SCOPE FOR ‘JUDICIAL ACTIVISM’ UNDER THE SCHEME OF INDIAN CONSTITUTION

5.1 BACKGROUND

The term ‘Judicial Activism’ is commonly understood as being a mere extension of the power of ‘Judicial Review’ in some intellectual quarters. This is inferable from the very work of Professor Sathe in his celebrated book Judicial Activism in India where he introduces the work as being “a monograph about judicial review and its role in democracy”\textsuperscript{320} Emphasizing the traditional role of judiciary under the Indian Constitution and the manner in which the power of ‘judicial review’ was exercised by the erstwhile judges; Sathe elaborates as to how the judiciary gradually started gaining more and more momentum over a period of time. He calls such gaining of momentum as “Searching Judicial Vigilance” and further defines it as ‘Judicial Activism’\textsuperscript{321} He is also of the view that ‘Activism’, however, can easily transcend the border of judicial review and turn into populism and excessivism\textsuperscript{322}. This makes the present chapter relevant in the scheme of this work, as it offshoots the need to actually ascertain the limits within which the power of ‘Judicial Review’ must be exercised in order to maintain harmony between the judicial organ of the state on the one hand and the other two co-equal organs of the state on the other.

The term ‘Judicial Activism’ has no unanimously agreed definition amongst the authorities as it is understood differently in different spheres, depending upon individual view point. Professor Baxi rightly points out that there can be no objective definition of whether or not a decision is an instance of ‘Judicial Activism’. According to him\textsuperscript{323}:

Judges are evaluated as activists by various social groups in terms of their interests, ideologies and values…..Quite often, the label is attached to a judge who himself may not consider him as an activist.

\textsuperscript{320} See S.P.Sathe, Judicial Activism in India 1 (2002).
\textsuperscript{321} Id. at 4.
\textsuperscript{322} Id. at 100.
\textsuperscript{323} See UpendraBaxi, Courage, craft, & Contention 3 (1985).
Sathe’s approach is persuasive in Indian context and holds the field since judiciary enjoys ample powers under the auspices of ‘Judicial Review’ under the constitutional scheme. Being the final interpreter of the Constitution, it can be rightly said that judiciary itself is the body that decides the limits of its power. Interestingly, it has taken a long arduous way in crystallizing such powers often resulting in ‘activism’ and ‘overreach’ since the making of the Indian Constitution till date and the process remains ongoing. The best illustrative example that reveals the height of this process is *Keshavanand Bharti v. State of Kerala*\(^{324}\) case. Further, innovations in the field of Public Interest Litigations (PIL) also signify the courage of conviction and the courage of confusion through which the Supreme Court of India has transformed itself into a Supreme Court for Indians\(^{325}\). However, the issue which still remains unanswered is: What is the limit of the power of ‘Judicial Review’? And how far can the judiciary claim power under the given constitutional scheme? These are certain questions that the present chapter undertakes and attempts to investigate.

In doing so, it is utmost important to first look at the parameters of the said power as can be evidenced from the trends of judicial behaviour, Especially the ones where judiciary is said to have ‘behaved’ in an activist manner. Though the list is not exhaustive, however, the following functional parameters can be listed\(^{326}\).

a. While interpreting the meaning and scope of a statutory provision or the statute itself made by a competent legislature.

b. While maintaining the balance between a federation and its federating units or among the units per se.

c. While upholding the supremacy of the Constitution when such a question has been brought before it in an adversarial system of justice.

d. While protecting the fundamental rights and freedoms of the citizens and non-citizens, if they are guaranteed by written constitution.

e. While dealing with institutional conflicts, viz. the conflicts between the legislature & judiciary or executive and judiciary; and

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324 AIR 1973 SC 1461.
f. While interpreting the Constitution itself with due regard to the intention of the framers of the Constitution etc.

Within the main frame of these enlisted parameters, this chapter further attempts to understand the nature and the legitimate extent of powers possessed by the Indian judiciary. Before doing so, it is worth having a lucid understanding of the position of judiciary under the constitutional scheme of India.

5.2 ROLE OF JUDICIARY

Our Founding Fathers while drafting the Preamble gave precedence to Justice over Liberty, equality and fraternity by placing these philosophical terms in that particular order. Unless there is justice, liberty is meaningless. Justice and liberty together secure equality. There can be no fraternity unless there is justice, liberty and equality. In the chain of philosophical thoughts underlining the Constitution, the most significant is the concept of Justice. Duly honouring justice lays the foundation for the welfare and progress of society. It holds civilized beings and civilized nations together. In this scheme of things the role of judiciary becomes very important.

Role of judiciary has always been to deliver justice to the matters which are brought in front of it. Conventionally this role was perceived as to deliver justice by strictly following the laws in vogue. But fulfilment of the promise given in preamble to secure Justice (social, economic and political) to all its citizens was not possible by the judiciary while strictly following its conventional role of interpreting law as legislated. It required a broader interpretation by judicial creativity and judicial activism to bring a social change keeping public interest in view. The judiciary has played a crucial role in evolving itself from its conventional role of interpreting the statute as legislated to the enhanced role of delivering justice to the masses by creative interpretation of the existing law and in absence of it making law to meet the needs of the society. In this process judiciary created a Magical Wand named Public Interest Litigation for delivering justice to the backward, poor, denied, downtrodden, destitute, deprived, depraved, disadvantaged handicapped, have-nots, half hungry, half clad millions, ignorant, illiterate, indigent, incapable, little Indian, lost and lonely, unaware, forlorn, forgotten, exploited, lowly and lost, weak, vulnerable and underprivileged class of society.
5.2.1 CONVENTIONAL ROLE OF JUDICIARY

Since the time of its inception the role of judiciary is to deliver justice in the matters which are brought before it. Conventionally the role of judiciary was taken as to deliver justice by following the laws in vogue. In the traditional concept of judiciary, the judge is depicted by an image, where the eyes of the judge are covered by dark cloth with hands holding the balance. This obviously means that the judges are supposed to have a very open mind on every issue with the eyes closed i.e. without having any personal opinions at all. Further, this also implies that the judges would not allow themselves to be influenced by the events happening around them. Traditionally, it was thought that the judges should live in some sort of isolation, so as to preserve a mind that will be open and remain unprejudiced under any circumstances.

The traditional paradigm of the adversarial judicial process was designed for adjudication of disputes between private parties over contracts or civil liberties, property or matrimonial affairs. It was based on the following hypothesis:

(1) People were supposed to know the law and their rights, and
(2) The judicial process was the least desirable method of settling disputes and had to be used only when other methods such as inter party settlement, conciliation, or mediation did not work. The traditional legal theory of judicial process envisioned a passive role of courts. It postulated that:
   a. The courts merely found the law or interpreted it but did not make it.
   b. If they made the law, they did so only to fill in the vacuum left by the statute and only to the extent necessary for the disposal of the matter before them.

As per doctrine of Separation of Powers, the legislative organ of the state makes the law, the executive enforces them and the judiciary applies them to specific cases arising out of the breach of law. In other words the judiciary is assigned the role to deliver justice by applying the enacted law to the specific cases which have been brought before of the judiciary for the breach of law.
5.2.2 ROLE ASSIGNED BY THE CONSTITUTION

Preamble of the Indian Constitution itself promises to secure JUSTICE which is social, economic and political. Therefore Constitution enhanced the conventional role of judiciary to deliver social, economical as well as political justice to all its subjects. The Indian Constitution assigned the functional role to the Supreme Court in its various provisions from Arts. 131 to 147. Supreme Court is given plenary powers (Article 142) to make any order for doing complete justice in any cause or matter and a mandate in the Constitution (Article 144), to all authorities, Civil and Judicial, in the territory of India to act in aide of the Supreme Court. Art.32 provides remedies for enforcement of Fundamental Rights. The scope of Write Jurisdiction of the High Court’s (Article 226) is wider than traditionally understood and the judiciary is separate and independent of the executive to ensure impartiality in administration of justice. The judiciary has a pivotal central role to play in our thriving democracy and shuns arbitrary executive action. The higher judiciary has been empowered by the constitution to pronounce upon the legislative competence of the law making bodies and the validity of a legal provision. The range of judicial review recognized in the higher judiciary in India is the widest and most extensive known to any democratic set up in the world.

5.2.3 LIMITATIONS OF THE JUDICIARY

However, Legislature, Executive and Judiciary have their own roles to play as demarcated by the Constitution. Article 142(1) of the Constitution of India while dealing with the enforcement of Supreme Court orders perspicaciously lays down as, “The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.”

The spirit of the Constitution in matters of the responsibilities and limitations of the Judiciary here are “in the exercise of its jurisdiction”, ‘for doing complete justice, in any cause or matter pending before it’ and ‘enforceable…as may be prescribed by or under any law made by Parliament.’ The phrases make perspicuous two limitations on
the Judiciary, namely that it shall act only on matters pending before it in exercise of its jurisdiction for doing complete justice, and that the operation of its decree or order is subject to the law made by Parliament or Presidential order. The limitation of jurisdiction and the need of matters being pending before it, together constitute a serious limitation on the Judiciary to do anything ‘for doing complete justice.’

5.2.4 ENHANCED ROLE OF THE INDIAN JUDICIARY

The conventional role of the judiciary is to deliver justice in the matters bought before it by interpreting the laws in vogue. After the independence initially the judiciary followed the principle of narrow construction and literal interpretation of statutes as well as strict rule of locus stand in dealing with cases. Strictly interpreted what is written. They believed that if the framers of the constitution intended something else then they would have included those few words. This approach of the judiciary can be well understood when we see the judiciary’s stand while dealing with the cases of Fundamental Rights & Directive Principles.

5.2.4.1 RELATIONSHIP BETWEEN FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF STATE POLICY

The directive principles differ from fundamental rights in this respect the Fundamental Rights are justifiable, Directive Principles are non-justifiable. In *State of Madras v. Chapakam Dorairajan*\(^{327}\), the Supreme Court observed as follows:

“The Directive Principles of the State Policy, which by Article 37 are expressly made unenforceable by Courts cannot override the provisions found in Part III which notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by legislative or executive act or orders, except to the extent provided in appropriate Article in Part III. The Directive Principles of State Policy have to confirm and to run as subsidiary to the Chapter on Fundamental Rights. In our opinion that is the correct approach in which the provision found in Part III and IV have to be understood. However, so long as there is no infringement of any fundamental right to the extent conferred by provisions in Part III, there can be no objection the State acting in accordance the directive principles set out in Part IV, but

\(^{327}\) *State of Madras v. Chapakam Dorairajan* AIR 1951 SC 228.
subject again to the legislative and executive powers and limitations conferred on the State under different provisions.”

It was held that in case of any conflict between fundamental rights and directive principles, the fundamental rights would prevail. But a year later when the Court dealt with Zamindari Abolition cases its attitude was considerably modified. In the *State of Bihar v. Kameshwar Singh*, the Court relied on Article 39 in deciding that a certain Zamindari Abolition Act had been passed for a public purpose within the meaning of Article 31. Finally, in *Re Kerala Education Bill*, the Supreme Court observed that though the directive principles cannot override the fundamental rights, nevertheless, in determining the scope and ambit of fundamental rights the courts may not entirely ignore directive principles but should adopt the principles of harmonious construction and should attempt to give effect to both as “much as possible.” While Part III contains negative directions to the State not to do various things. Part IV contains positive commands to promote what may be called a social and welfare State.

In its *Keshavanand Bharti v. State of Kerala* the Supreme Court has said that “fundamental rights and directives principles aim at the same goal of bringing social revolution and establishment of a Welfare State and they can be interpreted and applied together. They are supplementary and complimentary to each other. It can well be said that directive principles prescribed the goal is to be achieved.

In *Minerva Mills Ltd. v. Union of India*, the Supreme Court highlighted the position of Part IV of the Constitution. It is true, Part-III of the Constitution embodied fundamental right and Part IV contended the directive principle of the State policy. The scope of the two Articles was explained by the Supreme Court in a manner which has cleared all doubts and disputes in the mind of the people, and held that the goals set out in Part IV have to be achieved without the abrogation of the mills provided for by Part-III. It is in this sense that Part –III. It is in this sense that Part-III and Part IV together constitute the core of our Constitution and combine to form a conscience. Anything that destroys the balance between the two parts will ipso-facto destroy the essential elements of basic structure of our Constitution. In other words, the Indian

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Constitution is founded on the bed rock of the balance between fundamental right and the directive principle is an essential feature of the basic structure of the Constitution.

In *Unni Krishnan v. State of A.P.* also the Supreme Court has reiterated the same principle that ‘the fundamental rights and directive principles are supplementary and complementary to each other and the provisions in Part III should be interpreted having regard to the preamble and Directive Principles of the State Policy.’

### 5.2.4.2 FUNDAMENTAL RIGHTS

In 1952, in *Sri Sankari Prasad’s case*, a Constitution Bench held that any act passed by the Parliament under its amending power under Article 368 would be valid even if it abridged any of the fundamental right contained in Part III of the Constitution. Again in 1964, another Constitution Bench in *Sajjan Singh’s case* supported the views expressed in Sankari Prasad. These two cases were considered by an 11 Judge Bench in *Golak Nath’s case*. The views expressed in Sankari Prasad and Sajjan Singh was reversed. The Supreme Court held that fundamental rights are primordial rights necessary for development of human personality and these rights enable a man to chalk out his own life in the manner he likes best. The Bench expressed the view by majority judgment that fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament. But, at the same time, Parts III and IV of the Constitution were held to constitute an integral scheme forming a self-contained code. The scheme is so elastic that all the Directive Principles can be reasonably enforced without abridging or abrogating the Fundamental Rights. Various constitutional amendments were made by the legislators purporting to overcome the decision in Golak Nath’s case.

A larger Bench of 13 judges in celebrated *Keshavanand Bharti’s case* examined the correctness of Golak Nath’s decision to determine whether the law relating to Parliament’s power of amendment of Constitution had been rightly decided in Golak Nath’s case or not. In *Keshavanand Bharti’s case*, by majority, the *Golak Nath’s case* was overruled. It was held that Article 368 does not enable Parliament to
amend the Constitution to alter the basic structure of framework of the Constitution. Implied limitations were read in Article 368. Various constitutional amendments were made after decision in Kesavanand Bharti including 39th amendment thereby introducing Article 329-A was struck down by a Constitution Bench in the case of Indira Nehru Gandhi applying the basic structure theory.

