CHAPTER VI
JUDICIAL ACTIVISM AND RULE OF LAW

During the post–emergency era the third form of judicial activism observed in India was doctrinal activism based on rule of law. Through such doctrinal activism the Indian Supreme Court promoted the principles of rule of law which forms an essential feature of all constitutions of the world, written or unwritten. Playing an activist role the Supreme Court has made a tremendous contribution to the establishment of a rule of law society in India and enhanced the quality of life of the people especially those belonging to the weaker sections of our society to whom even after four decades of independence justice – social, economic and political was merely a teasing illusion.\(^1\) An instance where the Supreme Court referred to the concept of rule of law for promoting social justice is the case of *Ratlam Municipality*.\(^2\) In *Municipal Council, Ratlam v. Vardhichand* \(^3\), the Divison Bench (consisting of V.R. Krishna Iyer and O. Chinnappa Reddy, JJ.) pointed out that Article 47 of the Directive Principles in part IV imposed a primary duty upon the *Ratlam Municipality* to maintain public health and sanitation of the residents of Ratlam so want of sufficient funds would not be a ground for avoiding the liability under Article 47 read with Sec 33 of the Cr.P.C. In this regard, Krishna Iyer, J. observed:

---
\(^2\) *Municipal Council, Ratlam v. Vardhichand* AIR 1980 SC 1622
\(^3\) *AIR 1982 SC 1473*
“Public nuisance, because of pollutants being discharged by big factories to the detriment of the poor sections, is a challenge to the social justice component of the rule of law.”

In People’s Union for Democratic Rights and others v. Union of India and Others, the Supreme Court while applying the concept of rule of law to promote the concept of Public Interest Litigation as a strategic arm of the legal aid movement observed:

“The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is meant for them also, though today it exists only on paper and not in reality.”

Through judicial activism based on rule of law, the Indian Supreme Court has checked the arbitrary exercise of powers by the Government. In a recent ruling in Nandini Sundar v. State of Chhattisgarh issued by Justices B. Sudeshan Reddy and S.S. Nijjar, the Supreme Court said that the arming of untrained, barely educated tribal youth as ‘Special Police Officers (SPO’s)’ by the Chhattisgarh government is unconstitutional, irrational, arbitrary, capricious, a degeneration of their dignity as human beings and in violation of Articles 14 and 21 of the Indian Constitution that guarantee equality before law and protection of life and liberty. Referring to the concept of rule of law as the ultimate principle of governance the Bench said:

---

4 Ibid at para 15
5 AIR 1982 SC 1473 at para 2
6 “No More Special Police: says The Judge,” Tehelka, 16 July 2001, p. 44. Also cited as Nandini Sundar vs State of Chattisgarh, AIR 2011 SC 2839 at paras 59, 60
“The primordial value is that it is the responsibility of every organ of the State to function within the four corners of constitutional responsibility. That is the ultimate rule of law.”\(^7\)

Apart from developing the concept of Public Interest Litigation and human rights jurisprudence, judicial activism based on rule of law has helped in the growth of administrative law through the common law principles of ‘natural justice’, ‘Wednesbury’s principle’ and doctrine of ‘legitimate expectation’. Such judicial activism has helped in checking that an administrative order is neither malafide nor irrelevant and that the procedure contemplated by a law including a preventive detention law is just, fair and reasonable.

Judicial activism based on rule of law is in consonance with the principles laid in The Beijing Statement, 1995 for the Independence of the Judiciary in the Lawasia (Law Association for Asia and the Pacific) region of which India is a member State. The judiciary’s objectives as mentioned in the Beijing statement, 1995 includes “ensuring that all persons were able to live securely under the rule of law, promoting within the proper limits of the judicial function the observance and attainment of human rights and administering the law impartially among persons and between persons and the state.”\(^8\)

Judicial activism based on rule of law is also common in other legal systems of the world. In the United States, the US Supreme Court’s decision in *Bush v. Gore*\(^9\) has triggered a renewed interest in the applicability of the Anglo – American

\(^7\) “Salwa Judum is illegal: says Supreme Court,” *The Hindu*, 6 July 2011, p. 1

\(^8\) Resolution 10 of *The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, 1995*

\(^9\) 121 S Ct 525 (2000)
tradition of rule of law.\textsuperscript{10} The English speaking countries of the world (including under the unwritten Constitution of England) are renowned citadels of rule of law.\textsuperscript{11} In this regard the case of \textit{Somerset vs. Steward} \textsuperscript{12} may be cited. \textit{Somerset v. Steward} was an important precedent that gave legitimacy to the abolition of slavery in England, the United States and the British colonies. In \textit{Somerset}, Lord Mansfield, the Chief Justice speaking for King’s Bench in a habeas corpus petition, freed a black slave, James Somerset who was being held at his master’s orders on ship in the Thames for sale in Jamaica. Since there were no relevant laws, cases or statutes authorizing slavery in England he explained that slavery was too obnoxious to be established by custom. Under the common law doctrine of rule of law, Mansfield abolished slavery in England and freed fifteen or sixteen thousand slaves.

The application of the doctrine of rule of law is not only confined to the domain of domestic law. But it has also permeated into the realm of international law and now forms an indispensible part of the international law. “The international analogue to a “rule of law not men” would be a “rule of law not states.” \textsuperscript{13} The origin of rule of law as part of the international law can be traced back to the Second World War. After the Second World War, the demand for human rights assumed an international momentum which subsequently led to the drawing up of The Universal Declaration of Human Rights, 1948. The authors of the Declaration, therefore,

\textsuperscript{10} Todd J. Zywicki, “\textit{The Rule of Law, Freedom and Prosperity},” \textit{Supreme Court Economic Review}, Vol. 10, 2003, pp. 1 – 26, p. 4
\textsuperscript{12} 98 Eng. Rep 494 (K.B. 1772). This case has already been cited by Samuel J.M. Donnelly in his article “Reflecting on the Rule of Law”.
caught hold of the rule of law as an international test for the observance of human rights.\textsuperscript{14} This was envisaged in the Preamble to the Declaration as follows:

```
“... whereas it is essential, if a man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”
```

“In an international organization such as the United Nations, one would certainly find that the closest relationship, both in theory and in practice existed between the organizations and the concept of rule of law.”\textsuperscript{15} The International Court of Justice has played an activist role in obliging the accused states do not deny that they are bound by international law. In its 1986 judgment in \textit{Nicaragua v. USA}\textsuperscript{16} case the International Court of Justice declared that the accused states confirmed the general acceptance of the rules on force as binding law.

**Criticism of Judicial Activism based on Rule of Law**

Constitutional jurists have decried judicial activism based on rule of law byterming it as ‘hyper activism’ or ‘over activism’ based on an ‘amorphous’ or ‘nebulous’ concept or ‘an unruly horse’. They have raised the pertinent question of the invocation of the English doctrine of rule of law which recognizes the sovereignty of the British Parliament into written constitutions which recognizes the supremacy of the Constitution.\textsuperscript{17}

\textsuperscript{15} G.G. Fitzmaurice, loc. cit.
\textsuperscript{16} I.C.J. (1986) Rep. 14
\textsuperscript{17} Durga Das Basu, op. cit., p. 324
Indian judicial activism based on rule of law has also been criticised on the ground that it is not required. According to Durga Das Basu, the concept of rule of law which had its origin in England, dating from the Magna Carta and illumined by Dicey was imported by the Indian lawyers and judges into the Indian jurisprudence during the British regime\textsuperscript{18} in \textit{Sitao v. Emperor}.\textsuperscript{19} Such judicial activism has been criticised by Durga Das Basu on the following grounds:

(1) That the judiciary continues to refer to the rule of law concept for its activism inspite of having a ‘higher law’ embodied in the written constitution, the mandates of which override the sanction behind the principle of rule of law. The ‘higher law’ concept is to be distinguished from the ‘rule of law’ concept. According to Durga Das Basu, the concept of ‘higher law’ as embodied in a written Constitution should not be confused with ‘rule of law’ which may exist without a written constitution.\textsuperscript{20}

(2) Secondly, there is a great danger in regarding the rule of law as a basic feature of the Constitution which is of a superior value than the express provisions of the Constitution is that there is no knowing how far it will go.\textsuperscript{21}

(3) Thirdly, through the concept of rule of law, the Court has indulged in ultra–liberal interpretation of the constitutional provisions.\textsuperscript{22}

\textsuperscript{18} Ibid at p. 324
\textsuperscript{19} AIR 1943 Nag. 36 at para 41 – 42
\textsuperscript{21} Ibid at p. 345
\textsuperscript{22} Ibid at p. 220
(4) Fourthly, since the principle of equality of all persons before the law is enshrined in Article 14 of the Constitution it is not to be derived from the general notions of common law or particular judicial decisions as done in England.23

(5) Fifthly, it is unnecessary to rely on the English common law to assert that the Government possess no arbitrary or discretionary power apart from the powers conferred by law, for various provisions of the Indian Constitution expressly lay down that the Government cannot affect a citizen by those acts which the Constitution says can be done only if the appropriate legislature makes a law authorizing the Executive to do such act e.g. Art 19 (2), 21, 114 (3), 265, 266 (3), 300 A. If the Government seeks to do any of these acts, e.g. to impose any exaction without legislature sanction, such imposition shall be unconstitutional and void, and no appeal to any common law principle shall be necessary.24

A similar view is given by American jurist, Raoul Berger. Though he admits the necessity of the concept of rule of law in a written constitution for promoting constitutionalism nevertheless there may be a tendency to misuse the rule by the courts. In this regard, Raoul Berger says: “Constitutionalism–limited government under the rule of law was a paramount aim not to be wrapped in order to achieve some predilection of any given bench.”25

---

23 Ibid at p. 327
24 Ibid at p. 327
Diagrammatically opposite views are also available. Judicial activism based on rule of law has been supported by several judges. K.T. Thomas, former judge of the Supreme Court of India finds the role of the judiciary as the saviour of the Constitution and its values, including the rule of law. According to him the theme song of a republican philosophy is, “Howsoever high you may be, the law is still above you.” 26 According to Justice J.S. Verma, Chief Justice of India, “Rule of Law in a democracy provides for the preservation and protection of rights through the effective mechanism of an independent judiciary.” 27 Again M.N. Venkatachaliah, former judge of the Supreme Court of India finds democracy and rule of law as integral to the culture of constitutionalism. 28 “That the rule of law is the very substratum of an institutional democracy and to ensure that this substratum remains intact is a constitutional duty of the judiciary. If a judge has to perform an activist’s role to uphold the rule of law, he need not as he must not, hesitate in doing so.” 29

Recently, a bench of the Supreme Court consisting of Justices G.S. Singhvi and A.K. Ganguly through its ruling has supported judicial activism based on rule of law. 30

29 Siddharth Sharma, Myth of Judicial Overreach”, Economic and Political Weekly (EPW), March 8, 2008, pp. 15 – 18 , p.17
30 “Talk of Judicial overreach is bogey: Supreme Court,” The Hindu, Friday, 15th July, 2011
The Dicean concept of rule of law is applicable in India with modifications. In India, a rule of law means rule of law as embodied in the written constitution of India. Similarly the Dicean concept of rule of law is not applicable in international law. Rule of law as applied by international organization means the law as laid down in the International Covenants and Agreements.

