7.1 BACKGROUND

An active role of Indian judiciary over the functions falling constitutionally within the legislative competence raises certain serious and prominent issues qua ‘Judicial Activism’ in India. This aspect of ‘Judicial Activism’ equally holds the debatable field amongst others since the judge made law has gained a vast recognition throughout the world. The Indian Supreme Court has contributed to such recognition to a very large extent by giving directions to the government from time to time seeking compliance under its contempt power and many a times by legislating exactly in a manner akin to the legislature. Such instances of judicial intervention call for a need to closely scrutinize the essence and the constitutional perspective of the ‘lawmaking’ function of judges in distinction with the constitutionally conferred legislative powers of the legislature.

It is indeed true that within the given set up of ‘separation of powers’, the legislature under the Indian Constitution, acts as a prime mover in enacting laws to suit the changing circumstances of the society. However, the role of judiciary is also largely acknowledged since judges, while dealing with real life situations to adjudicate upon, do get opportunities to interpret the existing laws and apply them in a given situation to cater the changing needs and keeping pace with varying societal situations. The chief reason that can be attributed to such an important facet of judicial function is the undisputed fact that since law by its very nature is organic no legislature can foresee, with reasonable certainty, the future and forthcoming contingencies which the law attempts to address. Practically, every enacted law on a probing analysis reveals certain gaps which the judiciary is expected to fill up by way of interpretation. This is popularly known as ‘Judicial Legislation’.

dictates and confined to the extent permitted by the Constitution which distinguishes it from being branded as an instance of ‘Judicial overreach’.

Under Indian Constitutional mechanism a heavy responsibility has been cast upon judges to evolve law in consonance with the changing needs and aspirations of society and to serve the cause of social justice. Justice Bhagwati has aptly observed that:-

Judicial activism is now a central feature of every political system that rests adjudicatory power in a free and independent judiciary.604

Justice Michael Kirby, of New South Wales endorsing Justice Bhagwati's views says:-

Especially where there is a constitutional charter of rights and particularly in common law countries, judges have an inescapable function in developing the law.605

Highlighting the significance of the creative role of a judge, Mr. Justice E.G. Brennan of Australia observes:-

The great judge is a bold judge, because he so perceives the philosophy and history of the law that he can sweep aside the incidental and reaches for the essential, and fashion and refashion the basic principles so that they serve the society of his time. Boldness is a function of both understanding and courage-understanding of the deepest values of society, and courage in rejecting the applications of perhaps current at an earlier time. And so the significant contribution which judges are able to make to the society of their time is not confined to the application of principles, but includes more importantly the modification of principle to suit the good of that time.606

To Mr. Justice Brennan, evolution rather than application of law is more important aspect of judicial function. There have been great judges such as Holt,
Mansfield, Blackburn, Wright, Atkin and Denning in England, Warren and Thousand Marshall in United States of America, Brennan in Australia, Bhagwati and Krishna Iyer in India, who possessed both understanding and courage and who by using these two qualities have transformed the law phenomenally. It is realized that for Justice Bhagwati and his like, activism is a necessary and a significant aspect of any proper theory of judicial function in a democratic society governed by rule of law. He agrees that the degree and the scope of the legitimate exercise of judicial activism would largely depend on the power conferred on the courts, i.e. where the court enjoys the power of judicial review, there is a great scope for practicing judicial activism, and this increases considerably where the power of judicial review extends not only over executive action as in the case of the United Kingdom, but also over legislative action as is the case in the United States of America, and even over constitutional amendments as in the case in India.

7.2 NORMS OF SOCIAL ACTIVISM AND JUSTICE

The term judicial activism is very slippery and difficult to define. Various groups differ in their conception of activism. Webster's dictionary assigns the meaning 'being active' to the term 'activism'. In this sense every judge is, or at least should be an activist so long as one decides in whatever way one may choose to decide. Under this definition of activism the decision of Indian Apex Court given in the early 1950s and popularly known as Gopalan's case, holding that a right guaranteed in a particular provision of Article appearing in Part III of the constitution cannot and does not control, another right guaranteed in another provision appearing in the same part of the constitution, and thus refusing procedural due process to Gopalan is as activist a judgment as the one delivered by the same court in the Maneka Gandhi's passport case.

In Maneka Gandhi's case, the court in contrast to its earlier position, ruled that the term procedure established by law appearing in Article 21 of the Constitution

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608 After the Supreme court's Judgments particularly in Kesavanand Bharti v. State of Kerala (AIR 1973 SC 1461) and in Minerva Mills Ltd.v. Union of India (AIR 1980 SC 1789) it has become settled law that the amendment brought to the constitution by the Parliament exercising the power in Article 368 is subject to judicial review.
611 Maneka Gandhi v. Union of India AIR 1978 SC 597.
which says 'no person can be deprived of his life or personal liberty except in accordance with the procedure established by law is controlled by the provisions of Article 14, and thus the procedure contemplated under Article 21 cannot be unfair or arbitrary lest it should be hit by provision of Article 14. According to the dictionary meaning of the term activism is the use of vigorous campaigning to bring about political or social change. The Judges who in the Dread Scott's case 612 in United States of America saw nothing wrong in approving racism are as activist as a Judge who in Brown's decision 613 ruled racial segregation in schools unconstitutional and impermissible. Thus, seen in this sense, activism may be exercised equally for strengthening the force of status quo as much as it can be used to bringing about 'changes'.