This was followed by proclamation of internal emergency from June 1975 to March 1977 during which period Articles 14, 19 and 21 stood suspended. Sweeping changes were also made in Article 368 with a view to provide that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of the Constitution and also providing that no amendment of the Constitution including Part III thereof relating the Fundamental Rights shall be called in question on any ground.

In this period, Supreme Court in the case of ADM Jabalpur v. Shivkant Shukla gave quite a controversial decision wherein Article 21 (which provides that no person shall be deprived of his life or personal liberty except according to procedure established by law) was discussed. The majority of the Bench deciding Shivkant Shukla’s case held that in cases of dire emergency as existed between 1975 and 1977, a procedure can be established by law, following which even human life can be taken away Justice Chandrachud who wrote the judgment came under heavy fire for writing a pro-Government judgment but the proposition of law as propounded by him was an excellent example of Judicial Activism. Justice Chandrachud has so interpreted Article 21 and upheld the validity of legislation which require acceptance to maintain the sovereignty of the Country in case it is threatened either by internal aggression or external invasion.

5.2.4.3 ARTICLE 21: LIFE & LIBERTY AND ‘DUE PROCESS OF LAW’

Article 21 of the Constitution was bound to be the first on the Court’s agenda because its restrictive interpretation in AK Gopalan and its total demise in Shivkant Shukla had made this important fundamental right to life and liberty entirely dependent on the sweet will of the parliamentary majority. The Constituent Assembly

339 Ibid.
had purposely rejected the expression ‘due process of law’, which had been the source of judicial activism in United States, and had adopted a more specific expression, ‘procedure established by law’. The Supreme Court of India had interpreted those words very narrowly in Gopalan.

Article 21 of the Constitution says that ‘no person shall be deprived of his life or personal liberty except according to procedure established by law.’ In Gopalan, the Supreme Court held that the words ‘personal liberty’ meant only freedom from arbitrary arrest and the words’ procedure established by law’ meant procedure prescribed by any statute. Article 19, which guaranteed seven fundamental rights, included the right to move freely within the territory of India. The State can impose reasonable restrictions upon that right ‘in the interest of the general public or for the protection of the interests of the Scheduled Tribes’. It was argued that where a person was detained under a law of preventive detention, his right to move within the territory of India guaranteed by Article 19(1) (d) was also restricted. The Court, however, held (Justice Fazl Ali dissenting) that the rights under article 19 were available only to a person who was free. If a person was arrested not for making a speech, holding an assembly, forming an association, or entering a territory, his arrest had to be according to law and the validity of such arrest or detention could be examined only with reference to his right to personal liberty guaranteed by Article 21 and not with reference to any of the rights guaranteed by Article 19.

In Case of personal liberty and the freedom guaranteed by article 19, the view held in Gopalan continued to operate. In Kharak Singh v. U.P. the Supreme Court gave wider meaning to the words ‘personal liberty’ so as to include within its fold the right to privacy. The majority justices held that the words ‘personal liberty’ in Article 21 could not be confined to its negative meaning as being mere protection from arbitrary arrest but extended to include all aspects of liberty other than those covered by Article 19. It was on the question of exclusion of freedoms guaranteed by Article 19 from the scope of ‘personal liberty’ that the minority judges disagreed. In another case, Chief Justice Subba Rao held that the right to personal liberty included the right to go abroad and held that certain provisions of the Passport Act were

340 Article 19(1)(d) of the Constitution of India.
unconstitutional and void. The objection of the Court was to the non-existence of a law and the procedure for regulating the grant or denial of passports. The Court said that to go abroad was to the non-existence of a law and the procedure for regulating the grant or denial of passports. The Court said that to go abroad was a fundamental right as being part of personal liberty and it could be restricted or regulated by law. It was in response to this decision that Parliament enacted the Passport Act, 1967 laying down who can obtain a passport and when it can be refused and the procedure for applying for a passport.

**MRS. MANEKA GANDHI'S CASE**

A major breakthrough came in *Mrs. Maneka Gandhi's case*[^343]. It was a landmark example of amplifying the law to enhance personal rights and fundamental rights. There, the legislation governing grant of passport was interpreted in a manner so as to enhance the rights of personal freedom and personal liberty.

In the instant case, the passport of *Mrs. Maneka Gandhi* had been impounded and she challenged the validity on the ground that action violated her personal liberty. No hearing had been given to her as to why her passport should not be impounded. The Supreme Court not only gave wider meaning to the words ‘personal liberty’ but also brought in the concept of ‘procedural due process’ under the words ‘procedure established by law’. While giving wider meaning to the words ‘personal liberty’ the Court held that the earlier view that ‘personal liberty’ included all attributes of liberty except those mentioned in Article 19 stood rejected. Where a law restricted personal liberty, a court would also examine whether such restriction on personal liberty also imposed restrictions on any of the rights given by Article 19. The Court held that the right to go abroad was part of ‘personal liberty’. ‘Personal liberty’ a variety of rights which go to constitute the personal liberty of man’, in addition to those mentioned in Article 19. The Court held that impounding of her passport without giving her a hearing was not according to procedure established by law. The procedure that a must provide must be a just and fair procedure. The rules of natural justice which is a term used for a fair hearing, are the essential requisites of fair procedure. These rules are:


[146]
(1) That no one should be a judge in his own cause and
(2) That no one should be condemned unheard.

The person who decides must be an unbiased person, he should give a clear notice of what he intends to do, and he must give a reasonable opportunity to the person against whom he intends to act to present his defence as to why such an action should not be taken. The words ‘procedure established by law’ must include such procedure. In the present case, the Court was called upon to decide whether Mrs.Maneka Gandhi was entitled to a hearing before her passport was impounded. The Court conceded that in some situations where urgent action was needed, a prior hearing might not be feasible. In such exceptional situations if a prior hearing was not given, the authorities must give a post-decisional hearing. On the assurance of the learned Attorney General that a post-decisional hearing would be given soon, the majority, barring Justice Beg, held that the government ‘sanction need not be stuck down. Justice Beg held that the Government’s action was unconstitutional and void.

In Maneka Gandhi, the Court clearly overruled Gopalan on the following issues:

(1) The law authorizing deprivation of personal liberty would have to be valid not only under article 21 but also under article 19(1) (d);
(2) The words ‘life’ and ‘personal liberty’ had wider meanings that would be discovered from time to tie; they were open-textured expressions;
(3) The words ‘procedure established by law’ meant not the procedure prescribed by law but procedures considered to be just and fair in civilized countries.

The most significant aspect of Maneka Gandhi was that the Court laid down a seminal principle of constitutional interpretation. There cannot be a mere textual construction of the words of the Constitution. Those words are pregnant with meanings that unfold when situations arise. This opened the Pandora’s Box which resulted in flooding of litigations further expanding Art 21.

5.2.5 CHANGED JUDICAL TREND IN INTERPRETING PROVISIONS
(Maneka Gandhi, Sunil Batra, Haskot and Hussinnara Khatoon’s Trend)\(^{344}\).

\(^{344}\) Maneka Gandhi v. Union of India AIR 1978 SC 597 followed in Sunil Batra (No.1) v. Delhi Administration, AIR 1978 SC 1675; Sunil Batra (No.2) v. Delhi Administration, AIR 1980 SC 1579; M.H.Haskot v. State of Maharashtra, AIR 1978 SC 1548; Hussainara Khatoon (No.1) v. Home Secretary State of Bihar, AIR 1979 SC 1360; (no.3) AIR 1979 SC 1377 and number of other cases.
WIDEST INTERPRETAATION OF PROVISIONS OF PART III

In *Maneka Gandhi’s case* the Supreme Court has held that the provisions of Part should be given widest possible interpretation. Delivering the judgment, Justice Bhagwati, said, “The correct way of interpreting the provisions of Part III is that attempt of the court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content”. In *Gopalan’s case* the Court had taken the view that each Article dealt with separate rights and there was no relation with each other. In other words, they were mutually exclusive. This view has been held to be wrong in Maneka Gandhi’s case where the Court has taken the view that they are not mutually exclusive but form a single scheme in the Constitution, that is, they are all parts of an integrated scheme in Constitution. Beg J. in his judgment said, “Their waters must mix to constitute that grand flow of unimpeded and impartial justice. Isolation of various aspects of human freedom for purposes of their protection is neither realistic nor beneficial but would defeat the objects of such protection”. Further, the Court held that to be a fundamental right it is not necessary that a right must be specifically mentioned in a particular Article. Even if it is not mentioned in any of the Articles specifically, it may be fundamental rights if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. Every activity which facilitates the exercise of the named fundamental right may be considered integral part of that right and hence is a Fundamental right. For example, it has been held that right to travel abroad, speedy trial, free legal aid, protection to prisoners in jail from degrading and inhuman treatment etc., though not specifically mentioned, are fundamental rights under Article 21 of the Constitution.

The validity of a law infringing fundamental rights can be judged not only with reference to particular Article under which such a law is enacted but also with reference to other Articles. In Golplan’s case it was held that the validity of a deprivation law enacted under Article 21 could not be tested under Article 19. This view has been overruled in Maneka Gandhi’s case and it has been held that a law depriving a person of his personal liberty under Article 21 must also satisfy the test of ‘reasonableness’ under Articles 14 and 19 of the Constitution.
1. **NATURAL JUSTICE AND DUE PROCESS**

In Maneka Gandhi’s case the Supreme Court has held that the ‘procedure’ depriving a person of his ‘life or personal liberty must be just; fair and reasonable’. It must satisfy the requirement of natural justice is a distillate of due process” observed Krishna Iyer, J. The concept of natural justice and due process which were rejected in Goplan’s case forming part of our Constitutional Scheme have not been held to be an essential part of the Constitutional Scheme guaranteeing Fundamental rights. “True, our Constitution has no ‘due process’ clause or the VIII amendment of the American Constitution” Krishna Iyer, J., observed, “but after Cooper and Maneka Gandhi’s cases the consequence is the same.

2. **PRISONERS RIGHT AND PRISON REFORMS**

The Supreme Court has considerably widened the scope of Article 21 and has held that its protection will be available for safeguarding the fundamental rights of prisoners and for effecting prison reforms. Convicts are also human beings and until they are hanged they are entitled to live in jail as human beings and not as slaves. In human and barbarous treatment with prisoners is a constitutional prohibition. So, it has been held that the punishment of solitary confinement, hand-cuffing, harsh labour, degrading jobs and punishments in jail without judicial approval violate the mandate of Article 21 of the Constitution. Speedy trial and legal aid to poor prisoners are constitutional rights available to them and does not depend upon mercy of the State.

3. **EXPANDING ROLE OF WRIT OF HABEAS CORPUS**

The dynamic role of judicial remedies after Sunil Batra’s case imparts to the habeas corpus with a versatile vitality and operational utility as bastion of liberty even within the jails. Wherever, the rights of a prisoner either under the Constitution or under other law are violated the writ power of the Court can and should run to rescue. The habeas corpus writ can be issued not only for releasing a person from illegal detention but also for directing the jail authorities to provide necessary amenities to prisoners and to protect them from inhuman and barbarous treatment. In fact, in Sunil Batra (No.2) the petitioner did not seek his release from the prison because he was sentenced to life imprisonment and was to remain in jail but he sought the protection of the court from inhuman and barbarous treatment with which he was treated by jail

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345 Sunil Batra (No.1) v. Delhi Administration AIR 1978 SC 1675.
346 Sunil Batra (No.2) v. Delhi Administration AIR 1980 SC 1579.
authorities. On refusal to give money the petitioner was beaten and his anus was pierced with a warden’s baton. Batra, a convict under death sentence in Tihar Central Jail, came to know of this inhuman treatment with the petitioner and brought the incident to the knowledge of the court through a letter. The court converted this informal information in the habeas corpus petition and issued directions to jail authority to release the petitioner from punishment cell and not to subject him with severity until fair procedure as laid down in Maneka Gandhi’s case is complied with.

In *A.B.S.K. Sangh (Rly.) v. Union of India*\(^{347}\), it has been held that even an unregistered association can maintain a petition for relief under Article 32 of the Constitution if there is a common grievance. Thus Article 32 is not confined to protect only individual’s fundamental rights but is capable of doing justice wherever it is found and the society has an interest in it. “Access to justice through ‘class actions’, ‘public interest litigation’ and ‘representative proceedings’ is the modern jurisprudence”, declared Krishna Iyer J. In the historic judgment in Judges Transfer case\(^{348}\), the seven-judge Constitution Bench of the Supreme Court has set at rest the controversy whether a person not directly involved can move the Court for the redressal of grievances of persons who cannot approach the Court because of poverty or any other reasons. The Court held that any member of the public having “sufficient interest” can approach the Court for enforcing constitutional or legal rights of such persons or group of persons even through a letter.

**4. HUMAN RIGHTS JURISPRUDENCE**

In 1979, India became party to the International Covenant on Civil and Political Rights. Article 10 of the International Covenant provides that “All persons deprived of their liberty shall be treated with humility and with respect for the inherent dignity of the human persons. An Article 5 of the U.N. Declarations of Human Rights, 1948, says, “No one shall be subjected to torture or to cruel inhuman or degrading treatment punishment”. Human rights are the most important fundamental rights of every individual. Protection of the human rights became the primary responsibility of the Judiciary being the custodian of the Constitution (Art.32 of the Constitution provides remedies for the breach of any of the fundamental rights). Some instances where judiciary positively intervened to protect human rights are:

\(^{347}\) *A.B.S.K. Sangh (Rly.) v. Union of India*, AIR 1981 SC 298.

\(^{348}\) *S.P. Gupta and others v. President of India and others*. AIR 1982 SC 149; AIR 1980 SC 1535.
Reiterating the view taken in Motiram\textsuperscript{349}, the Supreme Court in Hussainara Khatoon\textsuperscript{350}, expressed anguish at the “travesty of justice” on account of under-trial prisoners spending extended time in custody due to unrealistically excessive conditions of bail imposed by the magistracy or the police and issued requisite corrective guidelines, holding that “the procedure established by law” for depriving a person of life or personal liberty (Article 21) also should be “reasonable, fair and just”.