However, as rightly observed by Prof. Sathe, “Activism can easily transcend the border of judicial review and turn into populism and excessivism. It is populism when doctrinal effervescence goes beyond the institutional capacity of the judiciary to translate the doctrine into reality and it is excessivism when a court undertakes responsibilities that should normally be discharged by the other co–ordinate organs of the government.”

In this Chapter, an attempt is made to analyse as to whether judicial activism based on rule of law was a case of judicial overreach or whether there was a myth of judicial overreach. In the first part an analysis is made of the changing concepts of the core principle of the equality embodied in Article 14 through judicial activism and its effects on the judicial decisions with regard to educational opportunities and job opportunities. In the second part, there is a discussion of the establishment of rule of law as a basic feature of the Constitution through judicial activism, judicial activism and judicial restraint in the application of the theory of basic structure in reviewing the constitutional amendments. In the third part, an analysis is made as to how through judicial activism the judiciary reviewed the powers of the President

---

under Article 356 to prevent its misuse or abuse. In the fourth part an analysis is made as to how through judicial activism the judiciary asserted its independence from the executive by referring to the concept of rule of law, the accountability of the judiciary for the quick disposal of cases and for the charges of corruption against it, how the constitutional machinery has failed to check judicial corruption and achieve judicial accountability, the proposal to discipline the judges through the Right to Information Act 2002 and the newly proposed bill – The Judicial Standards and Accountability Bill and the necessity to achieve the judicial accountability being interrelated to judicial independence. The discussion ends with concluding observations on such judicial activism based on rule of law.

**Equality based on Rule of Law – Changing Concepts through Judicial Activism**

“Another site for judicial activism during the post–emergency period has been Article 14 of the Constitution.” 32 The concept of equality based on rule of law has undergone frequent changes through judicial activism. During the pre–emergency Nehruvian period, Patanjali Shastri C.J.I., has defined the core principle of equality embodied in Article 14 as ‘formal equality’ 33 based on reasonable classification. During the pre–emergency post–Nehruvian period, Bhagwati, Chandrachud and Krishna Iyer JJ., have put it as absence of arbitrariness.34 During the emergency period, Mathew and Fazl Ali JJ., have supposed this ‘core’ of Article 14 to be “not formal equality” but the absence of “inequalities arising on account of vast social and economic differentials” or what is called “the principle of

32 Ibid at p. 130
33 In *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 at para 76, 93
34 In *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555 at para 85
egalitarianism.” 35 During the post – emergency period, Krishna Iyer J., has put another way of affirming the ‘rule of law’ as “be you ever so high, the law is above you.” 36

Durga Das rejects the changing facets of equality embodied in Article 14 through judicial activism. He contends that all that could be said about “equality was embodied in Articles 14 to 16 under the Indian Constitution and that there was no principle of equality outside these specific provisions. That, Article 14 itself, by assuming equality before law and equal protection of the laws, had provided both the shell and kernel, the skin and the core of the principle of equality.” 37

It is agreed that the concept of equality as embodied in Article 14 has been changing due to judicial activism for the judges are interpreting a Constitution that is endured for ages to come. Such liberal interpretation is not contrary to the mandate of Article 367 (1) that says that the Constitution should be interpreted as a statute ‘unless the context otherwise requires’. The non–obstante clause ‘unless the context otherwise requires’ gives full liberty to the judges to interpret the Constitution according to the changing circumstances though normally the Constitution is to be interpreted as a statute.

Article 14 guarantees the right to ‘equality before law’ and ‘equal protection of laws’. Such concept of equality does not mean a mathematical equality indicating a universal treatment of all in all circumstances. Article 14, is in fact, a

36 In Maneka Gandhi v. Union of India, AIR 1978 SC 597 at para 129
synthesis of both universal treatment and differential treatment. Article 14 embodies a universal treatment to all denying any special privilege in favour of anyone. The exceptions being the President, the Governor and the foreign ambassadors who enjoy full immunity from any judicial process during the tenure of their office. Through ‘equal protection of laws’ Article 14 embodies equal treatment among equals but a differential treatment among unequals. The differential treatment that ‘among the equals law should be equal and among the unequals law should be unequal finds further protection under the constitutional mandate of Article 15 and Article 16. Articles 15 and 16 which are species of differential treatment of which Article 14 is a genus. Article 15 (2) and 15 (3) sanctions differential treatment to women and children who constitute the vulnerable groups of the Indian society. Whereas Article 16 (4) sanctions differential treatment to backward classes who constitute the vulnerable class of the Indian society.

Judicial activism has ensured that the constitutional mandates for differential treatment by the legislature are made on a reasonable basis. In order to be reasonable, the courts have subjected such differential treatment to the American theory of reasonable classification. The theory of reasonable classification as formulated by the Supreme Court in State of West Bengal v. Anwar Ali Sarkar allows the legislature to classify a group from others left out of the group if it satisfies the twin tests of ‘intelligible differentia’ and ‘object differentia’. The ‘intelligible differentia’ requires the legislature to classify a group from ‘others left

38 AIR 1952 SC 75
out’ of the group on a reasonable basis. The ‘object differentia’ requires the legislation to have a reasonable nexus between the classification and the object sought to be achieved by the Act.

But the theory of reasonable classification has been subject to criticism by constitutional jurists. According to Prof. Sathe, the theory of reasonable classification should deal with three main questions: - Firstly, who are treated differently; secondly, why they are treated differently; and thirdly what is the differential treatment. The theory requires the establishment of a nexus between the ‘who’, ‘why’ and ‘what’ factors. In other words, the three factors of ‘who’ ‘why and ‘what’ are to be rationally related to each other. But as observed by Prof. Sathe, the theory of reasonable classification does not establish the nexus between ‘why’ and ‘what’ factors. The theory seems to be concerned only with the nexus between ‘who’ and ‘why’ factors.

Similar views were forwarded by Professor P.K. Tripathi who subjected the theory of reasonable classification to a similar analysis. Professor Tripathi objects that the theory of reasonable classification did not require the establishment of a relationship between ‘why’ and ‘what’ factors. It only required a nexus between ‘who’ and ‘why’ factors.

---

40 Ibid at p. 130
According to Prof. Sathe, the Court should insist that all these questions are inter related and should examine not only whether the criteria for distinguishing a group of people from others (who?) are rationally related to the purpose of differential treatment (why?) but also whether so much and the kind of differential treatment (what?) is justified to achieve the purpose (why?). The failure to do so results in formal equality at the expense of substantive equality. Professor Tripathi’s objection was that the nexus test as applied by the Court did not require an examination of the quantum of disparity created by the statute.\(^4^2\) It was left to be determined by the legislature. As such the theory of reasonable classification restricted judicial review to ‘who’ and ‘why’ factors resulting in formal equality at the expense of substantive equality. Such formal equality was an anathema to progress and change.\(^4^3\)

*E.P. Royappa v. State of Tamil Nadu*\(^4^4\) was a classical example of judicial activism in the interpretation of Article 14. The concept of equality as embodied in Article 14 now changed from reasonable classification to absence of arbitrariness. In *E.P. Royappa*, the Supreme Court challenged the traditional concept of equality based on reasonable classification formulated in *Anwar Ali Sarkar* and reformulated the concept of equality based on arbitrariness in *E.P. Royappa*. In *E.P. Royappa*, Justice Bhagwati on behalf of himself, Justices Chandrachud and Krishna Iyer said:

> “Equality is a dynamic concept with many concepts and dimensions and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits. From a positivistic point of view, equality is antithesis to arbitrariness.”\(^4^5\)

\(^{42}\) Ibid at p. 131
\(^{43}\) “Supreme Court upholds differential duty hours,” *The Hindu*, 21 Nov. 2010, p. 10
\(^{44}\) AIR 1974 SC 555; (1974) 4 SCC 3
\(^{45}\) (1974) 4 SCC 3 at para 85, p. 38
But the New Doctrine based on arbitrariness was also subject to criticism by jurist, H.M. Seervai. Mr. Seervai argues that the New Doctrine of Equality hangs in the air because of the three main reasons. Firstly, the New Doctrine gives the judges the untrammelled power to strike down legislative and executive action at will with a bald observation that they are not reasonable. The standard of ‘reasonability’ or ‘unreasonability’ not being subjected to any objective examination lies in the discretion of the Court. Secondly, the New Doctrine purports to treat arbitrariness as inequality at the same time. In fact, not all arbitrary actions can be termed unequal simply because some arbitrary actions are both arbitrary and unequal. For example if red haired students are expelled from school without reason that action is both arbitrary and unequal vis–a-vis non– red haired student. If, however, all students irrespective of the colour of their skin are expelled then it is simply arbitrary but not unequal. Thirdly, the New Doctrine fails to distinguish between the violation of equality by legislative action and the violation of equality by executive action.