What is activism and what is not, depends on whether the result is to the liking or disliking of the one who is evaluating the judicial role in that particular instance.

The term 'activist' is slippery and has been used more in an ascriptive sense and such ascription depends largely on liking or disliking of the evaluator of a particular judicial outcome, rather than on any theory of judicial function, and that activism can be and has been exercised by judges to serve the force of ‘change’ as well as preserving the status quo.

Justice Bhagwati’s approach is that it addresses itself more to the question as to the result for which judicial activism is to be exercised, than to whether judges can legitimately exercise judicial activism in constitutional interpretation. The issue in his philosophy is not whether, but what type of activism and what type of values would enter into constitutional interpretation. To him activism is to be exercised for 'willed result' 614. And that 'willed result' is the 'goal' of ensuring 'social justice', to all including the poorest of the poor, and evolving an egalitarian society where there is no place for any kind of exploitation of anyone. 615 Judicial activism to this school of judicial philosophy means an active use of judicial power for the realization of social justice. According to Justice Bhagwati, the term Judicial activism is not the term of 'fashion' or

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612 *Dred Scott v. Sandford* 19 Hav 393 (1857).
‘populism’\textsuperscript{616}, but a term signifying an important source of judicial power, which judges should use for the realization of willed result. The task of the judges takes them deeper into the future to make decisions which will affect the future course of social and economic and sometimes even political development. Therefore, in all humility they have to be aware of social needs and requirements and economics and political compulsions. They will have to recognize changes taking place in a fast developing society and to develop and adopt law to the changing needs and requirements of the people. And on each occasion when they do so, they are expected to provide justifying reasons which must satisfy not only themselves but also critics and jurists, nay the society itself, for what they decide.\textsuperscript{617} No other functionary of the State is subject to such a rigorous form of accountability as a judge.\textsuperscript{618}

Sensitivity and understanding of social needs, social requirements and political compulsions and accountability in the form of providing reasons satisfying critics, jurist and the society itself are the two major characteristics of the kind of activism, Justice Bhagwati advocates. This kind of activism neither rests on the theory of judicial function assigning unrestricted and uninhibited power to judges, nor approves the 'slot-machine' method of judicial decision making, Justice Bhagwati's activism is guided and restrained by values of the constitution and can be pressed into service only for furthering the cause of Constitutional objectives.

Justice Bhagwati has taken pains in his judicial pronouncements and in his other writings, to further explain his views on what kind of judicial activism, how much of it, what manner, within which self imposed limits, to what and with what tolerable accumulation of unintended results, should the judge adopt a proactive approach.\textsuperscript{619} According to him judicial activism can take many forms and thinks that 'technical and juristic' are two important forms of activism and that no legal system can survive in the modern age without providing some scope to the judge to exercise these two forms of judicial activism.

\textsuperscript{616} Upendra Baxi, \textit{The Indian Supreme Court and Politics} (1980) pp. 127-51.
\textsuperscript{617} Justice P.N.Bhagwati, \textit{Judicial Interpretation in Constitutional Law}, 8th Commonwealth Law Conference.
\textsuperscript{618} \textit{Ibid}.
The most remarkable example of the Indian Supreme Court exercising a juristic kind of activism with enduring influence on India's constitutionalism, and directed towards protecting citizens against any drastic or draconian amendments which may be made by the ruling party by reason of its brute majority in the parliament, is its Judgment in what is known as *Keshavanand Bharti case*\(^{620}\). In that case the court was called upon to interpret Article 368 of the Indian Constitution which confers power on the Parliament to amend the constitution. The Supreme Court refused to accept a narrow textual interpretation and held that the power to amend the constitution was not unlimited power, but was restricted by the basic structure doctrine - a doctrine that was propounded by the court for the first time in this case itself, and that Parliament was not competent to amend the constitution so as to affect any of its basic features like Republicanism and Secularism. To this list was added by the Supreme Court in a subsequent decision, known as the *Minerva Mills Case*,\(^{621}\) the power of judicial review. Basic structure doctrine was altogether a novel doctrine innovated by the court for the first time as not only that there is no mention of any such doctrine in the text of the Constitution but no such doctrine was mentioned even in the debates of the Constituent Assembly that gave us the Constitution. It was a superb example of juristic activism on the part of the court and the Judges.

This chapter, in the light of this background, attempts to unfold the dichotomy of ‘Judicial lawmaking’ vis-à-vis legislative power to ‘legislate’ as enshrined in the Constitution and analyzes as to how far can the judiciary be legitimately understood as playing an ‘activist’ lawmaking role. It further delves and highlights certain glaring instances where there have been an utmost disregard to the constitutional mandate and values that are necessary in the working of a healthy democracy, by the judiciary under the pretext of ‘judicial activism’. Eventually the trend reflects transition in the lawmaking role of judges from ‘activism’ to ‘over-activism’ or ‘overreach’ thereby implying that judiciary in India has transformed itself from a judicial to a super legislative organ of the state.

Since a page of history is worth a volume of logic, to begin with, an analysis of the ‘Realist’ philosophy of law breeds fruitful thematic thrust to examine the theory of

\(^{621}\) *Minerva Mills Ltd. v. Union of India* AIR 1979 SC 1789.
‘judicial lawmaking’ since it was a unique approach which, unlike other theories that aimed at defining the law in abstract senses, while scientifically analyzing the nature of law in practical terms kept the judicial process of a judge at its centre stage.