Justice Krishna Iyer in Sunil Batra No.2,\textsuperscript{351} said, “In its recent decisions one find extensive references of the Human Rights by the Supreme Court, particularly for protecting prisoners from various inhuman and barbarous treatment. Today, human rights jurisprudence in India has constitutional status.

In Prem Shankar Shukla\textsuperscript{352}, the Supreme Court found the practice of using handcuffs and fetters on prisoners violating the guarantee of basic human dignity, which is part of the constitutional culture in India and thus not standing the test of equality before law (Article 14), fundamental freedoms (Article 19) and the right to life and personal liberty (Article 21). It observed that “to bind a man hand and foot” fetter his limbs with hoops of steel; shuffle him along in the streets, and to stand him for hours in the courts, is to torture him, defile his dignity, vulgarise society, and foul the soul of our constitutional culture”. Strongly denouncing handcuffing of prisoners as a matter of routine, the Supreme Court said that to “manacle a man is more than to mortify him, it is to dehumanize him, and therefore to violate his personhood…” In the same case Krishna Iyer, J said that in interpreting constitutional and statutory provisions the Court must not forget the core principle found in Article 5 of the U.N. Declaration of Human Rights, 1948. Homage to human rights which calls for prisons, prison staff and prisoner’s reform, his Lordship declared. The rule thus laid down in this case was reiterated in the case of Citizens for Democracy\textsuperscript{353}.

\begin{footnotesize}
\textsuperscript{349} Motiram and others v. State of M.P AIR 1978 SC 1594.
\textsuperscript{350} Hussainara Khatoon and others v. Home Secretary State of Bihar AIR 1979 SC 1360.
\textsuperscript{351} Sunil Batra (No.2) v. Delhi Administration 1980 SC 1579.
\textsuperscript{352} Prem Shankar Shukla v. Delhi Administration 1980 SCC 526.
\end{footnotesize}
(iv) In *Icchu Devi Choraria*\(^354\), the court declared that personal liberty is a most precious possession and that life without it would not be worth living. Terming it as its duty to uphold the right to personal liberty, the court condemned detention of suspects without trial observing that “the power of preventive detention is a draconian power, justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil.”

(v) In *M.C.Mehta Vs. State of Tamil Nadu*\(^355\), the Court ruled out the employment of children in match factories as it is hazardous and declared various measures aiming at child welfare in some other cases\(^356\).

(vi) In *Nilabati Behera*\(^357\), the Supreme Court asserted the jurisdiction of the judiciary as “protector of civil liberties” under the obligation “to repair damage caused by officers of the State responsible to pay compensation to the near and dear ones of a person who has been deprived of life by their wrongful action, reading into Article 121 the “duty of care” which could not be denied to anyone. For this purpose, the court referred to Article 9(5) of the International Covenant on Civil and Political Rights, 1966 which lays down that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

(vii) In *Joginder Kumar*\(^358\), the court ruled that “the law of arrest is one of balancing individual; rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties of the single individual and those of individuals collectively…..”

(viii) In *Delhi Domestic Working Women’s Forum*\(^359\), the Court asserted that “speedy trial is one of the essential requisites of law” and that expeditious investigations and trial only could give meaning to the guarantee of “equal protection of law” under Article 21 of the Constitution.

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\(^354\) *Icchu Devi Choraria v. Union of India* 1980 SCC 531.


\(^359\) *Delhi Domestic Working Women’s Forum v. Union of India & Others* SCC 14.
In PUCL\textsuperscript{360}, the dicta in Article 17 of the International Covenant on Civil and Political Rights, 1966 was treated as part of the domestic law prohibiting “arbitrary interference with privacy, family, home or correspondence” and stipulating that everyone has the right to protection of the law against such intrusions.

In D.K. Basu\textsuperscript{361}, the Court found custodial torture “a naked violation of human dignity” and ruled that law does not permit the use of third degree methods or torture on an accused person since “actions of the State must be right, just and fair”.

In Vishaka\textsuperscript{362}, Supreme Court said that “Gender equality, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14,15,19 (1) (g)and 21 of the Constitution and the safeguards against sexual; harassment implicit therein and for the formulation of guidelines to achieve this purpose, in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at all workplaces, guidelines and norms are hereby laid down for strict observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution.”

On the insulation of Police and other investigation agencies from any kind of external pressure, Supreme Court issued various directions in Vineet

\textsuperscript{360} People’s Union for Civil Liberties (PUCL) v. Union of India and another AIR 1997 SC 568.

\textsuperscript{361} D.K.Basu v. State of West Bengal AIR 1997 SC 610.

Narain\textsuperscript{363} and Prakash Singh\textsuperscript{364}. The paradigm of Indian judicial system is testimony to the manner in which judiciary can contribute in good governance. Indian jurisprudence would insist upon enforcement of various rights thus guaranteed include: right to life & liberty; right against torture or inhuman degrading treatment; right against outrages upon personal dignity; right to due process & fair treatment before law; right against retrospect city of penal law; right to all judicial guarantees as are indispensable to civilized people; right to effective means of defence when charged with a crime; right against self-incrimination; right against double jeopardy; right of presumption of innocence until proved guilty according to law; right to be tried speedily, in presence, by an impartial & regularly constituted Court; right of legal aid & advice; right of freedom of speech besides right to freedom of thought, conscience & religion.

5. ENVIRONMENTAL JURISPRUDENCE

Playing a pro-active role in the matters involving environment, the judiciary in India has read the right to life enshrined in Article 21 as inclusive of right to clear has read the right to life enshrined in Article 21 as inclusive of right to clean environment. It has mandated to protect and improve the environment as found in a series of legislative enactments and held the State duty bound to ensure sustainable development where common natural resources were properties held by the Government in trusteeship for the free and unimpeded use of the general public as also for the future generation. The Court has consistently expressed concern about impact of pollution on ecology in present and in future and the obligation of the State to anticipate, prevent and attach the causes of environmental degradation and the responsibility of the State to secure the health of the people, improve public health and protect and improve the environment\textsuperscript{365}.

In the field of education and the rights of minority, there are various judgments in last about 60 years which have contributed immensely; in both these fields. Instead of going back 60 years to the cases of Kerala Education Bill, St. Xavier College, St.

\textsuperscript{363} Vineet Narain \& ors v. Union of India \& Anr. (1998) 1 SCC 226.
\textsuperscript{364} Prakash Singh \& Ors. v. Union of India \& Ors., JT 2006 9(12) SC 225.
Stephen College\(^{366}\), let me only make a mention of few decisions; in the last about 15 years [Mohini Jain, Unni Krishnan (leading to insertion of Article 21-A), TMA Pai, Islamic Acadamy and P.A. Inamdar (leading to insertion of Article15(5))].\(^{367}\)

The aforesaid areas are only few examples from numerous judgments to highlight the enhanced role of the judiciary. The journey which started from Gopalan\(^{368}\), Sankari Prasad\(^{369}\) and Champakam Dorairajan\(^{370}\) with the conventional role of narrow construction and strict interpretation of laws progressed tremendously after Maneka\(^{371}\), and Sunil Batra\(^{372}\) and literally enhanced the role of the judiciary.

### 5.2.6 ACTIVIST ROLE

The activist Court in its new role handed down many opinions to make basic human rights meaningful to the deprived and vulnerable sections; of the community and assure them social, economic and political justice; By such expansive interpretation it recognized the rights of under trial prisoners, prison inmates, and children under juvenile delinquency Acts and re-examined the validity of the provisions of the penal law sanctioning death sentence, and recognized the right to a speeder trial, the right to; an independent judiciary, and the right to efficient and honest governance etc. Thus, the rights given by the Constitution; were therefore, given maximum expance so as to make them real expressions of liberty, equality, and justice. The preamble of the Constitution no longer remained a mere decoration, but, became the source of the basic structure of the Constitution and the State actions could be scrutinized not merely in terms of their compatibility with specific provisions but in terms of; their compatibility with the broad principles of constitutionalism such as secularism.

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\(^{369}\) Sri Sankari Prasad Singh Deo v. Union of India & State of Bihar 1952 SCR 89.

\(^{370}\) State of Madras v. Champakam Dorairajan AIR 1951 SC 228.

\(^{371}\) Maneka Gandhi v. Union of India AIR SC 597.

\(^{372}\) Sunil Batra (No.1) v. Delhi Administration AIR 1978 SC 1675.
The Indian Supreme Court and the High Court’s expanded judicial access in furtherance of its activist role by entertaining letters from persons interested in opposing illegal acts, allowing social activist organizations or individuals to take up cudgels on behalf of the poor and disadvantaged sections who possessed neither knowledge nor resources for activating the legal process; and permitting citizens to speak on behalf of a large unorganized by silent majority against bad governance, wrong development, or environmental degradation. The wide definition of 'life' and ‘liberty’ as interpreted by the Courts helped various types of issues to come before the Courts. The doors opened by the Constitutional Courts in pursuance of its determination to keep open the legal process more participatory and democratic led to the PILs being used liberally for various types of relief, such as for protecting the fundamental; rights of under trial prisoners in jails, amelioration of the conditions of detention in protective homes for women, for medical check-up of remand home inmates, prohibition of traffic in women and relief for their victims, for the release of bonded labour, enforcement of other labour laws, e.g. full and direct payment of wages to workers or prohibiting the employment of children in construction work, acquisition of cycle-rickshaws by licensed rickshaws pullers, relief against custodial violence to women prisoners while in police lock up, for environmental protection, for enforcement of gender equality and protection from sexual harassment and the likes. One may find the activist role of the judiciary resulting in law-making also. There was no law to regulate the adoption of children by foreigners. In *Lakshmi Kant Pandey v. Union of India*[^373^], the Supreme Court laid down directions for regulating such adoptions and these directions have been in force for more than nineteen years. Similarly when women’s organization approached the Supreme Court with a request to lay down guidelines as to how sexual harassment of working women could be combated, the Supreme Court in *Vishaka v. State of Rajasthan*[^374^], responded by laying down guidelines and also declaring them to be the law made by it under Article 141 of the Constitution.

The Indian Supreme Court while liberally interpreting the rights could not stop at merely those rights that had been recognized as judicially enforceable rights known as civil liberties. The Constitution of India includes socio-economic rights such as the

right to primary education (Article 45), the right to adequate means of livelihood [Article 39(1) or the right to work (Article 41) in the directive principles of state policy contained in Part IV of the Constitution. These social and economic rights have been recognized in the Universal Declaration of Human Rights [Article 23(1)], right to work [Article 23(3)] right to just and favorable remuneration; (Article 26) right to education and in the International Covenant of Economic, Social and Cultural Rights  [Article 7(a) right to fair wage and Article 6 right to work]. It was generally felt and it is true also that these rights cannot be effectively made enforceable through judicial process. They require legislative and executive action.

But, the Supreme Court declared the right to education Unni Krishnan v. State of A.P.\textsuperscript{375}, the right to shelter Olga Tellis v. Bombay Municipal Corporation\textsuperscript{376} and the right to childhood M.C. Mehta v. State of Tamil Nadu\textsuperscript{377}, as being part of the fundamental right to life and personal liberty guaranteed by Article 21 of the Constitution. The Court by incorporating the above rights within the fundamental right to life and personal liberty made them enforceable thanks to the activist role of the judiciary.

\subsection*{5.2.7 CRITICISM OF ACTIVIST ROLE OF JUDICIARY}

The changed stance of the judiciary from moderate to active role has invited wrath from some sections of the society, criticism from some others and support and cheers from still other sections. Some political scholars feel that the judiciary is usurping powers in the name of public interest\textsuperscript{378}, while according to others, judicial activism and interference is actually preventing the executive from going astray\textsuperscript{379}.

Conservatives tend to argue that judicial activism is the process of ignoring, or at least selectively choosing precedent in order to hand down rulings which dramatically expand personal freedoms. They also complain that the doctrine of stare decisis is sometimes used to trump up the original meaning (or, in some cases, the original intent) of the text, or that the text is given so broad a construction so as to render it almost infinitely malleable. To others, judicial activism implies going beyond

\begin{itemize}
\item Rajinder Sachar, Judges as Governors, "The Indian Express", August 4 1999, p.8.
\item A.T. Thiruvenkadham, "A case of Institutional Conflict", The Hindu, April 27, 1999, p.21
\end{itemize}
the normal constraints applied to jurists and the Constitution gives jurists the right to strike down any legislation or rule against any precedent if it goes against the Constitution. Thus, ruling against majority opinion or judicial precedent is not necessarily judicial activism unless it is active, specifically in terms of the Constitution. Many are critical of judicial activism as an exercise of judicial power, which displaces existing law or creates more legal uncertainty than is necessary, whether or not the ruling had some constitutional, historical or other basis. This, it is argued, violates the doctrine of separation of powers. Whatsoever may be the case, one can negate the fruits of justice which the common public got due to this enhanced and activist role of the judiciary.

5.3 POSITION OF JUDICIARY UNDER THE INDIAN CONSTITUTION

Judiciary is accorded a significant position in a constitutional democracy where the constitution endows it with the duty to oversee the other organs of the state so as to keep them within the Constitutional bounds. This judicial function stems from a feeling that a system based on a written Constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the Constitution.381

The responsibilities which a court carries in a country with a written Constitution are very onerous much more onerous than the responsibilities of a court without written Constitution. The courts in a country like Britain interpret the laws but not the Constitution, whereas the courts in a country like India, having a written Constitution, interpret the provisions of the Constitution and thus give meaning to its cold letters. In doing so, the courts act the supreme interpreter, protector and the guardian of the supremacy of the Constitution.382 This being so, it can rightly be argued that in the capacity of the ‘ultimate interpreter’ of the Constitution, the Supreme Court inevitably becomes a sole judge of its own powers, which in turn, places the judiciary at a considerable position guarding the Constitution. This, in fact, is a power

380 For a detailed discussion, see H.M.Seervai, Position of the Judiciary under the Constitution of India (1970).
382 Ibid at 1554.
which ex-hypothesis is denied to every other organ functioning under the Constitution\textsuperscript{383}. In reality, such dicta when analyzed are formulations for judicial primacy over all other organs under the Constitution\textsuperscript{384}.

The power of judicial review enables the judiciary to play crucial role that in turn may be more crucial to the entire governmental process of the country. This is so because the bare text of the Constitution does not represent in itself the ‘living’ law of the country. The interpretative function is discharged by the courts through direct as well as indirect judicial review. In direct judicial review, the courts override or annul the enactment or an executive act on the ground that it is inconsistent with the Constitution. In indirect judicial review, while considering the constitutionality of a statute, the courts so interprets the statutory language as to steer clear of the alleged element of unconstitutionality\textsuperscript{385}.