Setting aside all criticisms the Court assimilated the doctrine of reasonable classification and the doctrine of arbitrariness in Maneka Gandhi case and in R.D. Shetty case. In Maneka Gandhi v. Union of India Justice Bhagwati said:

“... Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of

---

47 Maneka Gandhi v. Union of India, AIR 1978 SC 597
48 Ramana Dayaram Shetty v. International Airport Authority, AIR 1979 SC 1628
reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.”

The same principle was reiterated by Justice Bhagwati in R.D. Shetty v. International Airport Authority in the following words:

“... the doctrine of classification which is involved by the court is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislation or executive action would be plainly arbitrary and the guarantee of equality under Article 14 would be breached.’’

“From Royappa it was a merry ride through Maneka Gandhi, R.D. Shetty, Ajay Hasia and a host of other cases where the Supreme Court freely struck down actions of the other coordinate branches of the Government on the basis that it was not ‘reasonable’ or was ‘arbitrary’, a standard of judicial review, neither contemplated by the framers of the Constitution nor by the plain text of Article 14.”

It is agreed that E.P. Royappa’s case was a high water mark of judicial activism where the doctrine of reasonable classification was subject to the triple tests of ‘who’, ‘why’ and ‘what’ factors. The Court reviewed the interrelationship of these three factors to examine the legitimacy of reasonable classification made by the legislature. The principle of ‘what’ constitutes arbitrariness being nebulous gave each judge discretion to constitute what he thinks to be ‘arbitrariness’ or ‘non-

---

49 AIR 1978 SC 597 at para 56
50 AIR 1979 SC 1628 at para 21
51 Justice B.N. Srikrishna, “Skinning a Cat”, 8 SCC (J) 2005, pp. 1 – 17, p. 4
arbitrariness’. During the post–emergency period, the Supreme Court applied the principle of ‘non-arbitrariness’ to review the economic policies of the Government in educational and job matters. The Court seems to be guided by the preambular objective to achieve economic equality in a poverty ridden Indian society.

**Economic Inequality** – During the pre–emergency era, there was no confrontation between the Court and the Parliament on the issue of economic inequality. Economic inequality was intended to be dealt with by a Parliament through property legislations which were readily validated by the Court. But during the post–emergency period, the Court adopted an activist approach pertaining to the right to equality in educational opportunities and job opportunities. Education and job are considered to be the means to enhance one’s economic and social status in a society. The Court examined the interrelationship between ‘who’, ‘why’ and ‘what’ factors for differential treatment which gave ample scope to the Supreme Court to exercise discretion and its judgments were regarded as populists. The Court was also criticised for walking on the turf of the legislature since ‘what’ should be the differential treatment belonged exclusively to the legislature.

**Educational Opportunities** – In case of educational opportunities most of the cases pertained to the professional discipline such as medical and engineering. “These two disciplines offer the best of opportunities of earning wealth and social prestige.” The Court examined the nexus between the ‘who’, ‘why’ and ‘what’ factors in cases pertaining to these two disciplines. In *Ajay Hasia v. Khalid Mujib*

---

53 Ibid at p. 137
Sehravardi, Ajay Hasia challenged the allocation of 33 1/3 percentage of marks for oral test conducted during the Engineering Entrance Test as arbitrary and violative of his right to equality under Article 14 of the Constitution. The Court was able to establish the nexus between who (candidates) and why (merit assessment) factors. But the Court was not able to justify the nexus between why (merit assessment) and what (allocation of 33 1/3 percentage of marks) factors.

Consequently, the Court struck down the rule prescribing high percentage of marks (33 1/3 percentage of marks) for oral test as plainly arbitrary, unreasonable and violative of Article 14. But the Court declined to quash the admissions in view of a lapse of a reasonable amount of time. The Court held that a mere suspicion that some candidates had obtained high marks in oral interview but very low marks in written test did not establish a malafide intention on the part of the selectors.

Similarly, in Arti Sapru v. State of J & K, the Supreme Court held that the allocation of 33 1/3 percentage of marks for the viva-voice test conducted during the Medical College Entrance Test was excessive. The Court held that there was no nexus between the ‘why’ and ‘what’ factor.

“The nebulous test of arbitrariness has again enabled the Court to reach some undesirable result”. In Pradeep Jain, Dr. v. Union of India, Pradeep Jain challenged the validity of ‘domicile requirement’ and the ‘institutional preference’ for reserving seats for ‘local students’ and ‘students qualifying from the same

54 AIR 1981 SC 487 at para 19
55 AIR 1981 SC 1009 at para 11
57 (1984) 3 SCC 654; AIR 1984 SC 1420 at para 6
institution’. The Court held that such reservations were unconstitutional and violative of Article 14 of the Constitution. The Court forwarded the ‘national integration factor’ which was considered to be grossly impracticable, uncommendable and clearly exceeded the limits of judicial review. As regards the ‘what’ factor judicial review extended to examining the constitutionality of the nexus between ‘why’ and ‘what’ factors. It cannot determine the extent of ‘what’ factor. If the Court does so, it clearly transgresses its limits and intrudes into the turf of policy-making. In Pradeep Jain, the Court exceeded the limits of its judicial review when it held that the reservation for local students or students passing from the same institution should be restricted to seventy per cent in the case of undergraduate and fifty percent in the case of post-graduate.

Mohini Jain v. State of Karnataka was another instance which though highly laudable created an impractical and impossible situation. Mohini Jain, a non-Karnataka student challenged the Government Notification which charged reasonable fees from Karnataka students but exhorbitant fees from non-Karnataka students intending to pursue medical courses in Karnataka. The Division Bench constituting of Justice Kuldip Singh and R.N. Sahai held that the right to education at all level is a fundamental right under Article 21 of the Constitution and that charging different fees from different students was arbitrary, unfair and which violated not only Article 14 but also Article 21.

---

58 Ibid at para 8
In *Unni Krishnan v. State of A.P.* 60, the Supreme Court realizing the impracticability of its decision in Mohini Jain restricted the scope of its dictum at the primary level. Right to free and compulsory education was now available only to the children of age–group from six to fourteen years. Mohini Jain was another instance where the Court intruded into the domain of the legislature but soon founded in *Unni Krishnan* that its entry was unwarranted. *Unni Krishnan* also dealt with the fees charged by the private medical and engineering colleges. The Supreme Court soon found that its decision in *Mohini Jain* relating to the abolition of capitation fees was impractical and would soon result in the closure of private medical and engineering colleges. 61 Hence in *Unni Krishnan* the Court prepared a scheme wherein 50 percentage seats shall be called ‘free seats’ and 50 percentage seats shall be called ‘payment seats’. ‘Free seats’ shall be available at subsidized rate available at any government colleges whereas ‘payment seats’ shall be available at fees almost four to five times, higher than that of ‘free seats’. All seats were to be filled on merits. Such scheme created an unreasonable classification as rich students could apply both for ‘free seats’ as well as ‘payment seats’. According to Prof. Sathe, it was a case where the law increased inequality instead of mitigating inequality. 62 It was a clear case where an inexperienced Court experimented and legislated on a complex issue. Such issues could have been better handled by the legislature and therefore the Court clearly acted beyond the scope of judicial review.

---

60 (1993) 1 SCC 645: AIR 1993 SC 2178 at para 80, 145
61 Ibid at para 77
Dr. Priti Srivastava v. State of Madhya Pradesh 63 was another instance where the Court clearly exceeded the scope of its judicial review. Dr. Priti Srivastava and others had challenged the constitutionality of the Uttar Pradesh Post Graduate Medical Education (Reservation for SC’s and ST’s and other Backward Classes) Act and a Madhya Pradesh Government order that had lowered the minimum qualifying marks for admission to super speciality medical courses in favour of the reserved category candidates. The Court struck down both the laws as unconstitutional and violative of Article 15 (4) of the Constitution. The Court observed that merit alone should be the criteria for selecting students to the super speciality courses in medical and engineering. The Court was of the view that while advancing the object of Article 15 (4) one cannot ignore the wider interest of society. Though the decision was lauded by the students of the general category it was definitely an intrusion into the policy making of the legislature.

Job Opportunities – As regards job opportunities, the Court preferred not to interfere and examine the nexus between ‘why’ and ‘what’ factors. In this regard, some instances can be cited. In D.V. Bakshi v. Union of India 64 the Supreme Court held that the test involved in the case of Ajay Hasia cannot be applied in case of selection of professionals. The test which may be valid for competitive examinations or admission to educational institutions cannot be applied for appointments in public services. For admission to educational institutions, the candidates being young and inexperienced, great weightage is given to written test than to oral interviews. But in case of appointment in public services, the

63 AIR 1999 SC 2894
64 (1993) 3 SCC 662: AIR 1993 SC 2374 at para 6
candidates being mature and experienced, greater weight has to be given to test the intellectual skills, adaptability, judgment and capacity to take prompt decision. Similar views were expressed in *Lila Dhar v. State of Rajasthan*\(^{65}\) where the Court held that this test may be valid for admission to medical colleges but not for entry to public services. Consequently, the allocation of 25 percentage marks for oral interview for selection of *munsifs* in the Rajasthan Judicial Service was held not to be illegal.

But with regard to the extent of reservation in public services, the Court examined the nexus between ‘why’ and ‘what’ factor. In *Akhil Bharatiya Shosit Karmachari Sangh (Rly) v. Union of India*,\(^{66}\) the Supreme Court upheld that the criterion of the ‘carry forward rule’ extending reservation upto 64.4 percentage but subject to judicial review. In *K.C. Vasanth Kumar v. State of Karnataka*,\(^{67}\) the Supreme Court laid down guidelines in respect of reservation to be followed in case of SC and ST. The extent of reservation was also examined by the Supreme Court in *Indra Sawhney v. Union of India*\(^{68}\) wherein the Court upheld the Mandal Commission recommendation reserving 27 percentage posts in public services for backward classes excluding the creamy layer as justified. The Court found that the nexus between the ‘who’ factor (backward classes excluding the creamy layer), ‘why’ factor (protective discrimination) and ‘what’ factor (27 percentage reservation in public services) as reasonable.