7.3 THE ‘REALISTS’ PHILOSOPHY AND JUDICIAL LAWMAKING

The lawmaking function of the judiciary can be traced as being obscurely rooted in ‘Realist School’ of Jurisprudence since inline with the Austinian conception of law as a command of sovereign, realists regarded law being a command of a judge considering him supreme for the purposes of setting laws in the legal system. However, since there was no unanimity amongst the scholars who contributed to this way of thought, ‘realism’ was never regarded as a school of jurisprudence as such, Llewellyn is regarded as the chief proponents of this scientific and judge centred approach of law. The movement was regarded as ‘realist’ as it studied law as a body of rules and principles which are enforced by the courts.

‘The law (or the Constitution) is what the courts say it is’ is the working principle of realist jurisprudence. It develops naturally when there is a multiplicity of jurisdictions, and the Constitution or the laws, whether enacted or Common law; leave ‘open texture’ to be resolved by the courts. The constitutional system of the United States is highly dependent on judicial interpretative process for achieving any finality or certainty in the Constitution or the laws. On the other hand, in the United Kingdom the concept of sovereignty has led to the legal positivism which regards the sovereign, Parliament in modern times, as the ultimate source of positivity in law.

The Constitution of India partakes of both, the United States and British Constitutions since it has Parliament and cabinet systems of Government from England and federalism with its characteristic system for distribution of legislative functions

623 Ibid.
626 Hart, ‘Open textures” refers to ideas, words or phrases left undefined in the Constitution or enactments, such as, ‘due process of law’, ‘liberty’, or ‘personal liberty’, ‘reasonable restrictions’ or ‘matters of religion’ in Indian Constitution.
and judicial powers of review from the United States Constitution. Since realist jurisprudence and analytical positivism draw heavily from the respective constitutional systems of the United States Constitution. Since realist jurisprudence and analytical positivism draw heavily from the respective constitutional systems of the United States and the United Kingdom, it is natural that the two theories of law and jurisprudence may make an impact on each other continuously or intermittently in the working of the Indian Constitution.

Legal Realism emphasizes that law can be properly understood or defined in terms of judicial process only. The law on paper and the law in action are distinct from each other. It says that after the law has been laid down by the legislature, it is nothing but the ‘a prophesy of what the courts will do in fact’, and so long as the courts have not given their final pronouncement on it, the law remains uncertain, a child’s world. To define law on a subject, to know what ‘the law’ is in question the lawyer, the administrator or the affected person may look into the prescribed law (designated as ‘command’ by the positivists) but ultimately they have to find how the courts have already defined it and how are they likely to define the same when the matter again goes before them.

In modern times ‘policy decision making’ is advocated for breaking the rigidity of the Constitution and laws when their acquired meanings fail to achieve the socio-economic ideals of a socialist or welfare state. In developing countries law is desired to be dynamic. It should change with the changing needs of the society in time and space; in that way law becomes an instrument for social engineering. Indian Juristic thinking also recognizes ‘the dynamic character of law’.

However, the realist jurisprudence has a non-doctrinaire approach or politically neutral approach to the content of law or the Constitution. It focuses attention on the judicial process through which Constitution and law in practice operate. The law us made by the legislature but it is enforced through the agency of courts.

Judicial Lawmaking in ‘realist’ sense can thus be understood as a process that aims at determining all questions affecting interpretation, application, operation and working of the Constitution or other statutory enactments. No contributor of realism however negated the competence of legislature in lawmaking which suggests that law making function of judiciary is secondary in contrast with the legislature since courts can, by way of interpretation, only supplement the true essence and objective of the law primarily enacted by the legislature. Since such instances are supplement has an effect of law primarily enacted by the legislature. Since such a supplement has an effect of law and a binding consequence, ‘lawmaking’ in realist sense is a fact and a stark reality.

7.4  DO JUDGES MAKE LAW?

No informed citizen who is governed under a modern Constitution disputes the notion that judges do make law, especially the judges of constitutional courts. This is so since such courts have meticulously come at par with the expectations of the people and the changing social circumstances by way of their ‘interpretative skills’. In Indian context, a glaring example of this fact can best be evidenced from the complete shift accorded by the Supreme Court of India in interpreting Art.21 of the Constitution from Gopalan to Menaka. Further, innovations in the field of Public Interest Litigations (PIL) have also provided thrust to the undisputable notion that judges do indeed make law through directions.

In erstwhile halcyon days, it was argued by many commentators that a judge simply declares, discovers, and applies the existing body of legal principles by a logical and a purely mechanical process. The law was seen by those commentators, in Oliver Wendell Homes’ memorable phrase, as a ‘brooding omnipresence in the sky’. However, it is now a well settled fact that by applying or extending established rules to novel circumstances and by altering the content of legal rules in accordance with changed economic and social circumstances, judges do make law. The notion that

632 “The judges are always constrained to follow the law; for there is no law beyond the law. They cannot act as super-legislators.” Ronald Dworkin, “No Right Answer?” in P.M.S Hacker and J.Raz, Law, Morality and Society: Essays in Honour of H.L.A Hart 84 (1977)
634 Maneka Gandhi v. Union of India AIR 1978 SC 597.
635 See Holmes J. Dissent in Southern Pacific Co v Jensen 244 US 205 (1917) at 222.
courts make law is now widely understood not only by lawyers but also by lay commentators and the general community.