5.4. ‘JUDICIAL REVIEW’ UNDER THE INDIAN CONSTITUTION

Judicial review may be considered as a cluster of all these virtues and may be presented in the following pictorial representation, as judiciary is the refulgent sun radiating multi-dimensional functional-justice.

\textsuperscript{384} Id. at 7.
\textsuperscript{385} Ibid.
5.4.1 MEANING OF JUDICIAL REVIEW

The rhetoric of judicial review has been reverberating the judicial utility, more particularly since 19th Century and judicial accomplishment is a natural expectation of the people. Judicial operation has been concomitant with the advancement of culture, civilization, agricultural, industrial and scientific revolutions. Review by judiciary is warranted by public command to oversee the acts of state agencies to ensure compliance with the rule of law mandated by the people.
In common parlance, ‘Review’ means ‘to view again – Re + view’ and if we refer to literal technicality, Review means:

1. Formal examination of something so as to make changes if necessary;
2. A critical assessment of a book, play or other work;
3. A report of an event that had already happened.\(^{386}\)

Thus the dictionary meaning itself indicates that ‘Review’ is an examination with a purpose i.e to make changes if necessary; apart from being a critical assessment of a work, situation. Thus Review is an activating concept.

In legal parlance, judicial review is a legal activation of people’s life. In *Parduman Singh v. State of Punjab*\(^{387}\), the court held that Review means a judicial re-examination of the case in certain specified and prescribed circumstances.

“Judicial Review means ‘over-seeing by the judiciary of the exercise of power by other co-ordinate organs of the government with a view to ensuring that they remain confined to the limits drawn upon the powers by the Constitution.’\(^{388}\)

“Judicial Review in its most widely accepted meaning is the power of the courts, to consider the constitutionality of acts of other organs of Government when the issue of constitutionality is germane to the disposition of law suits properly pending before the courts. This power to consider constitutionality in appropriate cases includes the courts’ authority acts they find to be unconstitutional.”\(^{389}\)

Thus Judicial Review is not to be construed as a 'procession tinkering’ but a substantial switch over to justice process. Its play and operation is not confined to procedural law domain only but also extends to substantial law domain.

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\(^{386}\) *Compact Oxford Dictionary-Thesaurus – Indian Edition – 2003.\n
\(^{387}\) AIR 1958 Punj. 63.


\(^{389}\) *Encyclopedia of American Constitution, Vol.3* (New York – 1986 P-1054, states that -
5.4.2 JUDICIAL REVIEW IN UNITED KINGDOM

Herman Pritchet observes that, ‘ the foundations of judicial review are to be traced to the obvious influence of natural law, the belief that human conduct guided by fundamental and immutable laws which have natural or divine origin and sanction.”

In U.K. British Parliamentary Supremacy is an accomplished fact and parliamentary sovereignty is unassailable. As per De Lolme – “it is a fundamental principle with English Lawyers, that Parliament can do everything but a woman a man and a man a woman.”

Sir Edward Coke in Dr, Bonham’s case stated that – “When an act of Parliament is against common right or reason, or repugnant or impossible to be preformed, the common law will control it and adjudge such act to be void.”

“Though the Cokean Dictum contains the seminal vestiges of the Doctrine of Judicial Review, the Doctrine as it is understood now as the judicial power to strike down unconstitutional legislation failed to strike down unconstitutional legislation failed to strike roots in England, because of the historical conflict between the royal prerogative on one hand and the parliament and the people on the other.”

A.V.Dicey termed judicial law making as subordinate legislation for the Acts of Parliament may over-ride and constantly do override the law of the judges. Resultantly, the English courts could exercise only a limited power of judicial review, in the sense that they review the validity of subordinate legislation and the other executive acts of the Government and strike them down if they are ultra-vires of the Parents Acts.

Judicial Review of administrative action has been a traditional function of the courts. The courts followed maximum judicial restraint during the Second World War, which can be inferred from the decision in Liversidge v. Anderson. But later, the courts became more vigilant and started requiring the administrative authorities to satisfy them that all relevant matters had been considered and no irrelevant matters had been taken into consideration, even though they would not substitute their decision for the decision of the administrative authority. (Known as WEDNESBURY Principle)

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391 (1938) 54 Law Quartely Review ,p.543.
the advent of the welfare state and increase in the powers of the executive, the courts started asking for stricter standards of reasonableness from the executive. The Proportionality test imported in certain areas is also a new indicator as seen in Council of Civil Services Union vs. Minister of Civil Services. 393

Liversidge v. Anderson 394, a war-time decision illustrating judicial activism also us that the House of Lords declined to review a decision of the House of Lords declined to review a decision of the Home Secretary even where the regulations under which he had acted required of him, before taking action, not just subjective belief, but ‘reasonable cause to believe’ certain matters.

In this case, the House of Lords had to consider the effect of Regulation-18-B made under Emergency Powers (Defence) Act, 1939 which empowered the Home Secretary to detain without trial any person whom he had “reasonable cause to believe to be of hostile origin or association”, and that by reason thereof “it was necessary to exercise control over” that person. Question related to the second part i.e could the ‘Necessity for control challenged? House of Lords held that the detainee’s action for false imprisonment must fail; the Home Secretary had under the regulations discretion in the matter outside the control of the courts.

But Lord Atkin delivered an out-spoken dissenting judgment in favour of reviewing whether the Home Secretary’s belief were ‘reasonable’, and the decision of the majority has been said to be an authority for the proposition that the words “If A.B has reasonable cause to believe”. Subsequently, the judges started asserting their powers to review Subjective provisions too 395.

In England, the courts have expanded their power through the process of interpretation. They have imposed greater restrictions on the executive by subjecting more and more of its actions to the

1. Principles of Natural justice 396
2. Critically scrutinizing the exercise of discretionary powers 397

393 1984 (3) ALL.E.R. 935.
394 1941 (3) ALL.E.R. 338, CA.
397 Padfield v. Minister of Agrl, Fisheries and Food (1968) 1 ALL.E.R 694.

[163]
(3) Narrowly construing the ouster clauses that made the decisions of the administrative authorities, tribunals final and conclusive. Although courts in England cannot declare an Act of Parliament ultra-vires, they have subjected the administrative action to searching judicial vigilance. Judicial Review of administrative action has been traditional function of courts utilizing the interpretation technique. The courts followed maximum judicial restraint during the Second World War as seen in the decision of famous case *Liversidge v. Anderson*, after the war; however, they become more vigilant and required the administrative authorities to convince the courts although they were not inclined to substitute their decision in the place of the decision of administrative authorities to convince the courts although they were not inclined to substitute their decision in the place of the decision of administrative authorities. This is known as WEDNESBURY principle. With the advent of the welfare state and increase in the powers of the executive, the courts started asking for stricter standards of reasonableness from the executive.

5.4.3 JUDICIAL REVIEW IN AMERICAN LAW

The institution of judicial review in U.S. is indissoluble linked with Chief Justice Marshall who coined a historical interpretation creating and vesting with the judiciary the power of judicial review by manufacturing an alternative to wriggle out of judicial and executive collision and to safeguard, not his individual reputation or honour, but the reputation and honour of the institution of judiciary. This intellectual jugglery of the judicial wisdom of Marshall creating the power and process of judicial Review originated in the most famous “Midnight Judges” case *Marbury v. Madison*, Chief Justice Marshall review from a ‘process’ to a ‘power’. And this has become an outstanding feature of the operation of American Constitution even though judicial review was not mentioned in that document.

C. HERMAN PRITCHETT in his book “The American Constitution” states that the phrase ‘Judicial Review’ may be applied to several types of processes.

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399 (1941)ALL E.R Vol.2 P-612.
400 Associated Provincial Pictures Ltd. v. Wednesbury Corporation (1948) 1 K.B.223.
401 1.Cranch. 137 (1803).
1. To describe the control which courts exercise over subordinate corporations or units of Govt. like municipalities, public officials exercising delegated legislative and administrative powers;

2. To enable the courts to enforce the agreed on division of functions between the Central Govt... and the component States;

3. To empower the Supreme Court to declare acts of Congress unconstitutional if they are contrary to the basic Law.

Americans customarily consider “Judicial review” as “judicial supremacy” and expect that their understanding towards this judicial supremacy shall not be undermined by any authority or agency of the United States. So one can notice such a colour of respect for example, Validation of election of George Bush as the president through court intervention.

5.4.4 EVOLUTION OF JUDICIAL REVIEW IN U.S.

American practice of judicial review is based on that –

(1) The written constitution is a fundamental law subject to change only by an extraordinary legislative process.

(2) Power of the various departments of the Government is limited by the terms of the Constitution.

(3) Judges are expected to enforce the provisions of the constitution as the superior law and to refuse to enforce any legislative act or executive order in conflict there with.

(4) The impact of natural law as a limitation on the power of the king as observed by Sir Edward Coke as below;

“When an act of Parliament is against common right or reasons the common law will control it and adjudge such act to be void.”

Locke emphasizes the aforesaid proposition by saying that “the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it.”

402 Dr. Bonham’s case (1610).
5.4.5 HISTORICAL CASE OF MARBURY v. MADISON

During the presidential elections held in November, 1800, President Adams of Federal Party lost his office to Jefferson of Republican Party, and John Marshall who was the Secretary of State was also holding additional charge of the Chief Justice of the Supreme Court of U.S. as appointed by President Adams appointed 42 new justices of peace for the District of Columbia. 17 such new commissions of appointment could not be delivered by Secretary of State, John Marshall, before Thomas Jefferson assumed office on 4th March, 1801. Jefferson appointed James Madison as his Secretary of State and instructed him not deliver the appointments of justices of peace.

Four of the frustrated appointees headed by William Marbury petitioned Supreme Court for a writ of Mandamus under the Judiciary Act of a 1789 to compel Madison to deliver the commissions. Madison ignored a preliminary order issued by John Marshall and then Congress shut the court down for a year by changing the dates of its session, to keep it from passing on the validity of the repeal of the Federalist Judiciary Act, 1801. Consequently his petition could not be acted on until 1803.

Chief Justice Marshall confronted with the problem of facing the two alternatives. If he could issue the mandamus, it could be countermanded and court would be exposed as powerless. On the other hand, to avoid clash with the executive, if he did not issue writ, it also amounts to court’s powerlessness. To escape from this apparent dead end, Marshall brought a conflict between the Provisions of the Judiciary Act and the Constitution. Sec.13 of the Judiciary Act of 1789 provided that, the Supreme Court shall have the power to issue writes of mandamus, in cases warranted by the principles and usages of law to any court or authority of the U.S. Marbury did not go first to a lower court. Under this Statute, he directly filed this petition with the Supreme Court.

But Constitution provides that the Supreme Court shall have original jurisdiction only in cases affecting ambassadors, ministers and council and in cases where State is a party.

Marshall professed to believe that the statutory provision conflicted with the constitutional provision and that congress has attempted contrary to be constitution to
expand the original jurisdiction of the Supreme Court. S.P. Sathe in his book “judicial
Activism in India” makes a classical precision of the judicial review in U.S.

“There are two models of judicial review. One is a TECHNOCRATIC MODEL in which judges act merely as technocrats and hold a law invalid if it is ultra vires the powers of the legislature. In the second model, a court interprets the provisions of the constitution liberally and in the light of the spirit underlying it keeps the constitution abreast of the times, through DYNAMIC INTERPRETATION. A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individuals is said to be an activist court.

Judicial activism can be positive as well as negative. A court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist. The decision of the U.S. Supreme Court in the case of Dred Scott v. Standard, or Lochner v. New York, were examples of negative judicial activism, whereas the decision of that court in Brown v. Board of Education, is an example of positive activism.

In DredScott’s case U.S. Supreme Court upheld slavery as being protected by the right to property; In Lochner, a law against employment of children is violate of the due process clause of the constitution; and In Brown, it was held that segregation on the ground of race was unconstitutional and void.

Activism is related to change in power relations. A judicial interpretation that furthers the rights of the disadvantaged sections or imposes curbs on absolute power of the State or facilitates access to justice is a positive activism. Judicial activism is inherent in judicial review. Whether it is positive activism or negative activism depends upon one’s own vision of social change. Judicial activism is not an aberration but normal phenomenon and judicial review is bound to mature into judicial activism. JUDICIAL Activism also has to operate within limits. These limits are drawn by the limits of the institutional viability, legitimacy of judicial intervention, and recourses of

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403 (2nd Edn. P-5/6).
404 60 US 393 (1856).
405 198 US 45 (1904).

[167]
the court. Since through judicial activism, the court changes the existing power relations, judicial activism also a constitutional court becomes an important power centre of democracy.

5.4.6 JUDICIAL REVIEW IN INDIA

The Supreme Court of India in L. Chandra Kumar v. Union of India⁴⁰⁷, observed that – Judicial review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unforeseeable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land. Judicial review in India deals with three aspects:

(i) Judicial review of legislative action.
(ii) Judicial review of judicial action.
(iii) Judicial review of administrative action.

5.4.6.1 OBJECT, NATURE AND SCOPE OF JUDICIAL REVIEW

The object of judicial review is to ensure governance in conformity with the principles and rules of law and assure fair and equal treatment to the people. In Minerva Mills. v. Union of India⁴⁰⁸, the Supreme Court stated that the constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and the validity of legislation. It is the solemn duty of the judiciary under the constitution to keep different organs of the State within the limits of the powers conferred upon them by the constitution by exercising powers of judicial review as SENTINEL ON THE QUIVIVE.

Right from Kesavanand case, our apex court has been reiterating the emphasis that Judicial Review is a Basic Feature of the Constitution and it is the most Constitution and it is the most potent weapon in the hands of the judiciary to declare every unconstitutional act of legislature or executive or any authority as invalid and to see that neither the executive nor legislature transgress their limits. In R.K. Jain vs.

⁴⁰⁷ AIR 1997 SC 1125.
⁴⁰⁸ AIR 1980 SC 1789.
Union of India\textsuperscript{409}, it was held that Judicial Review is thus the Touchstone and essence of the Rule of Law.