\(^{65}\) AIR 1981 SC 1777 at para 8  
\(^{66}\) AIR 1981 SC 298 at para 77  
\(^{67}\) AIR 1985 SC 1495 at para 2  
\(^{68}\) AIR 1993 SC 477 at para 353
Rule of Law as a Basic Feature of the Constitution

“The Indian Supreme Court is probably the only Court in the history of human kind to have asserted the power of judicial review over amendments to the Constitution.” 69 It was through the theory of basic structure that the Court claimed the power to review the Parliament’s amendments to the Constitution under Article 368. The Indian Supreme Court had been claiming such power since pre–emergency days when it formulated the theory of basic structure in Kesavananda.70 Since Kesavananda, there has been a confrontation between the Parliament’s amending powers under Article 368 vis–a–vis the Court’s judicial review under Article 13 of the Constitution of India.

The confrontation between the Parliament and the Court over the former’s constituent power under Article 368 became visible during the emergency days. In Indira Gandhi v. Raj Narain,71 the Supreme Court applied the theory of basic structure, and established ‘rule of law’ as a basic feature of the Constitution. Justice B. Chandrachud imports ‘rule of law’ to justify his condemnation of Article 329-A (4) in the following words:

“These provisions [Art 329-A (4)] are an outright negation of the right of equality conferred by Article 14, which more than any other is a basic postulate of our Constitution”. 72

70 His Holiness Kesavananda Bharati Sripadgalvaru v. State of Kerala, AIR 1973 SC 1461 at para 302
71 AIR 1975 SC 2299 at para 680
72 Ibid at para 680
The learned judge further adds:

“It follows that clauses (4) and (5) of Article 329-A are arbitrary and are calculated to damage or destroy the rule of law ... The denial of such equality as modified by the judiciary and evolved by the theory of classification, is the very negation of rule of law.” 73

Chief Justice A. Ray also refers to the concept of the rule of law to invalidate the Constitution (39th Amendment) Act, 1975 which inserted Article 329-A (4) as pro tanto void because it offended the rule of Law, though he does not refer to the theory of basic structure to support his contention.

Some pertinent question arises in context to the reference to the rule of Law theory to invalidate a constitutional amendment. What was the necessity for reference to the rule of law theory? Whether the rule of law constitutes law higher than the constitution itself? With regard to the first contention it can be argued that the Supreme Court referred the rule of law to prevent the misuse of Article 368 by Indira Gandhi to validate her election which was invalidated by the Allahabad High Court. The then Prime Minister, Mrs. Indira Gandhi with the aid of the Parliament where majority of the members were her party men passed the (39th Amendment) Act, 1975 which inserted a new Article 329–A. The new Article 329–A excludes the judicial review to the election of a person appointed or to be appointed as a Prime Minister. As regards the second contention, it is argued that the rule of law is a dynamic concept necessary to uphold a dynamic constitution which has to adjust to the changing socio–economic conditions of a country.

73 Ibid at para 682
Once the rule of law was established as a basic feature of the Constitution, the Supreme Court asserted its power of judicial review over constitutional amendments.

During the post–emergency period the theory of basic structure was first applied by the Supreme Court in *Minerva Mills v. Union of India*.\(^74\) In *Minerva Mills*\(^75\) the Supreme Court by 4 to 2 majority struck down clauses (4) and (5) of Article 368 inserted by the Constitution (42\(^\text{nd}\) Amendment) Act, 1976. Clause (4) purported to exclude judicial review of any constitutional amendment (including Part III) whether made before or after the 42\(^\text{nd}\) Amendment. Clause (5) purported to remove any limitation whatsoever on the amending power of the Parliament. The Court held these clauses are destructive of the basic feature of the Constitution. The undefined doctrine of ‘basic structure became more exhaustive when the Court included more features to the list of ‘what constitutes the basic features’. In *Minerva Mills*\(^76\) the Supreme Court added ‘limited amending power of the Parliament as a basic feature of the Constitution.

According to Prof. Sathe, since the decision in *Minerva Mills*, the Supreme Court has exercised maximum restraint in using the basic structure doctrine against constitutional amendments.\(^77\) On the other hand, the Parliament was reluctant to pass constitutional amendments that challenged the theory of basic structure.

---

\(^{74}\) AIR 1980 SC 1789  
\(^{75}\) Ibid at para 25, 26  
\(^{76}\) Ibid at para 22  
The challenge to the theory of basic structure was, however, reopened in *L. Chandra Kumar v. Union of India*,\(^{78}\) where the Supreme Court overruled its decision in *S.P. Sampath Kumar v. Union of India*.\(^{79}\) In *S.P. Sampath Kumar*\(^{80}\) the Supreme Court upheld the constitutional validity of the Constitution (42nd Amendment) Act, 1976 which inserted Articles 323–A, 323–B in the Constitution and Section 28 of the Administrative Tribunal Act, 1985. These provisions excluded the jurisdiction of the high courts in service matters under Article 226 and Article 227 and vested it in the administrative tribunals. But since it did not exclude the jurisdiction of the Supreme Court under Article 32 and 136 the Amendment and the Act were held to be constitutionally valid. The judicial view in *S.P. Sampath Kumar* was overruled in *L. Chandra Kumar* wherein a seven member Constitution Bench of the Supreme Court struck down clause of Articles 323–A and clause 3 (d) of Article 323–B and Section 28 of the Administrative Tribunal Act, 1985 which provided for the exclusion of the jurisprudence of the high courts under Article 226 and 227. The Court has held that the power of judicial review of the high courts under Article 226 is a part of the basic structure which cannot be taken away by a constitutional amendment.\(^{81}\)

Prof. Sathe’s observation that the Supreme Court has exercised maximum restraint in using the basic structure theory against constitutional amendments is true particularly for constitutional amendments relating to reservation in government

---

\(^{78}\) AIR 1997 SC 1125  
\(^{79}\) AIR 1987 SC 386  
\(^{80}\) Ibid at para 15  
\(^{81}\) Ibid at para 78
jobs. In *Indra Sawhney v. Union of India*,\(^82\) popularly known as Mandal case, the Supreme Court laid the law of 50 percentage ceiling in government jobs. It also endorsed the concept of creamy layer among the OBC’s as a bar to reservation in government jobs. The nine judge Constitution Bench of the Supreme Court by 6:3 majority (B.P. Jeevan Reddy C.J.I., M.H. Kania, M.N. Venkatachaliah, A.M. Ahmadi with S.R. Pandian and S.B. Sawant JJ.,) held that the decision of the Union Government to reserve 27 percentage Government jobs for backward classes provided creamy layer among them are eliminated was constitutionally valid.\(^83\) The majority also held that the reservation should not exceed 50 percentage.\(^84\)

Post–Mandal, the Government passed several constitutional amendments to nullify the effect of 50 percentage ceiling in reservation in government jobs. In 1995, the Government passed the Constitution (77\(^{th}\) Amendment) Act which provided for reservation in matters of promotion in favour of SC’s and ST’s in government jobs, in 2000 the Constitution (81\(^{st}\) Amendment) Act which sought to end the 50 percentage ceiling on reservation for SC’s /ST’s and BC’s in backlog vacancies and in 2001, the Constitution (85\(^{th}\) Amendment) Act which extended the benefit of reservation in favour of SC’s/ST’s in matters of promotion with consequential seniority. It meant that the promotion will be given to these classes with retrospective effect from 1995 when the Constitution (77\(^{th}\) Amendment) Act was enacted. In 2007, all these constitutional amendments were upheld by a five Judge Bench (comprising C.J.I., Y.K. Sabharwal, K.G. Balakrishnan, S.H. Kapadia,

---

\(^{82}\) AIR 1993 SC 477  
\(^{83}\) Ibid at para 86  
\(^{84}\) Ibid at para 94 – A
C.K. Thakker and C.K. Balasubramaniyam JJ., in *M. Nagraj v. Union of India*.

The Court unanimously held that the above constitutional amendments by which Articles 16 (4 A) and 16 (4 B) have been inserted flow from Article 16 (4) and do not alter the basic structure of Article 16 (4).

**Judicial Restraint and Defection Provision** – *Kihota Hollohan v. Zachilhu and others* was another instance of judicial restraint when the Court exercised restraint in applying the theory of basic structure in invalidating a constitutional amendment. In *Kihota Hollohan*, the Supreme Court was asked to examine the constitutional validity of the Constitution (52nd Amendment) Act, 1985. The impugned amendment inserted the Tenth Schedule which contains deterrent provisions against defection of members of legislatures.

Clause 2 (1) (d) of the Tenth Schedule contained three disqualifications for defection by members of the House. Firstly, if a member gives up the membership of the political party on whose ticket he is elected to the House he loses his seat in the House. Secondly, if a member votes or abstinates from voting in the House against any direction of the political party or without the prior permission of such party, he loses his seat in the House unless it has been condoned by the party within 15 days from the date of voting or abstention. Thirdly, if any nominated member joins any political party after the expiry of six months from the date of joining the House. The second disqualification was held to violate the freedom of speech of the members of the Parliament under Article 105 (1) and the members of the State legislatures under

---

85 AIR 2007 SC 71
86 Ibid at para 122
87 (1992) 1 SCC 309
Article 194 (1) of the Constitution. “Clause (2) of each of the above articles confers immunity upon each member of the legislature from judicial proceedings in respect of anything said or any vote given by him in the House.” The parliamentary privilege of freedom of speech within the House was grossly violated by the Tenth Schedule when it curbed the freedom to vote within the House. It was asserted that the Tenth Schedule infringed the freedom to vote which was a concomitant of the freedom to free speech guaranteed by Article 105 (1) and Article 194 (1) of the Constitution. The theory of basic structure was put forward to support the contentions. “It was contended that since freedom of speech within the House was a part of the basic structure of the Constitution (52nd Amendment) Act in so far as it curtailed such freedom violated the basic structure of the Constitution and was therefore void.” The Court rejected the above contentions as it exercised restraint in invalidating the curbs imposed by the Tenth Schedule on the freedom to vote of the members within the House.