According to Hans Kelsen all judges, trial as well as appellate, created individual specific norms by their decisions. Specific individual norms directed to persons do not and cannot pre-exist a judicial decision. Such norms come into being only when a judge decides in accordance with higher norm, which is concretized by that decision. In other words, the process of concretization of general and abstract norms always results in creation of new law, individuated and specific norms. In this sense, the distinction between norm creation and norm application is not an absolute but a relative distinction.  

In this context, it is appropriate to consider a basic objection to the very notion of lawmaking by the judges on the ground that the judges in India were trained in the conservative English tradition under which they were expected to depart as little as possible from established precedents and that the judiciary should not be concerned with the policy underlying any legislation. It must however be noted that it is impossible for a judge who, unlike his counterpart in England, functions under a written Constitution not to make any law, to inquire into the policy behind the law and, indeed, to ensure that such policy conforms to the demands of the Constitution. The principle of grammatical interpretation is inapplicable since it is a Constitution and not a statute, whose interpretation is really in issue so that it can be worked.

But even in the United Kingdom (UK) the judgments of the House of Lords have shown conclusively in the last several decades that judges often do make law and that the fiction that they merely find it must be discarded. To talk openly of judicial lawmaking is therefore honest and makes sense as Justice Holmes, Brandeis, Cardozo, Warren and many other judges in the United States have shown. Only a minority of judges such as Frankfurter and jurists such as Wechsler have believed in sticking to a

narrow, grammatical or neutral view of the cold constitutional provisions, occasionally under the umbrella of a scientific approach. Even in Australia, an eminent judge Dixon C.J. who was noted for his strict constructions had accepted the need for a judge to be concerned with policy questions and even with political considerations in the following words:

It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.

To the same tune are certain judgments of Canadian Supreme Court, especially those of Rand J.

Having arrived at the practical answer to the dilemmatic and yet controversial question ‘Whether Judges make law?’ the most important analysis for the purposes of the present work is the ascertainment that what sort of law do the judges are entitled to make? Since actual lawmaking fall constitutionally in the domain of Legislature, who among the two organs of state enjoy primacy in lawmaking? And what is the distinction between a judge made law (adjudication) and a law enacted by the legislature (legislation)? These are certain issues which deserve discussion in this context.

7.5 ‘ADJUDICATION’ VIS-A-VIS ‘LEGISLATION’

In order to properly appreciate the distinction between ‘Adjudication’ and ‘Legislation’, it is first appropriate to analyze the word ‘interpretation’, which is central to the entire judicial process. To Salmond, ‘interpretation and ‘construction’ are synonymous by which he meant “the process by which the courts reach to ascertain the meaning of the legislature through the medium of authoritative forms in which it is expressed.” Justice Grey described it as “the process by which a judge construes from the words of a statute book the meaning of which he either believes to be that of

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642 Switzman v. Elbling & Attorney General, Quebec (1957) 7 D.L.R 337.
the legislature, or which he proposes to attribute to it. However, the soul of interpretation vanishes if the very proposes to attribute to it. However, the soul of interpretation vanishes if the very purpose of the statute is given a go-by. In the process of evolution of law judges act as the selective agents. However, law as a bundle of rules on which justice can rest is a mirage. It is akin to folkways and mores of a society it is an existing fact with an ever changing trajectory.

In this context, the question then arises that whether interpretation necessarily involves legislation. Judicial decision is however not akin to lawmaking; it is rather an alternative available whenever the applicable precepts provide more than the choices. In justification of this, one needs to understand the fundamental differences between ‘legislation’ and ‘adjudication’.

Adjudication presupposes initiation by the parties in the disputes who render reasoned advocacy based upon which and existing law, the judicial opinion manifests itself in the form of a result necessarily in the ‘either-or’ form. It is therefore monocentric, that is, rooted in disputes while legislation is polycentric, that is, when variables multiply, and the answer cannot be ‘either-or’ to given dispute. It thus needs legislation because resolution to such polycentric matters involves negotiation and bargain between the conflicting social interests which is a political act. ‘Adjudication’ can, however be better explained as “a decision based on some principle to protect rights (of an individual or a group) and, being based on this principle, has to be anticipatively consistent for uniform distribution of benefit from one case to next. The process of adjudication, therefore, negates any ‘intuitive’ decision since the latter cannot stand to future consistency in enforcement of rights it is so because ‘intuition’ is usually a product of the synthesis of the philosophy, values, and political leanings of an individual, and hence is quite individuated in character.

During adjudicatory process the law-making power of the judge, of late, has been acknowledged by most of the jurists. The idea of strict adherence to procedure, called ‘formalism’, has waned away the ‘ends’ of law and has gained primacy in the judicial process. It is probably because “there can be no wisdom in choice of a past

644 Cited in Id. at 2.
646 Ronald Dworkin, cited in Id. at 11.
unless we know where it wills lead\textsuperscript{647}. In fact, it cannot be denied that in the process attaining the ‘ends’ of law, the judges do get more space for lawmaking; however, it is a limited one. As justice Holmes Said:

I recognize without hesitation that judges must and do legislate, but they do so only interstitially they are confined from molar to molecular motions\textsuperscript{648}. Therefore, the general framework provided by the statute is to be filled in each case by means of interpretation following principles of interpretation of the statute.