In \textit{Sreelekha Vidyarthi v. State of U.P.}\textsuperscript{410} it was held that the power of judicial review is an integral part of our constitutional system and the rule of law would become a teasing illusion and a promise of unreality. The Judicial Review therefore is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic feature of the constitution.

In \textit{S.R. Bommai v. Union of India}\textsuperscript{411}, the Supreme Court stated that the Judicial Review is the touchstone and repository of the supreme law of the land. It is a vital principle of our constitution which cannot be abrogated without affecting the basic structure of the constitution.

\textbf{5.4.6.2 JUSTIFIABILITY VIS-À-VIS JUDICIAL REVIEW}

Judicial Review is distinct from Justifiability. Justifiability is not a legal concept with fixed contents, nor is it susceptible of scientific verification. The Supreme Court has in two landmark cases i.e. \textit{S.R. Bommai v. Union of India} (ibid) and \textit{Indra Sawhney v. Union of India}\textsuperscript{412}, has explained the subtlety between these two concepts. The power of judicial review relates to the jurisdiction of the court whereas justifiability is hedged by self-imposed judicial restraint. A court exercising judicial review may refrain to exercise its power if it finds that the controversy rose before it is not based on judicially discoverable and manageable standards. Moreover, the area of justifiability can be reduced or curtailed. Even when, exercise of power is bad, the court in its discretion decline to grant relief considering the facts and circumstances of case.

\textbf{5.4.6.3 LIMITATIONS OF JUDICIAL REVIEW}

As we hold that judicial review is meant to ensure that the Government carries out its duty in accordance with their provisions of the Constitution, it is operated for adjudicating the disputes rather than performing administrative functions. The duty of the court is to confine itself to the question of legality. It has to consider whether a

\textsuperscript{409} 1993 (4) SCC 119.
\textsuperscript{410} AIR 1991 SC 537.
\textsuperscript{411} 1994 (3) SCC 1.
\textsuperscript{412} AIR 1993 SC 477.
decision-making authority exceeded its powers, committed an error of law, violated rules of natural justice, and reached decision which no reasonable man would have reached or otherwise abused its powers. Though the court is not expected to act as a court of appeal, nevertheless it can examine whether the “decision-making” was reasonable, rational, not arbitrary or not violative of Art.14 of the Constitution. The parameters of judicial review must be clearly defined and never exceeded. If the authority has faltered in its wisdom, the court cannot act as super auditor.

BERNARD SCHWARTZ, a classical authority on Constitution of U.S. observed in his book ‘Administrative Law’

“If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial inquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the judge, the right to review becomes meaningless. It makes judicial review of administrative orders a hopeless formality for the litigant. It reduces the judicial process in such cases to a mere feint”.

5.4.6.4 JUDICIAL RESTRAINT

The concept of Judicial Review is not to be understood as a ferocious horse and its ride is always regulated by self-restraint. Judicial Review embellishes judicial process and so it should not be allowed to embezzle the end product of law i.e. justice to serve sectarian purpose. Even in realization of good ideals meant for many hapless disadvantaged lots, judicial review should not appear to be inclined to one wing and it should act as a lever to reconcile and balance conflicting interests. Over-zealous judicial review and activism may boomerang and judicial restraint is only the curative and preventive dose to counter adverse results in judicial process.

The Supreme Court in Tata Cellular v. Union of India stated,” The judicial power of review is exercised to rein in any unbridled executive functioning. The

414 2nd, Edn at P-584.
restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court’s ability to quash an administrative decision on its own merits. These restraints bear the hallmarks of judicial control over administrative action.”

5.4.6.5 GROUNDS OF JUDICIAL REVIEW

Judicial Review is a Protection, not a Weapon. While exercising power of judicial review, the Court does not exercise appellate powers. It is not intended to take away from administrative authorities the powers and discretion properly vested in them by law and to substitute courts as the bodies making the decisions. Lord Bright man in *Chief Constable v. Evans*[^416^], stated that, “Judicial review is concerned not with the decision-making process. Unless that restriction on the power of the court is observed, the court in my view under the guise of preventing the abuse of power is itself guilty of usurping power.”

The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Whether he committed an error of law?
3. Whether there is breach of principles of natural justice?
4. Whether the authority arrived at a decision which no reasonable judge or tribunal would have reached?
5. Whether there is abuse of power by the authority?

In the case of *Tata Cellular v. Union of India*:[^417^]

Our courts will interfere with the exercise of discretionary powers only when the administrative authorities-

1. Fail to exercise jurisdiction; or lack of jurisdiction;
2. Exceed their jurisdiction;
3. Abuse the discretion;
4. Fail to exercise discretion;

5. Fail to observe principles of natural justice;
6. Take into consideration irrelevant material; and leaving relevant material;
7. Resort to improper purpose or collateral purpose
8. Act unreasonably
9. Resort to colourable exercise of power;
10. Act with mala fides.

Judicial Review is not a Dubious Technique but a Double Edged Weapon. A Proper Dose is a Purifier and improper measure is perilous.

5.5. VARIOUS OTHER PROVISIONS UNDER THE INDIAN CONSTITUTION

Articles 12 to 35 of the Constitution pertain to fundamental rights of the people and cover a wider ground than the Bill of Rights under the U.S. Constitution. The framers of the Indian Constitution visualized great many difficulties in enunciating the fundamental rights in general terms and chose to leave their plight and enforcement in the hands of judiciary by vesting the powers of ‘Judicial Review’ on it. The Constitution of India explicitly confers the powers of judicial review in several Articles such as 13, 32, 131-136, 143, 226 and 246.\(^{418}\) Judicial Review is thus firmly rooted in India and has the explicit sanction of the Constitution. The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to the constitutional spirit. In doing so, the courts act as a ‘sentinel on the qui vive’.\(^{419}\)

1. **Article 13: Power of ‘Judicial Review’ and its effect thereof**

The justifiability of fundamental rights and the source of ‘Judicial Review’ can be found under Art. 13 which are regarded as a key provision as it gives teeth to the fundamental rights cannot be infringed by the state either by enacting a law to that effect or through an administrative action. It declares that all pre-constitution laws shall be void to the extent of their inconsistency with the fundamental rights\(^{420}\), and expressly provides that the State’ shall not make any law’ which takes away or abridges the fundamental rights and a law contravening a fundamental right is, to the

\(^{418}\) See Chs. IV, VIII, X, XXXIII Constitution of India.
\(^{419}\) *State of Madras v. V.G.Row* AIR 1952 SC 196.
\(^{420}\) Art. 13(1) of the Constitution of India.
extent of such contravention is void\footnote{Art. 13(2) of the Constitution of India.}. Essentially, it is crucial provision dealing with
the post-constitution laws and if any such law violates any fundamental right, it
becomes void ab-initio.

In effect, it makes the constitutional courts of India, the sole guardian,
protector, and the interpreter of the fundamental rights. It is the function of these
courts to access individual laws against the fundamental rights to ensure that no such
law infringes these rights. These courts consisting of the Supreme Court and the High
Courts perform the important task of declaring a law unconstitutional if it results in
infringement of these rights. More precisely, such courts play a protective role under
this provision.

The Supreme Court has further bolstered its protective role under Article 13(2)
by laying down the proposition that judicial review is the ‘basic’ feature of the
constitution\footnote{Art.13 (4), the clause was inserted by the Constitution (24\textsuperscript{th} Amendment) Act, 1971 to override the
view taken by Subba Rao J. for the majority in Golakh Nath v. State of Punjab 1967 (2) SCR 762.}. This means that the power of judicial review cannot be curtailed or
evaded by any future constitutional amendment. The idea was conveyed by
Chandrachud, C.J. in \textit{Minerva Mills v. Union of India}\footnote{\textit{Mineral Mills Ltd. v. Union of India} AIR 1980 SC 271} as thus:

“It is the function of the judges, nay their duty, to pronounce upon the validity
of laws. If courts are totally deprived of that power, the fundamental rights conferred
on the people will become a mere adornment because rights without remedies are as
writ in water. A controlled constitution will then become uncontrolled.”

The foundation of this power of ‘judicial review’ has been explained by a nine
judge bench of Supreme Court in \textit{S.C. Advocates on Record association v. Union of
India}\footnote{(1993) 4 SCC 441 at 328-331.}. The apex court has held that the Constitution, which is the fundamental law
of the land, is the will of the ‘people’, while a statute is only the creation of the elected
representatives of the people. If therefore, the will of the legislature as declared in a
statute, stands in opposition to that of the people as declared in the Constitution, the
will of the people must prevail.
As a guide to the exercise of this power, the Supreme Court in *Dwarka Prasad Laxmi Narain v. State of U.P*\(^\text{425}\), has held that in determining the constitutionality of a provision alleged to be violative of a fundamental right, the court must weigh the substance, the real effect and impact thereof on the fundamental right, and would not allow the legislature to bypass a constitutional prohibition by employing indirect methods.

Another important feature that regulates the manner of exercise of this power is the ‘doctrine of severability’. When some of the provisions of a statute become unconstitutional on account of inconsistency with fundamental rights, only the repugnant provisions of the law in question shall be treated by the courts as void, and not the whole statute\(^\text{426}\). The doctrine means that when a particular provision of a statute offends against a constitutional limitation, but that provision is severable from the rest of the statute, only that offending provision will be declared void by the court and not the entire statute. The test for application of this doctrine has been laid down by the Supreme Court in *State of Bombay v. F.N.Balsara* as thus\(^\text{427}\):

“Whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, whether on a fair review of the whole matter it can be assumed that the legislature would not have enacted at all that which survives without enacting the part that is ultra-vires.”

Art.13 is thus an express declaratory provision dealing with the power of ‘judicial review’ which cast a constitutional obligation on the judiciary to check constitutional transgressions. The power is conferred on the constitutional courts, i.e. High Courts and Supreme Court. Further, ‘state’ for the purposes of this provision means ‘state’ as defined under Art.12. Apart from guaranteeing the fundamental rights which are in the nature of political and civil rights, the Constitution also provides the mechanism for their enforcement. It does so by making ‘right to constitutional remedies’ itself a fundamental right. Articles 32 and 226 confer power of ‘Judicial Review’ on Supreme Court as well as High Courts respectively to review the virus of any law or administrative action on the touchstone of fundamental rights.

\(^{425}\)(1954) SCR 803.  
\(^{427}\)AIR (1951) SC 318.
Interestingly, this function offers a greater scope for ‘Judicial Activism’ to the constitutional courts.

2. Article 32: Writ Jurisdiction of Supreme Court

This provision, for the want of better purposive expression, is called as the ‘right to constitutional remedies’ and confers express powers on the Supreme Court to carry out the obligations declared under Art.13, that is, to act as a protector of fundamental rights. It constitutes one of the major constitutional safeguards against the state tyranny and can be said to confer ample scope for ‘judicial activism’ on Supreme Court which is evident from a catena of pronouncements made by it while giving a contemporary meaning to the fundamental rights and thereby creating new rights and obligations from time to time. The Supreme Court has described the significance of this provision in Prem Chand Garg v. Excise Commissioner, U.P. as thus 428.

The Fundamental Right to move this court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this court should itself ‘as the protector and guarantor of fundamental rights’ declare that “it cannot. Consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such; rights…..in discharging the duties assigned to it, this court has to play the role of a ‘sentinel on the qui-vive’ and it must always do it as its solemn duty to protect the said fundamental rights ‘zealously and vigilantly’.

It guarantees right to move to the Supreme Court, by appropriate proceedings for the enforcement of fundamental rights enumerated in the Constitution 429 and empowers the Supreme Court to issue appropriate orders or directions or writs including writes in the nature of habeas corpus, mandamus, quo-warranto, certiorari and Public Interest Litigations (PIL’s) for the enforcement of fundamental rights 430. It also empowers the Parliament by law to empower any other court to exercise within the limits of its territorial jurisdiction all or any of the powers exercisable by the Supreme Court under Art.32(2). This can however be done without prejudice to the

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428 AIR 1963 SC 996.
429 Art.32(1)
430 Art.32(2)
Supreme Court’s powers under Art.32 (1) and 32(2)\textsuperscript{431} and it further declares that the right guaranteed by it “shall not be suspended except as otherwise provided under the Constitution”.

Right of access to the Supreme Court under this provision is a fundamental right per se providing a guaranteed, quick and summary remedy for enforcing them as a person can straight away approach the Supreme Court without having been undergone any dilatory process involved in the judicial hierarchy. The Supreme Court enjoys a broad discretion in the matter of framing the writes to suit the exigencies of a particular case. Apart from issuing writs as discussed above, it can also issue any order including even a declaratory order, or give any direction, as may appear to it to be necessary to give proper relief to the petitioner\textsuperscript{432}.

Enforcement of fundamental rights under this provision permissibly includes the judicial review of administrative, legislative and governmental action or inaction. However, it cannot be invoked simply to adjudge the validity of any legislation or an administrative action unless it adversely affects the petitioner’s fundamental rights\textsuperscript{433}. The Supreme Court under this provision is only confined to the infringement of fundamental rights and is not expected to go into any other question\textsuperscript{434}. In this event, once the court is satisfied that the petitioner’s fundamental right has been infringed, he need not establish either that he has no other alternative remedy or that he has exhausted all other remedies provided by law, but only has to satisfy the court that he has not obtained proper redressal of his grievances. Similarly, recourse to the same is not available to assail the correctness of a decision rendered by the apex court on merits or to claim its reconsideration by it\textsuperscript{435}. While exercising review power under this provision, the court also has power to decide the disputed questions of facts arising in a writ petition if it so desires\textsuperscript{436}.

Being a fundamental right per se, this power cannot diluted or whittled down by any law and can be invoked even when a law declares a particular administrative action

\textsuperscript{431} Art.32(3) of the Constitution of India.
\textsuperscript{432} Kuchunni v. State of Madras AIR1959 SC 725.
\textsuperscript{434} Khyerbari Tea CO. v. State of Assam AIR 1964 SC 925.
\textsuperscript{435} Mohd. Aslam v. Union of India AIR 1996 SC 1611.
as final\textsuperscript{437}. It offers plenary powers on the Supreme Court which is not fettered by legal constraints. Even if the court commits a mistake in the exercise of these powers, the court has plenary powers to correct such mistakes\textsuperscript{438}. Such plenary powers enjoyed by the Supreme Court can be illustrated by making a reference to \textit{Khatri v. State of Bihar} \textsuperscript{439} where several petitioners filed petitions under this provision for the enforcement of their fundamental right under Art.21 on the allegation that they were made blind by the police while in police custody. The daunting question that arose was whether the court could order production of certain reports submitted by the CID to the state government and certain correspondence amongst the government officials. The government claimed that such material was protected under Sections 162 and 172 of the Cr.P.C. Rejecting the said contention, the court was of the opinion that proceedings under this provision are neither ‘inquiry’ nor ‘trial’ for an offence and while exercising jurisdiction under this provision, the apex court does not act as a ‘criminal court’.