The Court, however, seems to be concerned about para 7 of the Tenth Schedule that made the Speaker’s or Chairman’s decisions final and excluded judicial review. The Court expressed an opinion that there was a possibility of anti-defection laws being misused by its presiding officers. As such, the Supreme Court struck down para 7 of the Tenth Schedule which provided that the Speaker’s or Chairman’s decision regarding defection shall be final and beyond the purview of judicial review as unconstitutional and void. In this regard the Court applied the

---

89 Ibid at p. 90
90 Ibid at p. 90
91 Kihota Hollohon vs Zachilhu and Others, (1992) 1 SCC 309, at para 3 and 32
theory of severability to strike down and sever para 7 from the rest of the Tenth Schedule. As observed by Prof. Sathe, the Court could have applied the theory of basic structure to invalidate para 7 of the Tenth Schedule either. The Court had upheld judicial review as part of the basic structure of the Constitution of India in *Nehru Gandhi v. Raj Narain* and also in *Minerva Mills v. Union of India*. The Court was of the opinion that since judicial review cannot be excluded from examining the validity of amendments under Article 368, it cannot be excluded from the Tenth Schedule. The Court managed to keep its power of judicial review intact. All this was possible because of the Court’s doctrinal activism and the application of the rule of law theory.

The basic structure theory was rejected by the Court in *Kihota Hollohan’s* case to uphold freedom of speech as a part of the basic structure of the Constitution. But the same Court upheld the same theory in *P.V. Narasimha Rao v. State* (CBI/SPE) to uphold freedom of speech within the House as a part of the basic structure. “This obiter came while deciding whether a member of the House could be prosecuted for taking a bribe for voting against a non-confidence motion moved against the Narasimha Rao government.” The Supreme Court by a 3:2 majority (comprising S.P. Bharucha, S. Rajendra Babu and G.N. Ray JJ.) has held that the scope of Article 105 (1) and 105 (2) are wide enough to confer immunity against

---

93 AIR 1975 SC 2299
94 AIR 1980 SC 1789
any criminal proceedings on a member who has accepted bribe but voted in the House. The immunity, however, does not extend to a member who has accepted bribe but not voted in the House.  

The freedom to vote was held to be concomitant to the freedom of speech within the House. Thus, the Court’s doctrinal activism was swayed by the judges personal preferences and predilections. The Court had at times overused and at times underused the doctrine of basic structure. “Such overuse as well as underuse of the doctrine is likely to delegitimize it.” The Court should not use the basic structure doctrine for trivial matters. Instead it must use it as a censor to check the Parliament’s constituent power in order to preserve the most enduring values of the Constitution.

**Judicialization of Presidential Power under Article 356**

The Court through its doctrinal activism based on rule of law not only reviewed the arbitrary laws passed by the legislature infringing the fundamental rights. But it also extended its power of judicial review to the arbitrary actions of the executive in the exercise of its constitutional power. Consequently, this has led to the judicialization of powers of the constitutional authorities. One such apt example of judicialization of constitutional power is the judicial review of the Presidential power under Article 356. “Such judicial activism has become a duty rather than an interference in the working of the other two organs of the Government”

This is because the Court remains as the main bulwark of Indian

---

98 AIR 1998 SC 2120 at para 134
99 S.P. Sathe, op. cit., p. 93
100 Asha Gupta, “Judicialization of Politics of Ram Janmabhoomi – Babri Masjid Controversy in India,” Indian Bar Review (IBR), Vol. 20 (2) 1993, pp. 31 – 52, p. 32
democracy and other organs of the state have not yet shown any promise of rejuvenation.\textsuperscript{101}

Some pertinent question arises in respect of judicial activism in curbing constitutional powers. Whether such power can be judicially reviewed? What is the need of such judicial review? As Lord Acton says, ‘Power corrupts, absolute power corrupts absolutely’. The problem with power is that it is an exercise of liberty and as such can be dangerous if exercised arbitrary. “Abuse of power by government may be designated ‘rule by law’, where laws are used as instruments of government policy. ‘Rule of law’ by contrast, is the use of law among other things, to curb the misuse of law – making power by government”\textsuperscript{102}

The term ‘law’ as defined in Article 13 (3) of the Constitution of India includes any ordinance, order, bye–law, rule, regulations, notification, custom or usage having the force of law. Since the Presidential order under Article 356 is included within the definition of ‘law’ as provided under Article 13 (3) of the Constitution hence judicial review of the Presidential order under Article 356 is constitutional. Article 356 empowers the President to declare a State emergency, on receipt of a report from the Governor of a State or otherwise on account of failure of constitutional machinery in States. However, this power is to be exercised by the President on the advice of the Prime Minister and the Council of Ministers.

\textsuperscript{101} S.P. Sathe, op. cit., p. xxxviii – xxxix, (Introduction to the Paperback edition)
\textsuperscript{102} R.W.M. Dias, \textit{Jurisprudence}, 5\textsuperscript{th} ed., 1\textsuperscript{st} Indian Reprint, (New Delhi: Aditya Books Private Limited, 1994), p. 87
Presidential Power under Article 356 – “Article 356 of the Constitution was most keenly discussed and debated in the Constituent Assembly.”

The Founding Fathers of the Indian Constitution apprehended that Article 356 would not only be misused but abused as well. In this regard, the instance of *S.R. Bommai v. Union of India*,\(^{104}\) case may be cited where the Executive’s hegemony under Article 356 was challenged. The judgment in *S.R. Bommai* was significant from two viewpoints. Firstly, it subjected the President’s action under Article 356 to judicial review. Secondly, it established secularism as a basic feature of the Constitution thus making it out of the reach of any possible amendment by the Parliament. When the concept of secularism was introduced in the Constitution through the Constitution (42\(^{nd}\) Amendment) Act, the Parliament did not make an attempt to define the meaning of ‘secularism’. It was understood as, ‘liberty of belief, faith and worship’ as declared in the Preamble. The Court has defined it as ‘Sarva Dharma Sambhav’ which meant ‘equal respect for all religions’.\(^{105}\) The different political parties in India understand ‘secularism’ according to the preferences of its party manifesto. The Congress says it is committed to secularism. “Even the BJP says that it is committed to secularism and criticizes the secularism of other parties as pseudo–secularism.”\(^{106}\) The Court’s declaration of secularism as a basic feature of the Constitution bars the political parties to toy with the concept of ‘secularism’.


\(^{104}\) AIR 1994 SC 1918: (1994) 3 SCC 1

\(^{105}\) In *Aruna Roy v. Union of India*, AIR 2002 SC 3176 at para 83

As regards Article 356, the Court assumed judicial review of the President’s power to declare a State emergency. Article 356 confers the President the power to proclaim a State emergency due to failure of constitutional machinery in states. The President could issue a proclamation either on receipt of a report from the Governor of a State or otherwise. The term ‘otherwise’ meant that the President can act even without the Governor’s report. Through a proclamation under Article 356, the President may:- (1) assume to himself all or any of the powers vested in or exercisable by the Governor to anybody or authority in the State; (2) declare that the powers of the Legislature of the State shall be exercised by or under the authority of Parliament; (3) Article 356, however, does not authorize the President to assume to himself any of the powers vested in the high court or suspend the operation of any of the provisions of the Constitution relating to the high court.

The President’s power under Article 356 was intended to be exercised with great caution and great restraint. “Dismissal of a state government elected for a term was supposed to be a rare phenomenon. One democratically elected government dismissing another equally democratically elected government is negation of democracy as well as federalism.”107 But to the contrary, Article 356 had been invoked by the Centre mostly for removing the governments of opposition parties.

In 1977, Article 356 was invoked by the ruling Janata Party at the Centre to dismiss nine Congress led State governments. Similarly, in 1980 Article 356 was invoked by the ruling Congress (I) Party at the Centre to dismiss nine Janata Party

107 Ibid at p. 149
led state governments. Although Article 356 was invoked even after the decision in Bommai case in 1994, Bommai did prevent the multiple toppling of state governments. “Bommai gave power to the courts to prevent the manifest abuse of Article 356.”\textsuperscript{108} It restrained the political parties from misusing Article 356.\textsuperscript{109} By questioning the constitutional validity of political decisions of the political parties, the Court ventured into the political thicket. As observed by Prof. Sathe, one may criticize the Court for acting politically in Bommai but one cannot deny that the Court’s politics has helped the politics of governance become more principled and democratic.\textsuperscript{110}

Again, in 1992 multiple dismissals of state governments again took place after the Babri Masjid demolition at Ayodhya. On December 6, 1992 the Babri Masjid at Ayodhya was demolished by the karsevaks (volunteers) of the Vishwa Hindu Parishad and Bajrang Dal. It was contended that the demolition was done with the aid and encouragement of the BJP state government in Uttar Pradesh. Soon after the demolition, Mr. Kalyan Singh, the Chief Minister of Uttar Pradesh resigned. The President, acting on the advice of the council of ministers dismissed the BJP governments in the states of Madhya Pradesh, Rajasthan and Himachal Pradesh. Earlier three non – Congress state governments in Karnataka, Meghalaya and Nagaland had been dismissed under Article 356 for different reasons. Chief Minister S.R. Bommai of Karnataka filed a petition in the Karnataka High Court against the dismissal of his government. Subsequently, other state governments and

\textsuperscript{108} Ibid at p. 157
\textsuperscript{109} Ibid at p. 158
\textsuperscript{110} Ibid at p. 158
the three BJP governments that were dismissed also filed petitions against their dismissal. All cases of dismissal of state governments under Article 356 were jointly addressed in an appeal before the Supreme Court in *S.R. Bommai v. Union of India*\(^{111}\). Bommai case was heard by a nine–judge Constitution Bench. A majority of six judges against three held that the dismissal of the governments of Karnataka, Meghalaya and Nagaland was unconstitutional and void. “However, since fresh elections in the states had already been held and new governments had been installed the Court chose not to disturb the new arrangement.”\(^ {112}\) But the Court dismissed such view as a precedent for the future. The Court held that if the dismissal is found to be illegal then it can revive the dissolving Assembly.