Such adjudication has often been considered by many jurists as a freedom to operate within the gaps in the statute law. The principles developed by the judge, to be applied in a given case, have to be within the structure of the statute, only such decisions can expect to command respect that begets certainty and uniformity for future references. What is a judge’s ‘limit’ is also his ‘duty’. Although guided by his own experiences, the statute does circumscribe his choices. “He may intervene only to supplement the formal authorities, and even in that filed there are limits to his discretion in establishing rules of law. Neither he may restrict the scope of the general principle of our juridical organization, explicitly or implicitly sanctioned, nor may be lay down detailed regulations governing the exercise of given rights, by introducing delays, formalities, or rules publicity”\textsuperscript{649}. He should rather stick to objective interpretation even in the so called ‘hard cases’ since after all, hard cases make a bad law. “They (the judges) have the power, though not the right, to travel beyond the walls of interstices, the bounds to judicial innovation by precedent and customs. Nonetheless, by that abuse of power, they violate the law”\textsuperscript{650}.

7.6 **JUDICIARY: A TOOL OF LAW MAKING**

Judicial law making is a stark fact of the modern age. There are various techniques adopted by the judges in creating new rules. Precedent, construction of statutes, supplying the omission of the legislature\textsuperscript{651} or filling the gaps by using discretion are some of the tools used by the judges for creating law. Lord Wright has

\textsuperscript{648} Cited in Id. at 69.
\textsuperscript{649} Cited in Id. at 114-115.
\textsuperscript{650} Id. at 129.
\textsuperscript{651} Per Byles J. in *Cooper v. Wandsworth Board of Works* (1863) 14 CBNS 180.
said that ‘judging is an act of will and that ‘notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice.' \[652\] Julius Stone attributes the influence of a judge’s own outlook of life, fixed by his education, training, experience and association on the role of a judge in creating law besides the power of interpretation of the rule. \[653\] There are, yet certain constraints on the rule-creating power of the judges. Positivists from John Austin to HLA Hart put emphasis on judicial discretion. Realists forged ahead and have placed discretion on the highest pedestal. Holmes, has referred to it as ‘the sovereign prerogative of choice'. \[654\] The opinion of Lord Devlin is that, judicial creativity is permissible in the common law but not in relation to statutory legislation. His belief is that judicial activism must operate ‘within the consensus', \[655\] so that where there is no consensus, judges should not act creatively. Lord Scarman, expressing a similar opinion, feels that judicial activism can play only a peripheral part in keeping the law in touch with modern developments. \[656\] It will thus be seen, that judicial legislation as a fact, is not disputed. However, the question now revolves round the methods, motives, attitudes and reasoning, which underlie this development. Whenever a court applies an established situation or set of facts, new law is created. Holmes calls this process of legislation interstitial, \[657\] i.e., within the interstice of the existing fabric of the law.

Judicial creativity through the device of statutory interpretation is a fertile ground for judicial activism. This is done under the guise of finding the intention of the legislature. Besides, modern statutes lay down the broad general principles and leave it to the court to expound their meaning and ambit. The major part of the constitutional law of the United States is judge-made law. Even the elaborate and detailed constitutional provisions have not deterred the judges from judicial activism. Post-1977 the Indian Supreme Court has accentuated this trend by judicial creativity.

This, however, does not mean that judges are free to create new rules without inherent limitations of judicial process. The judicial process cannot make innovations of a general sweep. The judge tries to encompass his innovation within the traditional

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653 Ibid., 288.
655 Ibid., 1129.
656 Ibid.
657 Southern Pacific Co. v. Jensen 244 U.S. 205, 221 (1917).
framework. He does not usher in a new legal domain. In *Kasturilal v. State of Uttar Pradesh* 658 Chief Justice Gajendragadkar found the law relating to government liability ‘not very satisfactory’, yet he did not make the change by judicial construction, this shows judicial reverence to precedent. He suggested legislative intervention to ward-off the ‘not very satisfactory position of law.

Process of judicial law-making is restricted by its very nature and hence cannot be parallel to the legislative process. Even within this restricted parallel arena the scope of judicial law-making is subject to two conditions. (1) Whether the courts are endeavouring consciously to develop law relatively freely to meet new social and economic conditions, (2) the preference of the judge to dwell in the existing domain of precisely enunciated principles of law. This again will to a large extent, depend upon the philosophy of the judge.

### 7.7 SCOPE FOR ‘JUDICIAL LAWMAKING’ UNDER THE INDIAN CONSTITUTION

The scope for judicial innovation or creativity is more profound when it pertains to constitutional interpretation being an organic law, and also the source of all future law-making. For “a constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility and the scope of interpretation contracts, and the meaning hardens” 659. The more detailed a Constitution s more restricted is the scope of judicial lawmaking since the gaps get narrowed down.

In addition to the scope for ‘Judicial Activism’ as discussed under chapter III, Article 141 is one such provision under the Indian Constitution which recognize ‘judicial lawmaking’ in the sense we have observed so far 660. However, considerable misunderstanding prevails over this article, as if by it the Supreme Court is given the power to make substantive law of the land and its declarations are binding on everybody and they must be unquestioned 661. The article, however, only means that

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658 AIR 1965 SC 1039.
659 AIR 1951 SC 318.
660 Article 141 provides that the law declared by the Supreme Court is binding on all courts in India.
the declarations of Supreme Court are binding on all the courts as a matter of judicial precedent until they are reversed by the Supreme Court itself.

The following can be cited as certain illustrations, the interpretation of which leads to judicial lawmaking within the scheme of Indian Constitution. The list is however not exhaustive.