The Constitution stands silent as to the procedure to be followed under this provision. The Supreme Court in \textit{Bandhua Mukt Morcha v. Union of India} \textsuperscript{440} clarified that it is not bound under this provision to follow the ordinary adversary procedure and may adopt such procedure as may be effective for the enforcement of the fundamental rights.

Though this provision basically aims at empowering the apex court to guard the infringement of fundamental rights, nevertheless it has been used for a much wider purpose than what is expected, by laying down general guidelines having the effect of law to fill the vacuum till such time the legislature steps to fill in the gap by making the necessary law. The court has derived this power by reading this provision with Art.141 and 142\textsuperscript{441}.

The provision supplements enormity in judicial power since it empowers the apex court, apart from issuing writs as discussed above, to make any order, pass directions as it may consider appropriate to grant adequate relief to the petitioners. It may also grant declaration or injunction as well if that be the proper relief\textsuperscript{442} and can

\begin{itemize}
\item \textsuperscript{437} \textit{A.K.Gopalan v. State of Madras} AIR 1950 SC 27.
\item \textsuperscript{439} \textit{AIR 1981 SC 1068}.
\item \textsuperscript{440} \textit{AIR 1984 SC 802}.
\item \textsuperscript{441} For further details VII.
\item \textsuperscript{442} \textit{Kuchunni v. State of Madras} AIR 1959 SC 725.
\end{itemize}
mould relief to meet the exigencies of specific circumstance\textsuperscript{443}. This is been made explicit in \textit{M.C.Mehta v. Union of India} as thus\textsuperscript{444}:

“This court under Art.32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding namely, enforcement of a fundamental right and has the implicit power to issue whatever direction, orders or writ necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the Fundamental Right.”

However, in due course of time, the ‘activism’ shown by the Supreme Court has given a new dimension to Art. 32 and the court has implied there from the power to award damages when a fundamental right of a person has been infringed and there is no other suitable remedy available to give relief and redress in the specific situation for the injury caused to the petitioner. While doing so, the argument it has put forth is that under Art.32, its power is not only injunctive in ambit, but is also remedial in scope and that in the absence of such a power, the Article would be robbed of its entire efficacy, become emasculated and weakened\textsuperscript{445}. Similarly, in \textit{Rudul Shah v. State of Bihar}\textsuperscript{446} the court awarded damages to the petitioner against the State for breach of his right of personal liberty guaranteed under Art.21 as he was kept in jail for 14 years even after his acquittal by a criminal court.

Since Rudul Shah, damages have been awarded in quite a few cases to the victims themselves or their kith and kins for police brutality or harassment\textsuperscript{447}, custodial deaths\textsuperscript{448}, medical negligence\textsuperscript{449}, environment pollution\textsuperscript{450}, tortuous acts of government servants\textsuperscript{451} thereby opening a new vista of compensatory jurisprudence in exercise of this provision. The most prominent instance amongst such cases was \textit{Bodhisatva Gautam v. Subhra Chakroborty}\textsuperscript{452}, where a raped woman was awarded an interim compensation by the court. The rapist was directed to pay Rs.1000/- per month to the woman raped, pending the criminal trial.

\textsuperscript{443} Golak Nath v. State of Punjab 1967 (2) SCR 762.  
\textsuperscript{444} AIR 1987 SC 1086 at 1091.  
\textsuperscript{445} Ibid.  
\textsuperscript{446} AIR 1983 SC 1086.  
\textsuperscript{448} PUCL v. Union of India (1997) 3 SCC 433.  
\textsuperscript{449} Pashim Bangel Khet Mazdoor Samiti v. State of West Bengal AIR 1996 SC 2426.  
\textsuperscript{450} M.C.Mehta v. Union of India (1987) 4 SCC 463.  
\textsuperscript{452} AIR 1996 SC 922.
3. **Article 226: Writ Jurisdiction of High Court**

This provision signifies an essential aspect of Indian Constitution since it confers writ jurisdiction on high courts as well, with a much wider scope as compared to what is enjoyed by the Supreme Court under Articles 32. Consequently, it can possibly be understood in the sense of arming the judiciary with enormous power to act in an ‘activist’ manner.

It empowers the high court to issue directions, orders or writs including writs in the nature of habeas corpus, mandamus, quo warranto and certiorari for the enforcement of a fundamental right and certiorari for the enforcement of a fundamental right and ‘for any other purpose’\(^453\). The distinguishing feature of this power is the extension of the writ jurisdiction of high courts ‘for any other purpose’ in addition to fundamental rights. Such purposes may rightly be understood as forming the actions of the state entities in various delegated capacities. These words ‘for any purpose’ enable the high court to take cognizance of any matter even if no fundamental right infringement is involved. Since Indian Constitution does not favour the doctrine of ‘separation of powers’ in strict sense, public authorities in India often exercise various types of powers including executive, adjudicatory and legislative powers, for which the ‘rule of law’ demands such a power to keep check on their malafide and whimsical exercise thereby making the writ jurisdiction in India more firm as compared to the English system.

It operates “notwithstanding anything in Article 32” \(^454\) and enjoys an independent constitutional existence unaffected by Art.32 and confers a parallel writ jurisdiction on high courts for the enforcement of fundamental rights with no derogation of Supreme Court’s jurisdiction. It is advantageous since its scope cannot be curtailed or whetted down even by legislation. Even if the legislature declares the action or decision of an authority final and ordinary jurisdiction of the courts is barred, the high court is still entitled to exercise its writ jurisdiction which remains unaffected by such legislation \(^455\). Further, a finality clause in a statute is no bar to the exercise of the High Court’s jurisdiction under this Article \(^456\). The High Court may even grant a

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\(^{453}\) Art.226 (1) of the Constitution of India.

\(^{454}\) Ibid.

\(^{455}\) Sajjan Singh v. State of Rajasthan AIR 1965 SC 845.

declaratory relief if it finds that a writ would not suffice the proper relief and can also make an interim order pending final disposal of the petition\textsuperscript{457}.

The Supreme Court has time and again emphasized that this power of the high court to issue writs is supervisory in nature and is not akin to its appellate power. That is to say that while exercising jurisdiction nudes this provision, the high court cannot go into the correctness of merits of the decision taken by the concerned authority but can only review the manner in which the decision is made\textsuperscript{458}. It only ensures that the authority arrives at its decision according to law and in accordance with the principles of natural justice wherever applicable\textsuperscript{459}. At the same very time, the court can intervene if the authority acts unfairly and unreasonably\textsuperscript{460}. This can make one say that judicial review under this provision is not directed against a decision, as such, but is confined to the decision making process.

Unlike Art 32, the high court under Art.226 does not ordinarily issue a writ when an alternative efficacious remedy is available. That is to say, the high court does not decide disputes for which remedies under the general law are available. The High Court, under this provision, has jurisdiction to determine questions of both fact and law by having recourse to affidavits and may even permit cross examination of a person who has sworn to such an affidavit\textsuperscript{461}. It can also intervene in case the question pertains to a mixed question pertains to a mixed question of law and fact both\textsuperscript{462}. Where, however, disputed questions of fact arise, a petition under Art.226 is not a proper remedy\textsuperscript{463}.

‘Judicial Activism’ can best be resorted to under this provision when one attempts to ascertain that as to whom can a writ be issued by the high court, since courts have widened their jurisdiction by bringing more and more bodies under their ambit. Ordinarily, a writ of mandamus or certiorari is issued to a government instrumentality whether statutory\textsuperscript{464} or not\textsuperscript{465}. However this depends on how ‘actively’

\textsuperscript{457} Kanoria Chemicals & Industries Ltd. v. Uttar Pradesh State Electricity Board (1997) 5 SCC 772.
\textsuperscript{462} Sharma Prashant v. Ganpatrao AIR 2000 SC 3094.
\textsuperscript{463} Tamilnadu State Electricity Board v. Sumathi AIR 2000 SC 1603.
\textsuperscript{464} Rajasthan State Electricity Board v. Mohan Lal AIR 1967 SC 1857.
\textsuperscript{465} Sukhdev v. Bhagat Ram AIR 1975 SC 1331.
Art.12 is interpreted for the purposes of defining ‘state’. But besides Art.12, interpretation of the word ‘authority’ also caters enough scope for ‘Judicial Activism’ under this article. Normally under this provision, the high court does not grant merely a declaration unless the aggrieved asks for a consequential relief available to him, but it empowered to grant mere declaration if the petitioner is not entitled to the further consequential relief on account of some legal bar of circumstances beyond his control. In *M.C. Sharma v. The Punjab University, Chandigarh* it has been held that\(^\text{466}\).

“In exceptional cases, the High Court may be justified to grant the relief merely in a declaratory form after being satisfied that the person approaching the court was prevented from praying for any other consequential relief on account of legal impediment or bar of jurisdiction created by the same statute.”

Apart from granting declaratory relief, the high courts have power to make orders and to issue directions. Accordingly, they not only issue writs, but are rather empowered to mould the relief in accordance with the facts of the case with a view to do complete justice between the contending parties.

Another innovative development of recent origin is the emerging remedial scope of the provision. Like Supreme Court, high courts have also granted compensation to the victims of the state lawlessness and negligence. Although this provision nowhere means any direct reference to ‘compensation’, it has been interpreted so by the Supreme Court\(^\text{467}\). Furthermore, the court may make an interim or interlocutory order in orders to maintain status quo between the parties to ensure that the proceedings do not become anfractuous or ineffective by any unilateral overt act by one side or the other during the pendency of such a proceeding.

4. **Article 131: Power to decide Inter-governmental disputes**

Since Indian Constitution sets up a federal polity where intergovernmental disputes often arise, Art.131 takes care of such instances by providing a mechanism for settling such disputes quickly at the highest judicial level. Under this provision, the Supreme Court has exclusive original jurisdiction in any dispute between the centre and the state, or the centre and state on one side and a state on the other side, or

\(^{466}\) AIR 1997 P&H 87.  
\(^{467}\) Nilabati Behera v. State 1993 AIR SCW.
between two or more States. A dispute to be justifiable under this article should involve a question of law or fact on which the existence or extent of legal right depends. That is to say that the dispute must involve assertion or vindication of a legal right of Government of India or a state. Questions of political nature not involving any legal aspect are excluded from the Court’s view. Supreme Court’s jurisdiction under this provision is limited by two fold fetters, that is, as to the parties and as to the subject matter. Commenting on the necessity of such a provision, Bhagwati J. has observed in State of Karnataka v. Union of India as thus:

“This article is a necessary concomitant of a federal or a quasi federal form of government and it is attracted only when the parties to the dispute are the government of India or one or more States arranged on either side.”

The Supreme Court has observed that the distinguishing feature of this provision is that the court is not required to adjudicate upon the disputes in exactly the same way as ordinary courts of law are normally called upon to do for upholding the rights of the parties and enforcement of its orders and decision. The court rather is only concerned to give its decision on questions of law or of fact on which the existence or extent of a legal right claimed depends. Once the court comes to its conclusion on the cases presented by any disputants and gives its adjudication on the facts or the points of law raised the function of the court under art.131 is over.

In its exercise of jurisdiction, the Supreme Court has power to grant whatever relief may be necessary for the enforcement of the legal right claimed. The court has ruled in State of Karnataka v. State of Andhra Pradesh that under Art.131. It can pass any order or direction as may be found necessary to meet the ends of justice.

5. Article 132: Constitutional Appellate Jurisdiction

The Supreme Court primarily being a court of appeal enjoys extensive appellate jurisdiction in various jurisdictions. Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final order, whether civil, criminal or other proceeding, of a high court of it certifies that the case involves a substantial question of

\[469\] AIR 1978 SC at 143.
\[471\] AIR 2001 SC 1560.
law as to the interpretation of the Constitution. On obtaining such a certificate any party in the case may appeal to the Supreme Court on the ground that any such question has been wrongly decided. However, only those questions can be agitated for which the high court has granted leave unless permitted by the Supreme Court. A very broad power is thus conferred on the Supreme Court to hear appeals in constitutional matters.

This symbolizes the Supreme Court as the final court of constitutional interpretation. Questions of constitutional interpretation are thus placed in a special category irrespective of the nature of proceedings in which they arise. The Supreme Court has commented on this provision as thus:

“The principle underlying the article is that the final authority of interpreting the Constitution must rest with the Supreme Court. With that object the article is freed from other limitations imposed under Art.133 and 134 and the right of the widest amplitude is allowed irrespective of the nature of the proceedings in a case involving only a substantial question of law as to the interpretation of the Constitution.”

6. Article 133: Civil Appellate Jurisdiction

Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final orders in a civil proceeding of a high court if it certifies that the case involves a substantial question of law of general importance and that in the opinion of the high court, the said question needs to be decided by the Supreme Court.

No appeal in a civil matter lies to the Supreme Court as a matter of right. It can only lie upon the grant of certificate by the high court. Further, no appeal can lie to the Supreme Court under this provision from the decision of a single judge of the high court. The Supreme Court has emphasized that for grant of certificate, the question, howsoever important and substantial, should also be of such pervasive import and deep significance that in the high court’s judgment, the question imperatively needs to be

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472 Art.132(1) of the Constitution of India.
473 No such appeal shall be heard if the certificate is not granted by the High Court. Syedna Taher v. State of Bombay AIR 1958 SC 83.
475 Art.132(3).
477 Art.133(1).
478 However, Parliament has power to provide otherwise. Art. 133(3).
settled at the national level by the highest court, otherwise the apex court will be flooded with cases of lesser magnitude. This provision covers all civil proceedings including all proceedings affecting civil rights. Proceedings under Art. 226 are also regarded as civil proceedings affecting civil rights. Proceedings under Art.226 are also regarded as civil proceedings for the purposes of this provision.