In this regard Justice P.B. Sawant observed:

> “There is no reason why the Council of Ministers and the Legislative Assembly should not stand resorted as a consequence of the invalidation of the Proclamation, the same being the normal legal effect of the invalid action.”\(^ {113}\)

Similar observations were made by the Pakistan Supreme Court in *Mian Muhammad Nawaz Sharif v. President of Pakistan and others*\(^ {114}\). In *Mian Muhammad Nawaz Sharif*, the Pakistan Supreme Court not only declared President Gulam Ishaque Khan’s order dismissing the Nawaz Sharif government and dissolving the National Assembly under Article 58 (2) (B) of the Pakistan Constitution as unconstitutional and illegal. But it also showed considerable courage in setting aside the arbitrary presidential order. It is assumed that the

\(^{111}\) AIR 1994 SC 1918  
\(^{113}\) AIR 1994 SC 1918 at para 73, p 1984  
\(^{114}\) (1993) PLD SC 473
learned Judge P.S. Sawant had relied upon the decision of the Pakistan Supreme Court.

**Independence of Judiciary and Rule of Law**

Once rule of law was established as a basic feature of the Constitution it became the primary principle for asserting the independence of judiciary. In *S.P. Gupta v. Union of India*, a seven member bench of the Supreme Court of India while delivering the judgment adopted an activist attitude in asserting its independence for upholding the rule of law as a principle running through the entire fabric of the Constitution. In this regard the judges have raised an opinion regarding the dependence of rule of law on the independence of judiciary for its sustenance.

As per Justice Bhagwati:

“The principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values... The judiciary has therefore a socio – economic destination and a creative function. If there is one principle which runs through the entire fabric of the Constitution it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective.”

Justice Bhagwati further adds:

“Judges should be of stern stuff and tough fibre unbending before power, economic or political, and they must uphold the core principle of the rule of law which says “Be you ever so high, the law is above you.” This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of

---

115 AIR 1982 SC 149  
116 Ibid at para 26
social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution.”

Similar views were expressed by Justice Venkataramiah:

“It is important to bear in mind that the independence of the judiciary is one of the central values on which our Constitution is based ... In all countries where the rule of law prevails and the power to adjudicate upon disputes between a man and a man, a man and the State, a State and a State, and a State and the Centre is entrusted to a judicial body, it is natural that such body should be assigned a status free from capricious or whimsical interference from outside and the judges who constitute it should be granted a security of tenure that lifts them above the fear of acting against their conscience.”

Prof. Sathe also believes that the independence of the judiciary is doubtless a condition precedent for the existence of the rule of law and every citizen’s life and liberty is secure only when there is rule of law. Thus, independence of judiciary, rule of law and fundamental rights are inter–dependent on each.

If independence of judiciary is safeguarded, rule of law and fundamental rights are consequently safeguarded. The decision in S.P. Gupta v. President of India marks the beginning of litigations that question government lawlessness and abuse of power. In S.P. Gupta, the Court recognised the right to an independent judiciary as a concomitant of the right to honest and efficient governance. “The

---

117 Ibid at para 26
118 Ibid at para 105
120 AIR 1982 SC 149
121 S.P. Sathe, loc. cit.
members of the constituent assembly had also envisaged the judiciary as a bastion of rights and of justice”.\textsuperscript{122}

**Accountability of Judiciary** - The Court’s doctrinal activism based on rule of law has made the legislature and the executive accountable for its actions. Pertinent questions then arises regarding its own accountability. To whom the judiciary is accountable? Why it should be made accountable? The judiciary cannot ignore its accountability and act like a big brother. Since there is a limited government the judiciary like the other two organs are accountable to the Constitution and its people.

Independence of judiciary had been a major issue concerning a judiciary since it concerned security of tenure, salary, appointment process and the ability to act without fear or favour. No doubt, the importance of these matters continues but one cannot ignore the increasing emphasis on the principles of judicial accountability.\textsuperscript{123} Today, there is an emphasis on the increased scrutiny of the judiciary generally as a body and of the conduct of its members as individuals.\textsuperscript{124} Thus, the principles of judicial accountability revolve around two aspects: - (1) Institutional accountability as well as (2) individual accountability. The demand for evolving the principles of accountability has become louder in commonwealth nations. Most of the commonwealth countries have not yet developed the principles of judicial accountability. India is no exception. In India, judicial accountability has

\textsuperscript{122} Granville Austin, *The Indian Constitution – Cornerstone of a Nation*, 16\textsuperscript{th} impression, (New Delhi: Oxford University Press, 2011), p. 175

\textsuperscript{123} Cyrus Das & K Chandra (eds.), *Judges and Judicial Accountability*, 2\textsuperscript{nd} Indian Reprint, (Delhi: Universal Law Publishing Co. Pvt. Ltd., 2005), see p. v (preface)

\textsuperscript{124} Ibid at p. vi (preface)
to be developed from two perspectives. Firstly, accountability of the judiciary in the performance of its functions. Secondly, accountability of the members of the judiciary on the grounds of misbehaviour or misconduct.

**Judicial Accountability and Judicial Delays in disposal of cases:**

Questions have been raised regarding the accountability of the judiciary as an institution. The waning confidence in the judiciary as an institution is due to the inordinate delay in the disposal of cases.\(^{125}\) At a recent Chief minister’s conference in Delhi, the Prime Minister, Manmohan Singh expressed concern that the biggest challenge before the judiciary was the disposal of a huge backlog of cases. The pending cases as on 31-03-09 in the Supreme Court amount to 50,160 in the High Courts to 39,55,224 cases and in the District and subordinate Courts to 2,67,52,193.\(^{126}\) Such a huge data of pending cases negates the right to speedy trial guaranteed as a fundamental right under Article 21.

Though alternative mechanisms like Lok Adalats, evening courts in some states have been tried but were soon found to be cosmetic and insufficient in dealing with the large disposal of cases.\(^{127}\) The former Chief Justice of India, K. G. Balakrishnan feels that the judges should strive more to clear the backlog of cases. This is particularly true when the higher judiciary goes on long vacations and holidays. The Supreme Court goes on summer vacations for seven weeks and a week each for Dussehra, Diwali, Holi, Christmas and New Year in addition to the

---

\(^{125}\) “Lords on trial”, *India Today*, 7 Sept, 2009, p. 25

\(^{126}\) Source: Supreme Court of India cited in the article ‘Lords on trial’.

\(^{127}\) K. G. Balakrishnan, former Chief Justice of India in an interview titled, “We are ready for a wider body for judicial appointments,” in *India Today*, Sept 7, 2009
normal weekends. A Law Commission report has suggested the curtailment of vacations in the higher judiciary by at least 10 to 15 days and the extension of the Court’s working hours by at least half an hour.\textsuperscript{128} Such a suggestion has come in the wake of the recent hike in the salaries of the judges by the Parliament. “The Commission states that with an increase in salaries and perks of the judges, it is their moral duty of the judiciary to respond commensurately”.\textsuperscript{129} The need to achieve judicial accountability is best described by Justice Michael Kirby of Australia in the following words:

“Judges are the essential equalizers; they serve neither majority nor any minority either. Their duty is to law and to justice. They do not bend the knee to governments, to particular religions, to the military, to money, to tabloid media or to the screaming media. These are words that should fasten on to the hearts and minds of all judges and lawyers and all those concerned with the administration of justice”.\textsuperscript{130}

**Judicial Accountability and Judicial Corruption** – Judges like Caesar’s wife should be above suspicion. Recent incidents of corruption in the Indian judiciary have revealed that the Indian judiciary is not above suspicion. Disturbing trends of corruption among the judiciary is worldwide. As observed by Justice Clifford Wallace, “Judicial corruption certainly exists; I know of no country that is completely free of corruption; with its insidious effect of undermining the rule of

\begin{itemize}
\item \textsuperscript{128} “Lords on trial”, India Today, 7\textsuperscript{th} Sept. 2009, p. 26
\item \textsuperscript{129} Ibid at p. 26
\end{itemize}
The challenge is therefore to eradicate judicial corruption through judicial accountability but without compromising judicial independence.

The problem of achieving judicial accountability without compromising judicial independence has also come up as a challenge in the Indian judiciary. Questions like, “Who will watch the watch-dog?” or “Who will tame the Uncle Judges?” reveals the fact that this is an area where even angels fear to tread. Transparency International, in its Global Corruption Report, 2007 released on May 25, 2007 came out with a shocking revelation that the estimated amount paid in bribe to the lower judiciary in India during 2006 was around Rs. 2,630 crore. Of late, growing allegations of corruption in the higher judiciary have emerged as a disturbing concern, which, if left unaddressed, could erode public faith in the justice delivery system.