I. What classification is reasonable and legitimate within the meaning of Articles 14, 15(1) and 16(1), and what special provisions are legitimate within the meaning of Articles 15(3), (4) and 16(4).

II. What restrictions are reasonable and in the public interest within the meaning of clauses (2) to (6) of article 19;

III. What is comprised in the right to life and right to personal liberty within the meaning of article 21, and what amounts to procedure established by law within the meaning of that article;

IV. What regulations are reasonably related to “public order, morality and health” and to other provisions of part III within the meaning of Articles 25(1) and 26(1) and what regulations are legitimate under article 25(2) (a);

V. What regulations governing minority educational institutions are reasonably related to the need of maintaining educational standards and do not amount to an unreasonable interference with the right of the minorities to establish and administer the institutions of their choice;

VI. Whether the principles laid down by legislation regarding compensation, within the meaning of original article 31, was a just equivalent of the property acquired. Now, article 300 A, in the light of the interpretation given in Maneka Gandhi to the expression ‘law’ in article 21, brings about the same result.

VII. What provisions of a law contemplated by article 31A are reasonably related to the purposes mentioned in sub-clauses (a) to (e) of clause (1) of Article 31A.
VIII. What law abridging a fundamental right is, within the meaning of Article 31A genuinely gives effect to or secures any of the directive principles mentioned in part 4.

7.7.1 JUDICIAL LAW MAKING AND CONSTITUTIONAL INTERPRETATION

It is only the tradition that judges ‘find’ and do not ‘make’ law. By interpretative technique the judges not only make and state what the law is but they also assert what it ought to be. There has been all around expansion of the frontiers of judicial activism. This trend has been notable since the decision in Golak Nath. The post Maneka Gandhi syndrome has given a new boost making Articles 14 and 21 omnipotent for judicial law making. In fact what the U.S. Supreme Court has done under the commerce clause, our Supreme Court has achieved under Articles 14 and 21 of the Constitution. Post Maneka Gandhi ruling of the apex court has clearly authenticated the view that judges of the Indian Supreme Court not merely declare the law, or apply it, but they also create the Constitution. In this way the Supreme Court has turned itself into a continuing constitutional convention.

Emphatic assertion of judicial law making started with the right to property. The beginning was made by the Patna High Court in *Kameshwar Singh v. State of Bihar*, although the challenge to the Bihar Land Reforms Act 1950 was made under Article 14 and not under article 31 of the Constitution. This decision led to the first constitutional amendment in 1951. In *State of West Bengal v. Beta Banerjee*, the Court invalidated the West Bengal Land Act and held that ‘Compensation’ means just equivalent or full indemnification. This case was followed by the Court in *State of West Bengal v. Subodh Gopal* and *Dwarkadas Shrinivas v. Solapur Spinning and Weaving Co.* these rulings were set aside by the Constitution (Fourth Amendment) Act 1955. This amendment made adequacy of compensation a non-justifiable issue.

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665 AIR1951 Pat 91.
666 AIR 1954 SC 170.
667 AIR 1954 SC 92.
668 AIR 1954 SC 19.
But in the *Bank Nationalization Case*, the Supreme Court by a majority of 10: 1 declared that, The Constitution guarantees a right to compensation an equivalent in money of property compulsorily acquired. This is the basic guarantee.

The judicial process ignored the express and intended legislative directions and created a judicial norm. In *Madhav Rao Scindia v. Union of India* the court held that Privy purses were property and could not be abolished without compensation. A clear veto to the socio-economic programmes of the government was made an electoral issue by the Congress (I) Party. This party won the election with a thumping majority. The conflict between the legislature and the judiciary once again started. The Twenty-Fourth, the Twenty-Fifth and the Twenty-Sixth Amendments were made to the constitution in 1971 to nullify the ruling of the Supreme Court in Golak Nath, Bank Nationalization and the Privy Purses cases, respectively. It is notable that the judges trained in Common Law traditions neither followed the rule of supremacy of Parliament in England nor the judicial restraint of the US Supreme Court. In *Marbury v. Madison* the US Supreme Court declared that ‘it is emphatically the province and duty of judicial departments to say what the law is, but it did not invalidate Congressional legislation for fifty five years thereafter’, till the Taney Court in *Dred Scott v. Stanford*, held that Congress had no power to prohibit slavery in the territory ceded by France under the Missouri compromise. The Constitution (Fourth Amendment Act) 1955 was blown out in *Vajravelu v. Special Deputy Collector*. The Court, in this case declared the compensation ‘illusory’ and a fraud on the Constitution. Clearly, the court neither obeyed the rule of interpretation nor followed the philosophy of the Constitution. It acted as a super legislature.

In Keshavanand the court overruled Golak Nath and at the same time introduced the vague concept of ‘basic structure’ or ‘essential feature’, which according to the court, could not be reached by Parliament. This view was endorsed by

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669 R.C. Cooper v. Union of India AIR 1970 SC 564.
671 AIR 1971 SC 530.
672 Marbury v. Madison 2 L. ed 60 (1803).
673 15 L.Ed691 (1857).
674 AIR 1965 SC 1017.
675 AIR 1974 SC. 1461.
the court in *Minerva Mills Ltd. v. Union of India*.\(^{676}\) This interpretation shows that the court is still guided by proprietary philosophy and not by Constitutional Philosophy.