In exercising its jurisdiction under this provision the Supreme Court does not ordinarily interfere with the findings of the fact and it is all the more reluctant to do so when there are concurrent findings of the two courts below. This however is not an absolute rule and the court may interfere if findings of fact are unsupported by evidence on record, or are based on misreading of the evidence, or on non-advortence to the material evidence bearing on the question and to the probabilities of the case, or where the appreciation of evidence by the court below has resulted in miscarriage of justice.

7. Article 134: Criminal Appellate Jurisdiction

This provision regulates the criminal appeals to the Supreme Court and is so designed as to permit only important criminal cases to come before it. It confers a limited criminal jurisdiction on the Supreme Court as the court hears appeals only in exceptional criminal cases where justice demands the intervention of the apex court. An appeal, under this provision, lies as a matter of right to the Supreme Court from any judgment, final order, or sentence of a high court in a criminal proceeding if the high court in a criminal proceeding has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death. However, no appeal lies if the high court reverses an order of conviction and acquits the accused.

Secondly, an appeal also lies to the Supreme Court if the high court withdraws for trial a case from the lower court and sentences the accused to death.

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482 Under Art. 134(2), the Parliament is authorized to enlarge the criminal appellate jurisdiction of the Supreme Court. To this effect, it has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, further authorizing the Supreme Court to hear appeals from High Courts.
483 Art.134(1)(a) of the Constitution of India.
484 Art.134(1)(b) of the Constitution of India.
Thirdly, the Supreme Court can hear an appeal in a criminal case if the high court certifies that the case is a fit one for appeal purposes.\footnote{Art.134(1)(c). The High Court under this provision enjoy an unqualified power to grant fitness certificates in criminal cases. See also Babu v. State of Uttar Pradesh AIR 1965 SC 1467.}

8. **Article 136: Power to grant special leave to appeal**

Over and above all the constitutional provisions expressly declaring and regulating the power of the Supreme Court in various capacities, this provision empowers the Supreme Court to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.\footnote{Art.136(1). This is however subject to Art.363.} It however, excludes from its scope any judgment or order passed by a tribunal functioning under a law relating to the Armed Forces. An outstanding feature of this provision is that it empowers the Supreme Court to hear the appeals not only from courts but also from tribunals in any cause or matter.

The power of the Supreme Court under this provision is unaffected by Art.132, 133 and 134 and plenary as the provision puts no qualificatory fetters in its exercise. It is a sweeping power, exercisable outside the purview of ordinary law to meet the pressing demands of justice. The Supreme Court characterizes this power as “an untrammelled reservoir of power incapable of being confined to definitional bounds the discretion conferred on the Supreme Court being subjected only to one limitation, that is, the wisdom and good sense of justice of the judges.”\footnote{Kunhayammed v. State of Orissa AIR 2000 SC 2587.}

The provision does not define the nature of proceedings from which the Supreme Court may hear appeals and therefore, it could hear appeal in any kind of proceedings whether civil, criminal, or relating to income-tax, revenue or labour disputes. It even accommodates the Supreme Court in hearing appeals even though the ordinary law pertaining to the dispute makes no provision for such an appeal. Supreme Court can even disregard the limitations as discussed above and can hear appeals which it could not otherwise hear under these provisions. Being a jurisdiction conferred by the Constitution, it cannot be diluted or circumscribed by ordinary legislative process.
In its exercise, the Supreme Court claims to have power to give whatever relief may be necessary and proper in the facts and circumstances of the specific case. The Court has power to mould the relief according to the circumstances of the specific case. The court can also invoke its power under Art.142 for this purpose.

9. **Article 141: Authority to make final declaration of law**

Under this provision, the Supreme Court has the power to declare any law and the said declaration has the force of an authoritative precedent, binding on all other courts in India, of course except the Supreme Court itself. Such a final authority which the Supreme Court claims to possess includes power to decide the validity of a law and to interpret it. Such a claim gives the court an unbridled discretionary power without any accountability whatsoever and the consequent development is the ‘judicial activism’.

10. **Article 142: Power to do complete justice**

The Supreme Court, in exercise of the power conferred under this provision, is entitled to pass any decree, or make any orders, as is necessary for doing complete justice in any cause or matter pending before it. The expressions ‘cause’ or ‘matter’ used include any proceeding pending in the court including civil or criminal proceeding. The provision confers very wide powers on the Supreme Court to do complete justice in any case and it has been given a broad and purposive interpretation by the Supreme Court.

Under this provision, the jurisdiction and powers of the Supreme Court are supplementary in nature and are provided for doing complete justice in any matter. In the course of time, the apex court has given much wider dimension and ambit to this Article, practically raising it to the status of a new source of substantive power for itself.

As claimed by the judiciary, it contains no limitations regarding the causes or the circumstances in which the power can be exercised nor does it lay down any condition to be satisfied before such power is not exercised, nor does it lay down any

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condition to be satisfied before such power is exercised. The apex court claims to have a complete discretion in its exercise.

In *Supreme Court Bar Association v. Union of India*, the Supreme Court characterized its role in the following words:\(^{490}\)

“Indeed the Supreme Court is not a court of restricted jurisdiction of only dispute settling. The Supreme Court has always been a law-maker and its role travels beyond merely dispute settling. It is a problem solver in nebulous areas.”

Further, describing the nature of its power under this provision, it has held that: The plenary powers of the Supreme Court under Art.142 of the Constitution are inherent in the court and complementary to those powers which are specifically conferred on the Court by various statutes though is not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers exist as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis of its exercise, may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is thus, the residual source of power which this court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law:\(^{491}\).

### 5.6 PUBLIC INTEREST LITIGATION (PIL)

PIL serves a vital role in the civil justice system. If offers a ladder to justice to the disadvantaged sections of the society, provides an avenue to enforce diffused or collective rights, and enable civil societies to not only spread awareness about human rights but also allows them to participate in government’s decision making. It facilitates an effective realization of collective, diffused rights for which individual litigation is neither efficient nor a practicable method. The range and scope of PIL is vast as it is a mechanism to agitate any socio-economic public issue before the court which can be brought within the legal and constitutional mould. It constitutes the

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\(^{490}\) AIR 1998 SC 1895.

\(^{491}\) Also see *Delhi Electric Supply Undertaking v. Basanti Devi* AIR 2000 SC at 49.
major source of ‘judicial activism’ since there is nothing that fetters the jurisdiction of the courts for entertaining them. The concept of PIL can be understood as being concomitant to art.32 with regard to Supreme Court and to art.226 with regard to High Court. A PIL writ petition can be filed in the Supreme Court under art.32 only if a question concerning the enforcement of a fundamental right is involved. Under art.226, a writ petition can be filed in a High Court whether or not a fundamental right is involved.

5.6.1 PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM

Public interest litigation or social interest litigation today has great significance and drew the attention of all concerned. The traditional rule of "Locus Standi" that a person, whose right is infringed alone can file a petition, has been considerably relaxed by the Supreme Court in its recent decisions. Now, the court permits public interest litigation at the instance of public spirited citizens for the enforcement of constitutional- legal rights. Now, any public spirited citizen can move/approach the court for the public cause (in the interests of the public or public welfare) by filing a petition:

1. In Supreme Court under Art.32 of the Constitution;
2. In High Court under Art.226 of the Constitution; and
3. In the Court of Magistrate under Sec.133, Cr. P.C.

Justice Krishna layer in fertilizer Corporation Kamgar Union v. Union of India\textsuperscript{492}, (1981) enumerated the following reasons for liberalization of the rule of Locus Standi:-

1. Exercise of State power to eradicate corruption may result in unrelated interference with individuals’ rights.
2. Social justice wants liberal judicial review administrative action.
3. Restrictive rules of standing are antithesis to a healthy system of administrative action.
4. “Activism is essential for participative public justice”.

\textsuperscript{492} Kamgar Union v. Union of India AIR 1981
Therefore, a public minded citizen must be given an opportunity to move the court in the interests of the public. Further, the Supreme Court in S.P. Gupta vs. Union of India, popularly known as “Judges’ Transfer Case”, Bhagwati J. firmly established the validity of the public interest litigation. Since then, a good number of public interest litigation petitions were filed.

5.6.2 ORIGIN AND DEVELOPMENT OF PUBLIC INTEREST LITIGATION IN INDIA

It should be noted at outset that PIL, at least as it had developed in India, is different from class action or group litigation. Whereas the latter is driven primarily by efficiency considerations, the PIL is concerned at providing access to justice to all societal constituents. PIL in India has been a part of the constitutional litigation and not civil litigation. Therefore, in order to appreciate the evolution of PIL in India, it is desirable to have a basic understanding of the constitutional framework and the Indian judiciary. After gaining independence from the British rule on August 15, 1947, the people of India adopted a Constitution in November 1949 with the hope to establish a ‘‘sovereign socialist secular democratic republic’’. Among others, the Constitution aims to secure to all its citizens justice (social, economic and political), liberty (of thought, expression, belief, faith and worship) and equality (of status and of opportunity). These aims were not merely inspirational because the founding fathers wanted to achieve a social revolution through the Constitution. The main tools employed to achieve such social change were the provisions on fundamental rights.

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493 S.P. Gupta v Union of India AIR 1982 SC 149.
494 The Indian Code of Civil Procedure though allows for class action: ord.1Rr.8 of the Code of Civil Procedure 1908. Furthermore, s.91 of the Code provides: “In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted . . . with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.”
496 Constitution of India 1950 Preamble. Although the terms “socialist” and “secular” were inserted by the 42nd amendment in 1976, there were no doubts that the Constitution was both socialist and secular from the very beginning.
497 Constitution of India 1950, Preamble.
(FRs) and the directive principles of state policy (DPs), which Austin described as the “conscience of the Constitution”\textsuperscript{499}.

In order to ensure that FRs did not remain empty declarations, the founding fathers made various provisions in the Constitution to establish an independent judiciary. As we will see below, provisions related to FRs, DPs and independent judiciary together provided a firm constitutional foundation to the evolution of PIL in India. Part III of the Constitution lays down various FRs and also specifies grounds for limiting these rights. “As a right without a remedy does not have much substance”\textsuperscript{500}, the remedy to approach the Supreme Court directly for the enforcement of any of the Part III rights has also been made a FR\textsuperscript{501}. The holder of the FRs cannot waive them\textsuperscript{502}. Nor can the FRs be curtailed by an amendment of the Constitution if such curtailment is against the basic structure of the Constitution. Some of the FRs is available only to citizens\textsuperscript{503} while others are available to citizens as well as non-citizens\textsuperscript{504}, including juristic persons. Notably, some of the FRs are expressly conferred on groups of people or community\textsuperscript{505}. Not all FRs are guaranteed specifically against the state and some of them are expressly guaranteed against non-state bodies\textsuperscript{506}. Even the “state” is liberally defined in Art.12 of the Constitution to include, “the Government and Parliament of India and the Government and the legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India”.

\textsuperscript{499} Granville Austin, \textit{Indian Constitution: Cornerstone of a Nation}, p.50.
\textsuperscript{500} M.P. Jain, “‘The Supreme Court and Fundamental Rights’” in S.K. Verma and Kusum (eds), \textit{Fifty Years of the Supreme Court of India—Its Grasp and Reach} (New Delhi: Oxford University Press, 2000), pp.1, 76.
\textsuperscript{501} Constitution of India 1950 Art.32.
\textsuperscript{502} \textit{Basheshar Nath v CIT} AIR 1959 SC 149; \textit{Nar Singh Pal v Union of India} AIR 2000 SC 1401.
\textsuperscript{503} See, for example, Constitution Art.15(2) (right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them to access and use of public places, etc.); Art.15(4) (special provision for advancement of socially and educationally backward classes of citizens or the scheduled castes and the scheduled tribes); Art.16 (equality of opportunity in matters of public employment); art.19 (rights regarding six freedoms); Art.29 (protection of interests of minorities).
\textsuperscript{504} See, for example, Constitution Art.14 (right to equality); Art.15 (1) (right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them); Art.20 (protection in respect of conviction of offences); Art.21 (protection of life and personal liberty); Art.22 (protection against arrest and detention); Art.25 (freedom of conscience and right to profess, practice and propagate religion).
\textsuperscript{505} See, e.g. Constitution Arts. 26, 29 and 30.
\textsuperscript{506} Austin cites three provisions, i.e. Constitution arts 15(2), 17 and 23 which have been “designed to protect the individual against the action of other private citizen”: Austin, \textit{Cornerstone of a Nation}, p.51. However, it is reasonable to suggest that the protection of even arts 24 and 29(1) could be invoked against private individuals. See also Vijayashri Sripati, “‘Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)” (1998) 14 \textit{American University International Law Review}, p. 413, 447–48.
The founding fathers envisaged ‘‘the judiciary as a bastion of rights and justice’’\textsuperscript{507}. An independent judiciary armed with the power of judicial review was the constitutional device chosen to achieve this objective. The power to enforce the FRs was conferred on both the Supreme Court and the High Courts\textsuperscript{508} - the courts that have entertained all the PIL cases. The judiciary can test not only the validity of laws and executive actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders, supported with the power to punish for contempt, can reach everyone throughout the territory of the country. Since its inception, the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public policies and establishment of rule of law and constitutionalism\textsuperscript{509}.

5.6.2.1 Judicial Moulding of Standing, Procedure, Substance and Relief

Two judges of the Indian Supreme Court (Bhagwati and Iyer JJ.)\textsuperscript{510} prepared the groundwork, from mid-1970s to early 1980s, for the birth of PIL in India. This included modifying the traditional requirements of locus standi, liberalising the procedure to file writ petitions, creating or expanding FRs, overcoming evidentiary problems, and evolving innovative remedies\textsuperscript{511}.

Modification of the traditional requirement of standing was sine qua non for the evolution of PIL and any public participation in justice administration. The need was more pressing in a country like India where a great majority of people were either ignorant of their rights or were too poor to approach the court. Realising this need, the Court held that any member of public acting bona fide and having sufficient interest has a right to approach the court for redressed of a legal wrong, especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights.