Unfortunately, the mechanisms provided either under the Constitution or any other law have proved to be insufficient in disciplining the higher judiciary. It happened in the case of K. Veeraswami, a former judge of the Madras High Court who was prosecuted under the Prevention of Corruption Act, 1946 for financial gains. He fought his case in 1991 in the Supreme Court which held that a sanction from the Chief Justice was needed before a criminal case could be registered against a judge. A charge framed under the Prevention of Corruption Act, 1946 without the prior approval of the Chief Justice of India lacked the force to

---

131 Quoted in Cyrus Das and K. Chandra (eds. ), op cit., p. next page to cover
132 Ranen Kumar Goswami, “When the judge courts corruption,” The Assam Tribune, 9 Mar., 2009
133 “Watch the Watchdog,” The Assam Tribune, 22 Nov., 2008
prosecute a judge charged with corruption. The Constitution of India provides for removal of a judge by way of impeachment on the grounds of proved misbehaviour or incapacity.\textsuperscript{135} The instance of Justice V. Ramaswamy shows that the constitutional mechanism of impeaching a corrupt judge may fail in the absence of the support of a two-third majority in the Parliament. V. Ramaswamy, the son-in-law of V. Veeraswami was the first judge to face impeachment for financial irregularities committed during his term as a Punjab and Haryana High Court judge. But he got away with impeachment as the Congress MPs sitting in opposition completely abstained from voting in the Tenth Lok Sabha. The constitutional provisions of impeaching an errant judge can thus fail by political manipulations.

During the recent times, corruption in the judiciary is at an all time high as stories of judicial misconduct continue to tumble out of judicial cupboards.\textsuperscript{136} In 2002, at least thirty-four sitting judges from all the three tiers of the Uttar Pradesh judiciary came under scanner for their alleged involvement in the Ghaziabad Court employees provident fund scam. The investigation against the erring judges is on. Of late, the two developments that have embarrassed the country’s higher judiciary are the cash-for-judge scam and the misappropriation of money by a High Court judge. In the cash-at-judge door scam, Justice Nirmal Yadav, a sitting judge of Punjab and Haryana High Court was relieved from judicial work after her name was involved for a receiving a bag of Rs. 15 lakhs. The bag containing Rs. 15 lakhs was mistakenly delivered at the residence of Justice Nirmaljit Kaur, another sitting judge of the Punjab and Haryana High Court. Now, Justice Nirmal Yadav had asked the

\textsuperscript{135} Article 124 (4) (5) of the Constitution of India
\textsuperscript{136} “Lords on trial,” \textit{India Today}, 7 Sept. 2009, p.21
Chief Justice of India to take her back to work “as nothing has been proved”. The second incident involves Justice Soumitra Sen of the Calcutta High Court who was held guilty of criminal misappropriation when he was an advocate and appointed receiver in a lawsuit. Thereafter he became a judge of the Calcutta High Court. On receipt of a report from the Chief Justice of the Calcutta High Court, the Chief Justice of India had recommended the Prime Minister for removing Justice Sen from office. The proposal to impeach Justice Sen is yet to materialize. The errant judge had rejected the advice to resign or seek voluntary retirement after he was found guilty of misconduct. Recently Justice Sen resigned before he faced the Lok Sabha proceedings for impeachment.

Corruption, land-grabbing charges and abuse of judicial office are among the sixteen charges framed against Justice P.D. Dinakaran currently facing removal proceedings in the Parliament. Justice Dinakaran as Chief Justice of the Karnataka High Court was recommended for being appointed a Supreme Court judge in August. 2009. But after the land grabbing allegations were levelled, he went on leave and his elevation was stopped. Thereafter he was shifted to the Sikkim High Court as Chief Justice. At present, he is functioning in his new capacity. The impeachment proceedings against Justice Dinakaran are also yet to materialize. It is feared that the impeachment proceedings against Justice Dinakaran may meet the same fate as that of Justice K. Ramaswamy.

Hardly had the dust settled, allegations of corruption are now chasing another judicial personality who was no less than the Chief Justice of the highest

---

137 “Corruption, Land-grab charges slapped on Justice Dinakaran,” The Hindu, 19 Mar., 2011
Court of the land till the other day. Justice K. G. Balakrishnan who retired as the Chief Justice of India on May 12, 2010 is currently facing changes for favouring his next kith and kin. This is not the first instance where the Chief Justice of India is facing charges of corruption either for his personal benefit or for favouring his next kith and kin. A former Chief Justice of India was accused of getting special treatment for his daughter, a practicing lawyer in the Supreme Court during his tenure as the Chief Justice of India. Another Chief Justice of India was accused of using his position as the CJI to get the subordinate judiciary to rule in favour of his mother-in-law in a suit that had been barred by limitation for decades. Similarly another Chief justice of India faced allegations of delivering orders against the principles of natural justice and also for furthering business interests of his family. No charges were, however, proved in any of the above instances.

“When the robed brethren break the code of correct conduct or rob the rule of law of its efficacy, sanctity and majesty, they too must be subject to severe discipline and punitive action in case of delinquency and aberration”. Since the mechanisms available for disciplining the erring judges have proved to be fallacious, it was suggested that to cure the cancerous growth of corruption in the higher judiciary, the judges of the Supreme Court and High Courts disclose their financial assets. The elected MLAs and MPs are under an obligation to make public their assets. The refusal by the higher judiciary for not veering abound to the idea

---

of putting their assets in the public domain has invited severe criticism from all quarters.

Such refusal is contrary to a resolution passed at the Chief Justices conference at New Delhi on September 18-19-1992. The resolution sought to establish guidelines and convention reflecting the high values of judicial life to be followed by the judges. A Full Court meeting of the Supreme Court adopted it on May 7, 1992 to serve as a guide to be observed by judges.

**Disciplining Judges through the Right to Information Act 2002:** When an attempt was made to bring the judiciary within the purview of the Right to Information Act, 2002, the judiciary voiced strong oppositions against it. Former Chief Justice of India, K. G. Balakrishnan went to the extent of saying that since the CJI is not a constitutional authority it does not come within the purview of the RTI Act.\(^{140}\) The contentions of the CJI was, however, rejected by a parliamentary committee headed by E. M. Sudarsana Natchiappanan on 29 April, 2008.\(^{141}\) The Committee held that the judiciary comes under the purview of the Right to Information law with regard to all activities of administration except “judicial decision making”. Interpreting section 2(h) of the RTI Act, the Committee said that from the definition of ‘public authority’, it is clear that all the constitutional authorities come under the definition of ‘public authority’. That all the wings of the State – executive, legislature and judiciary are fully covered under this Act since all

---

\(^{140}\) “CJI says judges are not bound to disclose their wealth,” *The Assam Tribune*, 17 Jan. 2010, p. 10

\(^{141}\) Ibid
organs of the State are accountable to the citizens of India in a democratic state. The judiciary cannot immunize itself from judicial accountability under the RTI Act.

**Disciplining Judges through the Judicial Standards and Accountability Bill**

- The constitutional shortcomings to impeach a judge of the higher judiciary and the inefficiency of the Judges (Inquiry) Act, 1968 and the Judges (Inquiry) Rules, 1969 has called for alternative mechanisms to discipline the erring judges of the higher judiciary. The Judicial Standards and Accountability Bill which has been tabled in the Lok Sabha on Dec. 2, 2010 seeks to provide an alternative answer to the problem. The Bill provides a mechanism to deal with complaints against judges of the high court and the Supreme Court. The Bill also seeks to replace the Judges Inquiry Act, 1968 but retain its basic features. The Bill contemplates setting up of a National Oversight Committee with which public can lodge complaints against erring judges including the Chief Justice of India and the Chief Justices of the high courts. The Bill also mandates the judges of the high courts and the Supreme Court to declare their assets and liabilities including those of their spouses and dependants.

“The frequent reports of acts of impropriety by some of the most senior judges should persuade the judiciary to take steps to improve its image and restore its credibility among the people.”

The judiciary need not depend upon any legislation to enforce discipline among its robed brethren.

Highlighting serious lacunae in the proposed judicial standards and Accountability Bill, 2010, the former Chief Justice of the Delhi and Madras High

---

Courts, Ajit Prakash\textsuperscript{143} has cautioned that the measure was an example of a cure being worse than the disease. It would undermine the independence of the judiciary.

\textbf{Judicial Independence and Judicial Accountability are Interrelated} - In the face of the harm caused by judicial corruption, some questions why judicial independence should create a barrier to any potentially effective means of ensuring judicial accountability.\textsuperscript{144} The cause of judicial independence cannot be dismissed. "An independent judiciary is an indispensable requisite of a free society under the rule of law. Such independence implies freedom from interference by the executive or the legislature in the exercise of the judicial function but it does not mean that the judge is entitled to act in an arbitrary manner."\textsuperscript{145} "Indeed, independence of judiciary is a vital component of a judge’s accountability since a judiciary which is not truly independent, competent or possessed of integrity would not be able to give any account of itself."\textsuperscript{146} Hence, the principles of judicial accountability must be developed consistent with the principles of judicial independence.\textsuperscript{147}

In India, the method of evolving the principles of judicial accountability consistent with judicial independence has raised a problem. Today it is the method of appointments to the superior judiciary and the absence of any disciplinary control

\textsuperscript{143} "Justice Shah: Judicial Accountability Bill cure worse than disease," The Hindu, 10 Nov. 2010, p. 9
\textsuperscript{145} R. F. V. Heuston, Essays in Constitutional Law, 2\textsuperscript{nd} ed., (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2\textsuperscript{nd} Indian Reprint 2011), pp. 52 -53
\textsuperscript{146} Justice Tan Mohammed Dzaiiddin Abdullah, “Welcome Address,” in Cyrus Das & K. Chandra, op. cit., p. 7
\textsuperscript{147} Justice Tan Dri Datuk Steve Shim Lip Kiong, Chief Justice, Sabah & Sarawak, “Closing address,” in Cyrus Das & K. Chandra, op. cit., p. 10
including removal of a judge of a superior court which has raised problems of accountability.\textsuperscript{148} This is because the Supreme Court of India through judicial activism has become the appointing authority of judges of superior courts. At the same time the only constitutional method of disciplining a judge of a superior court through removal for his proved misbehaviour by the Parliament has not only proved to be unwieldy but also politicized as in the instance of V. Ramaswamy.\textsuperscript{149} In absence of an alternative method for disciplining a judge of a superior court either for misconduct or misbehaviour has only aggravated the problem. Consequently, today the Indian judiciary with the Supreme Court at its head and eighteen high courts in the State is arguably the most powerful judiciary in the world.\textsuperscript{150} The power and esteem enjoyed by the Indian higher judiciary, however, does not match the accountability mechanisms. Nevertheless the judiciary did strengthen its independence through judicial activism. This it did through its decisions in three main cases popularly known as the \textit{First, Second} and \textit{Third Judges} cases.