Justice Cardozo once observed that, ‘the teleological conception of his functions must ever be in the judge’s mind’\(^{677}\). But, this caution, it appears, has not been, taken by the Supreme Court of India. There has been a new trend in the judicial process. There are certain constraints in judicial law-making. The judges do not sit and decide as a Court of 26. They sit in Benches and Bench allocation is not systematic. Much depends upon the Chief Justice. Justice P.N. Bhagwati and Krishna Iyer have been the crusaders of ‘poverty jurisprudence’. Public action litigation (also known as social action litigation) relaxation in the rule of locus standi, awarding compensation in writ proceedings is some of the facets of post-1978 judicial process in India. *Fertilizer Corporation Kamgar Union v. Union of Indi*\(^{678}\) can be taken as the precursor of PIL (Social Action Litigation), relaxation in the rule of Locus Standi in *S P Gupta v. President of India*\(^{679}\) and *Peoples Union of Democratic Republic v. Union of India*,\(^{680}\) established the public interest litigation in India,\(^{681}\) are some of the facets of post-1978 judicial process in India. Much revered but incongruous dichotomy between sovereign and non-sovereign or commercial functions, in determining state liability has been whittled down. The court has not overruled the earlier decision based on the century-old precedent. In fact, the interpretation of state liability for torts has been on the wrong footing. The ratio decidendi of *P & O Case*\(^{682}\) has not been correctly applied by the courts. *Vidhyawati*\(^{683}\) and *Kasturilal*\(^{684}\) both have been decided on the basis of dichotomy between sovereign and non-sovereign functions. In Kasturilal, the Court has declared every act done under the statutory authority as sovereign for which no liability attaches. This case has neither been overruled by the court, nor annulled by legislation. However, its impact has been washed away by subsequent judicial activism. In the *Peoples Union for Democratic Rights v. Police Commissioner, Delhi*,\(^{685}\) the Supreme

\(^{676}\) AIR 1980 SC 1784.
\(^{678}\) AIR 1981 SC 344.
\(^{679}\) AIR 1982 SC 149.
\(^{680}\) AIR 1982 SC 1473.
\(^{681}\) AIR 1982 SC 149 & AIR 1982 SC 1473.
\(^{682}\) S. Bom H.C.R. appendi I.I.
\(^{683}\) AIR 1962 SC 993.
\(^{684}\) AIR 1965 SC 1093.
\(^{685}\) AIR 1989 4 SCC 730.
Court awarded Rs. 75000/- as compensation for death of a labourer in police custody. Similarly, in *Saheli v. Commissioner of Police*, 686 an amount of Rupees 75,000/- was paid to an unfortunate mother as costs for her child who had died as a result of police beating. The court relied upon that portion of the judgement in *State of Rajasthan v. M S Vidhyavati*, which are obiter dicta with reference to the principle on the basis of which the case had been decided.

The case was determined on the basis of the distinction between sovereign and non-sovereign functions. The relevant portion of judgement reads:

Can it be said that when the jeep car was being driven back from the repair shop to the collector’s place, when the accident took place, it was doing anything in connection with the exercise of sovereign powers of the State? The court answered this in the negative as the injuries resulting in the death of Jagdishlal were not caused while the jeep car was being used in connection with the sovereign power of the state. 687

In *Saheli* 688, the Supreme Court referred to one portion of the judgement in *Vidhyavati*. 689 The court also avoided any reference to *Kasturilal v. State of Uttar Pradesh*, 690 in which it was clearly established that every act done under the authority of a statute in ultimate analysis is a sovereign exercise for which no vicarious liability attaches. 691 This clearly shows that the judges of the Supreme Court have ample discretion to convert any portion of the judgement into ratio.

Judicial process in India has not been streamlined. Much depends on the philosophy of the judges concerned. It appears that the role of the council also plays almost a decisive role in the formulation of the decisions. *Saheli* 692 and *Premchand v. State of Haryana* were decided by a bench consisting of Justices B C Ray and S Ratnavel Pandian. In the former case, the judges have converted the obiter into ratio, and in the latter case, they have defied the clear legislative mandate. These two decisions illustrate the law-creating power of the Indian Supreme Court.

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686 AIR 1990 SC 513.
687 Ibid at 935.
688 AIR 1990 SC 513.
689 AIR 1962 SC 1039.
690 AIR 1965 SC 933.
691 Ibid p.1048.
692 AIR 1990 SC 513.
The evils of atrocities against women have increased alarmingly. The incidents of custodial rapes have risen. However, the judicial attitude has not changed and the judges have clung to the age-old rules and interpretations of the criminal laws and the law of evidence. The judicial activism has been alarmingly slow in this area. *Tuka Ram v. State*\(^{693}\) substantiates this statement. In this case, one girl (Mathura) was raped in a police station by two constables. They were charged for the offence of rape but were acquitted on technical grounds. This led to many demonstrations and criticism by all sections of society.

Ultimately, the law was amended by the Criminal Law (Amendment) Act 1983. Besides other changes, the heading in the IPC before S. 375 was substituted as ‘sexual offences’ for ‘rape’ S. 375 and 376 were also changed and new sections 376 A, 376 B, 376 C and 376 D were added. S. 228-A now requires prior authorization of the Court for publication of such trial proceedings. S. 327 Cr. P.C. 1973 provided for in-camera inquiry and S. 114 A of the Evidence Act makes provision for presumption as to the lack of consent in prosecutions for custodial rape etc. Section 376 (2) of the IPC as amended, provides for a mandatory punishment of not less than ten years imprisonment in the case of custodial rape. This sentence at the discretion of the court can be reduced but special reasons to be mentioned in the judgement’.

