiciary’s integrity and independence.

The emergency ended with the announcement of 1977 Parliamentary elections. The end of the emergency inaugurated a new political era in the Indian political scene, putting an end to the hegemonic Congress domination and opening up opportunities for alternative political forces to make their presence felt at the centre of power in New Delhi.\textsuperscript{272} In the 1977 parliamentary elections Indira Gandhi suffered a massive defeat. The Janata Party led by Morarji Desai came to power at the Centre.

During the post-emergency era, the principal tasks undertaken by the Morarji Desai’s government were to repeal the legislations damaging the fundamental rights and to restore a democratic constitution through a

\begin{footnotes}
\item[269] Ibid at para 15
\item[270] Ibid at para 37, 63
\item[271] Ibid at para 41
\item[272] Sumanta Banerjee, \textit{The Indian Emergency of 1975 – 77}, pp 1 – 4 at p. 4
\end{footnotes}
comprehensive amendment. Under a favourable political scenario, the Supreme Court again embarked on judicial activism to shed aside its negative image created during the emergency.

Concluding Observations

Thus, from the above discussion it is clear that the origin of the judicial activism in India dates back from the commencement of the Constitution. From 1950 to 1977 judicial activism in India underwent two phases of transformation – firstly during the pre–emergency period from 1950 to 1974 and secondly during the emergency period from 1975 to 1977. During these two phases the Supreme Court transformed itself from a literal interpreter to a liberal interpreter during the pre–emergency era and then again to a literal interpreter during the emergency era.

As the saviour of people’s rights the Court also indulged in a new role of law making. The Supreme Court’s new role was however, not acknowledged and there were occasions of confrontation between the Court and the Parliament. This was particularly during the post–Nehruvian period of the pre-emergency era when the judiciary invalidated the land reforms of the government. Sometimes judicial activism also had a tendency to become judicial populism and pro–rich.

Another interesting feature about judicial activism in India was that it was not an isolated case. In fact, it was a continuing process of what was already happening under some constitutions of the world.

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