Till 1982, the government played a decisive role in the selection and appointment of judges. It was supposed that the government’s discretion in appointing the judges was unfettered.\textsuperscript{151} In \textit{S.P. Gupta v. Union of India},\textsuperscript{152} a five

\begin{itemize}
  \item T.R. Andhyarujina, “\textit{Judicial Accountability: India’s Methods and Experience,}” pp.101-130 in Cyrus Das & K. Chandra, op. cit., p. 101
  \item Ibid
  \item Ibid
  \item AIR 1982 SC 149
\end{itemize}
judge bench of the Supreme Court considered the method of appointment of judges of the Supreme Court and high court under Article 124 (2) and Article 127 (2) of the Indian Constitution. The Court while aware of the necessity of independence of judiciary as a basic feature of the Constitution held that the ultimate power to appoint judges vested solely and exclusively in the Executive.\textsuperscript{153} The power of the Executive was, however, subject to full and effective consultation with other constitutional functionaries mentioned in Article 124 (2) and Article 217 (1) which included the Chief Justice of India.

The Court refused to hold the expression ‘consultation’ meant ‘concurrence’. The majority through Justice Bhagwati expressed that if consultation meant concurrence that would enable the view of the Chief Justice of India to prevail over the view of the Government.\textsuperscript{154}

According to Justice Bhagwati, such a procedure had not been contemplated under the Constitution. The Court’s view was completely in tune with the intention of Dr. Ambedkar, the Chairman of the Drafting Committee of the Constituent Assembly. Dr. Ambedkar suggested that it is a dangerous proposition to give primacy to the opinion of judiciary.\textsuperscript{155} The Court, however, subjected the decision of the Central Government to challenge if it was based on malafide and irrelevant considerations or when the constitutional functionaries expressed an opinion against the appointment. The reason cited for giving primacy to the opinion of the

\textsuperscript{153} T.R. Andhyarujina, “Judicial Accountability: India’s Methods and Experience,” pp. 101-130 in Cyrus Das and K. Chandra, 2\textsuperscript{nd} ed., (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2\textsuperscript{nd} Indian Reprint 2005), p. 113

\textsuperscript{154} In S. P. Gupta v. Union of India, AIR 1982 SC 149

\textsuperscript{155} T.R. Andhyarujina, “Judicial Accountability: India’s Methods and Experience”, pp. 101-130 in Cyrus Das and K Chandra (eds.), Judges and Judicial Accountability, 2\textsuperscript{nd} ed., (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2\textsuperscript{nd} Indian Reprint 2005), p. 113
executive in the appointment of judges was that the executive was responsible to the legislature and through the legislature it was accountable to the people who were consumers of justice. In this regard Justice Bhagwati speaking for the majority observed:

“This is, of course, not an ideal system of appointment of Judges, but the reason why the power of appointment of judges is left to the executive appears to be that the executive is responsible to the legislature and through the legislature, it is accountable to the people who are consumers of justice.”\textsuperscript{156}

\textbf{The Second Judges case} – \textit{Supreme Court Advocates on Record Association v. Union of India} - Judicial independence enhanced with judicial accountability.

Since 1982, there was no substantial evidence to prove that the executive had misused its power of appointment which was feared in the \textit{First Judges} case\textsuperscript{157}. There was also no evidence to prove that there was any threat to the independence of judiciary. But still apprehensions were raised regarding the primacy of the opinion of the executive in the matter of appointment of judges. Ten years later in \textit{Supreme Court Advocates on Record Association v. Union of India} \textsuperscript{158} a larger bench of nine judges was constituted to consider the correctness of the \textit{First Judges} case which had held that the opinion of the Chief Justice did not have any primacy in judicial appointments. The \textit{Second Judges} case not only overruled the majority view in the \textit{First Judges} case but also held that the concurrence of the Chief Justice was necessary for selecting judges. The \textit{Second Judges} case also created a judicial

\textsuperscript{156} In \textit{S. P. Gupta v. Union of India}, \textit{AIR} 1982 SC 149 at para 29

\textsuperscript{157} Ibid

\textsuperscript{158} (1993) 4 SC 441: \textit{AIR} (1994) SC 268
collegium comprising of the Chief Justice and his two senior colleagues for selecting fresh appointees which was subsequently enlarged by the Court in the Third Judges case.

The majority judges viewed that the Chief Justice of India would be the best constitutional functionary to assess the merits of a candidate and that such assessment was also necessary to eliminate political influence in the appointment of judges. The opinion of the Chief Justice was given primacy which was, however, required to be formed after taking into account the views of two of his senior colleagues who were required to be consulted by him in the formation of his opinion.

Dismissing the majority view in the First Judges case that the executive should have primacy since it is accountable to people while the judiciary had no such accountability, the majority view in the Second Judges case held:

"... an easily exploded myth, a bubble which vanishes on a mere touch. Accountability of the executive to the people in the matter of appointments of superior judges has been assumed, and it does not have any real basis."

The Second Judges case no doubt ensured judicial independence but it also enhanced judicial accountability in the appointment of judges.

---


160 In Supreme Court Advocates on Record Association v. Union of India, para 478
The Third Judges Case – Presidential Reference 161

After the decision in the Second Judges case, it was presumed that the Chief Justice and the collegium of two senior-most judges of the Supreme Court would act collectively. That the Chief Justice would consult his senior most colleagues and his recommendation would generally be acceptable and not controversial. 162 But the recommendations for appointment of judges made by Chief Justice Punchhi during his eight months tenure as the Chief Justice of India proved otherwise. The recommendations were found to be controversial as the Chief Justice had not consulted the collegium of two senior most judges as required by the Second Judges case. It was a clear case of judicial independence without judicial accountability. It was also a case whereby the judiciary increased its power but denied responsibility. “It was even feared that a Bench of the Supreme Court constituted by the Chief Justice could issue a mandamus on the government to appoint a judge recommended by him.” 163 In order to avoid the tension created within the judiciary, the Central Government in July 1998 made a reference to the Supreme Court of India under Article 143 (1) seeking its advisory opinion in this regard. Nine questions were referred to a nine judge bench of the Supreme Court which unanimously held that the recommendation made by the Chief Justice of India without following the consultation process as required by the Second Judges case is not binding on the Government. The Chief Justice of India before making his recommendation was required to consult his two senior most colleagues in case of appointment of judges to the Supreme Court and in case of appointment of judges to the high court, his

161 AIR 1999 SC I
162 T.R. Andhyrujina, op. cit., p. 117
163 Ibid at p.117
four senior most colleagues. Ironically, the *Third Judges* case diluted the primacy given to the opinion of the Chief Justice of India by a requirement of consensus from the collegium of four senior most colleagues. The *Third Judges* case has now placed the primacy on the collegium system.

Analysis of the *Second* and the *Third Judges* case will reveal that the judiciary in its zeal to secure its independence has created more problems than solutions. In the name of securing the independence of the judiciary, the Court has re-written the provisions of the Constitution for the appointment of judges. A remarkable feature of the *Second* and *Third Judges* case is the Government’s willing acceptance of the judgments and the surrender of its own power to the judiciary regarding the appointment of judges. Mr. A.K. Ganguly, who appeared as amicus curiae in a recent petition filed for revisiting the 1993 nine-judge judgement has said: “The 1993 decision needs to be reconsidered as the procedure adopted for appointment of judges therein is unworkable under the democratic set-up of India. It is also contrary to the constitutional foundation of democracy, separation of powers and checks and balances.” The judgement in the *Second Judges* case and the *Third Judges* case has come to be perceived as encouraging lack of accountability in the collegium system for appointment of judges. The in-house procedure followed by the judiciary lacks transparency as well as accountability.

---

164 Ibid at p. 118
165 Ibid at p. 120
166 “Collegium system of judges appointment to be revisited,” *The Hindu*, 5 Apr. 2011
“This situation is not happy because a veto power in the hands of the Chief Justice and his collegium could also be detrimental to the independence of the judiciary.”

Concluding Observations

The Court’s doctrinal activism was based on the concept of rule of law. Through such activism the Court made the legislature and the executive accountable for its actions through the principle of non-arbitrariness and the theory of basic structure. Sometimes there was an judicial overreach in the application of the principle of non–arbitrariness. Similarly there was judicial activism as well as judicial restraint in the application of the theory of basic structure. In the name of securing independence, the judiciary, however, lacked accountability either for the charges of corruption or for the disposal of cases or even in the matter of appointment of judges of the higher judiciary. Such lack was felt in the absence of effective mechanisms for enforcing judicial accountability. Principles of judicial independence have to be developed in consistent with the principles of judicial accountability. This is because only an independent judiciary can be made an accountable judiciary.

“Judicial activism may not be necessary in nations that have a proper administrative system and where the rule of law is implemented successfully.”

Unfortunately this is not the case in India where the judiciary is looked upon as the

---

168 Amit Banerjee, “Judges not emperors,” The Telegraph, Guwahati, 13 December 2007, page 6, (See Letters to the Editor)
only hope for delivering justice in a country and where the executive and the legislature often fail to uphold the interests of the public.

Judicial activism based on rule of law, is thus, justified. According to Soli J. Sorabjee, former Solicitor General of India, “The Rule of Law runs like a golden thread in our Constitution which in several articles emphasizes the necessity of a law.”

The Supreme Court of India through its several activist judgments has given effect to the doctrine of the rule of law embodied in these several articles.

***************

---