\textsuperscript{507} Austin, Cornerstone of a Nation, p.175.
\textsuperscript{508} Constitution of India 1950 arts 32 and 226
\textsuperscript{509} See, for an analysis of some of the landmark judgments delivered by the Apex Court during these years, Gobind Das, “The Supreme Court: An Overview” in B.N. Kirpal et al. (eds), Supreme but not Infallible: Essays in Honour of the Supreme Court of India (New Delhi: OUP, 2000), pp.16–47.
\textsuperscript{510} These two judges headed various committees on legal aid and access of justice during 1970s, which provided a backdrop to their involvement in the PIL project. See Jeremy Cooper, “Poverty and Constitutional Justice: The Indian Experience” (1993) 44 Mercer Law Review 611, 614–615.
is at stake. Later on, merging representative 1st\(^{512}\) and citizen standing, the Supreme Court in *S.P. Gupta v Union of India*\(^{513}\) held: “Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.”

The court justified such extension of standing in order to enforce rule of law and provide justice to disadvantaged sections of society\(^{514}\). Furthermore, the Supreme Court observed that the term “appropriate proceedings” in Art.32 of the Constitution\(^{515}\) does not refer to the form but to the purpose of proceeding: so long as the purpose of the proceeding is to enforce a FR, any form will do\(^{516}\). This interpretation allowed the Court to develop epistolary jurisdiction by which even letters or telegrams were accepted as writ petitions\(^{517}\). Once the hurdles posed by locus standi and the procedure to file writ petitions were removed, the judiciary focused its attention to providing a robust basis to pursue a range of issues under PIL. This was achieved by both interpreting existing FRs widely and by creating new FRs. Article 21—“no person shall be deprived of his life or personal liberty except according to the procedure established by law”—proved to be the most fertile provision to mean more than mere physical existence\(^{518}\); it “includes right to live with human dignity and all that goes along with it”\(^{519}\).

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513 Ibid.


515 “The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights contained in this Part is guaranteed.” Constitution of India 1950 Art.32(1).


517 See, for example, Sunil Batra v Delhi Administration AIR 1980 SC 1579; Dr Upendra Baxi v State of UP (1982) 2 SCC 308.


519 Francis Coralie v Union Territory of Delhi AIR 1981 SC 746, 753.
Ever-widening horizon of Art.21 is illustrated by the fact that the Court has read into it, inter alia, the right to health, livelihood, free and compulsory education up to the age of 14 years, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and various rights of under-trials, convicts and prisoners. It is important to note that in a majority of cases the judiciary relied upon DPs for such extension. The judiciary has also invoked Art.21 to give directions to government on matters affecting lives of general public, or to invalidate state actions, or to grant compensation for violation of FRs. The final challenge before the Indian judiciary was to overcome evidentiary problems and find suitable remedies for the PIL plaintiffs. The Supreme Court responded by appointing fact-finding commissioners and amici curiae. As in most of the PIL cases there were no immediate or quick solutions, the Court developed “creeping” jurisdiction thereby issuing appropriate interim orders and directions. The judiciary also emphasised that PIL is not an adversarial but a collaborative and cooperative project in which all concerned parties should work together to realize the human rights of disadvantaged sections of society.

5.6.3 THE THREE PHASES OF PIL

At the risk of over-simplification and overlap, the PIL discourse in India could be divided, into three broad phases. One will notice that these three phases differ from each other in terms of at least the following four variables: who initiated PIL cases; what was the subject matter/focus of PIL; against whom the relief was sought; and how judiciary responded to PIL cases.

In the first phase—which began in the late 1970s and continued through the 1980s—the PIL cases were generally filed by public-spirited persons (lawyers, journalists, social activists or academics). Most of the cases related to the rights of disadvantaged sections of society such as child labourers, bonded labourers, prisoners,

520 See Ashok H. Desai and S. Muralidhar, “Public Interest Litigation: Potential and Problems” in Kirpal et al., Supreme but not Infallible, pp.159, 165–167. The Court also held that the power to appoint commissioners is not constrained by the Code of Civil Procedure or the Supreme Court Rules.
521 Baxi, “Taking Suffering Seriously” (1985) Third World Legal Studies 107, 122
522 See Sathe, Judicial Activism in India, pp.207–208, 235–237.
523 Dam divides SAL in three functional phases: creative, lawmaking and super-executive. Shubhankar Dam, “Lawmaking beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing The Legitimacy of the Nature of Judicial Lawmaking in India’s Constitutional Dynamic)” (200) 13 Tulane Journal of International and Comparative Law 109, 115–116. This division, however, does not fully explain the complexity of PIL, because it focuses only on one aspect of it.
mentally challenged, pavement dwellers, and women. The relief was sought against the action or non-action on the part of executive agencies resulting in violations of FRs under the Constitution. During this phase, the judiciary responded by recognising the rights of these people and giving directions to the government to redress the alleged violations. In short, it is arguable that in the first phase, the PIL truly became an instrument of the type of social transformation/revolution that the founding fathers had expected to achieve through the Constitution.

The second phase of the PIL was in the 1990s during which several significant changes in the chemistry of PIL took place. In comparison to the first phase, the filing of PIL cases became more institutionalized in that several specialized NGOs and lawyers started bringing matters of public interest to the courts on a much regular basis. The breadth of issues raised in PIL also expanded tremendously—from the protection of environment to corruption-free administration, right to education, sexual harassment at the workplace, relocation of industries, rule of law, good governance, and the general accountability of the Government. It is to be noted that in this phase, the petitioners sought relief not only against the action/non-action of the executive but also against private individuals, in relation to policy matters and regarding something that would clearly fall within the domain of the legislature. The response of the judiciary during the second phase was by and large much bolder and unconventional than the first phase. For instance, the courts did not hesitate to come up with detailed guidelines where there were legislative gaps. The courts enforced FRs against private individuals and granted relief to the petitioner without going into the question of whether the violator of the FR was the state. The courts also took non-compliance with its orders more seriously and in some cases, went to the extent of monitoring government investigative agencies and/or punishing civil servants for contempt for failing to abide by their directions. The second phase was also the period when the misuse of PIL not only began but also reached to a disturbing level, which occasionally compelled the courts to impose fine on plaintiffs for misusing PIL for private purposes.

It is thus apparent that in the second phase the PIL discourse broke new grounds and chartered on previously unknown paths in that it moved much beyond the declared objective for which PIL was meant. The courts, for instance, took resort to judicial legislation when needed, did not hesitate to reach centers of government
power, tried to extend the protection of FRs against non-state actors, moved to protect the interests of the middle class rather than poor populace, and sought means to control the misuse of PIL for ulterior purposes.

On the other hand, the third phase—the current phase, which began with the 21st century—is a period in which anyone could file a PIL for almost anything. It seems that there is a further expansion of issues that could be raised as PIL, e.g. calling back the Indian cricket team from the Australia tour and preventing an alleged marriage of an actress with trees for astrological reasons. From the judiciary’s point of view, one could argue that it is time for judicial introspection and for reviewing what courts tried to achieve through PIL. As compared to the second phase, the judiciary has seemingly shown more restraint in issuing directions to the government. Although the judiciary is unlikely to roll back the expansive scope of PIL, it is possible that it might make more measured interventions in the future.

One aspect that stands out in the third phase deserves a special mention. In continuation of its approval of the government’s policies of liberalization in Delhi Science Forum, the judiciary has shown a general support to disinvestment and development policies of the Government. What is more troublesome for students of the PIL project in India is, however, the fact that this judicial attitude might be at the cost of the sympathetic response that the rights and interests of impoverished and vulnerable sections of society (such as slum dwellers and people displaced by the construction of dams) received in the first phase. The Supreme Court’s observations such as the following also fuel these concerns: “Socialism might have been a catchword from our history. It may be present in the Preamble of our Constitution. However, due to the liberalization policy adopted by the Central Government from the early nineties, this view that the Indian society is essentially wedded to socialism is definitely withering away.”

It seems that the judicial attitude towards PIL in these three phases is a response, at least in part, to how it perceived to be the ‘‘issue(s) in vogue’’. If rights of prisoners, pavement dwellers, child/bonded labourers and women were in focus in the first phase, issues such as environment, AIDS, corruption and good governance were at the forefront in second phase, and development and free market considerations might dominate the third phase. So, the way courts have reacted to PIL in India is merely a reflection of what people expected from the judiciary at any given point of time.

5.6.4 PROBLEM IN EXERCISE OF JUDICIAL ACTIVISM THROUGH PIL

It seems that the misuse of PIL in India, which started in the 1990s, has reached to such a stage where it has started undermining the very purpose for which PIL was introduced. In other words, the dark side is slowly moving to overshadow the bright side of the PIL project.

(1) Ulterior purpose: Public in PIL stands substituted by private or publicity. One major rationale why the courts supported PIL was its usefulness in serving the public interest. It is doubtful, however, if PIL is still wedded to that goal. As we have seen above, almost any issue is presented to the courts in the guise of public interest because of the allurements that the PIL jurisprudence offers (e.g. inexpensive, quick response, and high impact). Of course, it is not always easy to differentiate ‘‘public’’ interest from ‘‘private’’ interest, but it is arguable that courts have not rigorously enforced the requirement of PILs being aimed at espousing some public interest. Desai and Muralidhar confirm the perception that: ‘‘PIL is being misused by people agitating for private grievances in the grab of public interest and seeking publicity rather than espousing public causes.’’122 It is critical that courts do not allow ‘‘public’’ in PIL to be substituted by ‘‘private’’ or ‘‘publicity’’ by doing more vigilant gate-keeping.

(2) Inefficient use of limited judicial resources: If properly managed, the PIL has the potential to contribute to an efficient disposal of people’s grievances. But considering that the number of per capita judges in India is much lower than many other countries and given that the Indian Supreme Court as well as High Courts is facing a huge backlog of cases, it is puzzling why the courts have not done enough to stop non-genuine PIL cases. In fact, by allowing
frivolous PIL plaintiffs to waste the time and energy of the courts, the judiciary might be violating the right to speedy trial of those who are waiting for the vindication of their private interests through conventional adversarial litigation. A related problem is that the courts are taking unduly long time in finally disposing of even PIL cases. This might render ‘‘many leading judgments merely of an academic value’’. The fact that courts need years to settle cases might also suggest that probably courts were not the most appropriate forum to deal with the issues in hand as PIL.

(3) **Judicial Populism:** Judges are human beings, but it would be unfortunate if they admit PIL cases on account of raising an issue that is (or might become) popular in the society.

Conversely, the desire to become people’s judges in a democracy should not hinder admitting PIL cases which involve an important public interest but are potentially unpopular. The fear of judicial populism is not merely academic is clear from the following observation of Dwivedi J. in *Keshavnanda Bharti v State of Kerala*: ‘‘the court is not chosen by the people and is not responsible to them in the sense in which the House of People is. However, it will win for itself a permanent place in the hearts of the people and augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority protection to the humanitarian concept of the protection of the weaker section of the people.’’

It is submitted that courts should refrain from perceiving themselves as crusaders constitutionally obliged to redress all failures of democracy. Neither they have this authority nor could they achieve this goal.

(4) **Symbolic Justice:** Another major problem with the PIL project in India has been of PIL cases often doing only symbolic justice. Two facets of this problem could be noted here. First, judiciary is often unable to ensure that its guidelines or directions in PIL cases are complied with, for instance, regarding sexual harassment at workplace (*Vishaka case*) or the procedure of arrest by police (*D.K. Basu case*). No doubt, more empirical research is needed to investigate the extent of compliance and the difference made by the Supreme Court’s
guidelines. But it seems that the judicial intervention in these cases have made little progress in combating sexual harassment of women and in limiting police atrocities in matters of arrest and detention.

The second instance of symbolic justice is provided by the futility of over conversion of DPSPs into FRs and thus making them justifiable. Not much is gained by recognizing rights which cannot be enforced or fulfilled. It is arguable that creating rights which cannot be enforced devalues the very notion of rights as trump.127 Singh aptly notes that,

“a judge may talk of right to life as including right to food, education, health, shelter and a horde of social rights without exactly determining who has the duty and how such duty to provide positive social benefits could be enforced”. So, the PIL project might dupe disadvantaged sections of society in believing that justice has been done to them, but without making a real difference to their situation.

(5) Disturbing the Constitutional Balance of Power: Although the Indian Constitution does not follow any strict separation of powers, it still embodies the doctrine of checks and balances, which even the judiciary should respect. However, the judiciary on several occasions did not exercise self-restraint and moved on to legislate, settle policy questions, take over governance, or monitor executive agencies. Jain cautions against such tendency: “PIL is a weapon which must be used with great care and circumspection; the courts need to keep in view that under the guise of redressing a public grievance PIL does not encroach upon the sphere reserved by the Constitution to the executive and the legislature.”

Moreover, there has been a lack of consistency as well in that in some cases, the Supreme Court did not hesitate to intrude on policy questions but in other cases it hid behind the shield of policy questions.130 Just to illustrate, the judiciary intervened to tackle sexual harassment as well as custodial torture and to regulate the adoption of children by foreigners, but it did not intervene to introduce a uniform civil code, to combat ragging in educational institutions, to adjust the height of the Narmada dam and to provide a humane face to
liberalization-disinvestment policies. No clear or sound theoretical basis for such selective intervention is discernable from judicial decisions.

It is also suspect if the judiciary has been (or would be) able to enhance the accountability of the other two wings of the government through PIL. In fact, the reverse might be true: the judicial usurpation of executive and legislative functions might make these institutions more unaccountable, for they know that judiciary is always there to step in should they fail to act.

(6) **Overuse-induced non-seriousness:** PIL should not be the first step in redressing all kinds of grievances even if they involve public interest. In order to remain effective, PIL should not be allowed to become a routine affair which is not taken seriously by the Bench, the Bar, and most importantly by the masses: ‘‘The overuse of PIL for every conceivable public interest might dilute the original commitment to use this remedy only for enforcing human rights of the victimized and the disadvantaged groups.’’ If civil society and disadvantaged groups lose faith in the efficacy of PIL, that would sound a death knell for it.

5.7 **FINDINGS**

A cumulative or effect analysis of all the above provisions and especially the PIL makes it abundantly clear that the judiciary in India, in general and Supreme Court in particular has vast powers under the Constitutional scheme, and that in turn provide enough scope for the judiciary to play activist role. However, the judiciary must exercise caution in use of its power so as to be within the constitutional framework. Judiciary must ensure that the PIL is not used for the judicial populism and for the ulterior motives and private interest of few else it would undermine the very purpose for which it was introduced.