In *Premchand*\(^{694}\) ‘the trial court as well as the High Court punished the accused Police constables with a mandatory sentence of ten years rigorous imprisonment for custodial rape of the prosecutrix. However, on appeal against the quantum of punishment, the Supreme Court reduced the sentence to five years. The statutory requirement of adequate and special reasons for reducing the sentence is astonishing. While the court agreed that the ‘offence of this nature had to be viewed very seriously and had to be dealt with condign punishment’, \(^{695}\) it, nonetheless reduced the punishment for unconvincing reasons. It appears that the court was swayed by the argument of the counsel for appellant that the victim, ‘Suman Rani was a woman of questionable character and easy virtue with lewd and lascivious behaviour’\(^{696}\). The Court reduced the sentence of the two constables on the basis of the ‘peculiar facts and

\(^{693}\) AIR 1989 SC 937.
\(^{695}\) Ibid.
\(^{696}\) Ibid pp.539-40.
circumstances’ of the case coupled with the conduct of the victim.\textsuperscript{697} This ruling, however, was severely criticized and a review petition was filed in the Supreme Court under Article 137 of the Constitution.\textsuperscript{698} The review petition also failed. Since the Supreme Court did not find any error apparent on the face of the record, and yet made ‘observations’ to the effect, that the Judges have neither characterized the victim Suman Rani as a woman of questionable character and easy virtue nor made any reference to her character or reputation in any part of the judgement. They also clarified that the expression ‘conduct’ was used in the lexi graphical meaning for the limited purpose of showing as to how she had behaved or conducted herself, in not telling anyone for five days about the sexual assault perpetrated on her. This explanation, it is respectfully submitted, neither sustains the reduction of the sentence, nor fulfils the requirement of ‘adequate and special reasons’ as envisaged by Section 376 (2) IPC.

If the delay of five days is so fatal, there does not seem any reasonable ground for punishing the accused appellants. The position of an ordinary citizen vis-à-vis the police is well-known. The gravity of the offence is aggravated by the conduct of the police constables who had raped the prosecutrix in the police post. If such leniency is shown, the very purpose of the law is defeated. This may justify the killing of an accused that is suspected of murder or a dacoity. The conduct of a dacoit or murderer can always be manipulated to be special. This will give legitimacy to police lock-up deaths. By any standard, five days delay cannot be taken as fatal for a girl who had undergone a trauma for sexual assault by the police personnel. She might have been dissuaded to make a complaint for obvious reasons. Moreover, the girl came from the lower stratum of the society and may not have been prepared for allowing the act to be a permanent stigma on her life by publicity. The case was fit for review under Rule 1 order XI of the Supreme Court Rules. There was certainly an error apparent on the face of the record, because of the minimum punishment for custodial rape is ten years Rigorous Imprisonment, extendable to life imprisonment. It appears that the result would have been different had the case been heard by a teleological judge like Krishna Iyer or P N Bhagwati in place of Justices B C Ray and S Ratanlal Pandian who heard the appeal. In the judicial process, the role of a judge is more important than the written

\textsuperscript{697} Ibid p. 938.
\textsuperscript{698} Ibid p. 938.
words of a statute. Krishna Iyer justice has rightly observed: “A socially sensitized judge is better statutory armour against gender outrage than long clauses of a complex section with all protections writ SIC into it.” 699

From the above it is clear that ‘judging’ has become ‘an act of will’ and the judge has not only ‘some degree of choice’700 but an unlimited power of creating law. The explosion of public interest litigation cases has pushed judicial activism to the end of the road. The well-established and well-defined rules of procedure have become nearly redundant. This has brought uncertainty into law. Moreover, an already divided court into benches has further been divided. Individual leadership among the justices of the court is yet another outcome of public interest litigation. The opinion of Justice Pathak in BandhuaMukti Morcha that mere letter without proper form and verification should not be accepted by the court, was also side-tracked and it was asserted that the court would entertain even a letter written by an individual or social action group acting pro bono publico. Judicial activism is desirable but within defined limits. In a democracy, the judicial process by its very nature cannot supervene the legislative mandate or executive authority.

Judicial over-activism is fraught with many dangers. In the first place, the over-liberalization of the rule of locus standi has produced groups of individuals who tend to assume the role of both the petitioner and the judge. Sheela Barse v. Union of India701 can be cited as an example. In this case, the Supreme Court was designated as a ‘dysfunctional’ institution and the petitioner claimed not to be a subordinate or subsidiary to the court. 702 Secondly, the Court had assumed the role of a state within the Union of India. The Court creates new norms, Article 32 which empowers the Supreme Court ‘to forge new remedies and fashion new strategies’ was an assertion to assume the legislative role in M C Mehta v. Union of India,703 exercises supervision over the implementation,704 appoints commissions and expert committees,705 and determines the disputes.

699 Ibid.,p.1253.
702 Ibid., p.2222.
703 AIR 1987 SC 1086, 1089.
704 Ibid.
The Court can take a clue from the Constitution for social and economic transformation but it cannot usurp the legislative role. Judicial restraint, particularly in PIL cases is the need of the hour. Justice V Khalid has given timely warning in this regard. He favours restraint on PIL not only by the Court but also by litigants. If self-restraint is not observed, he warns, the Court will have to take upon them administrative and judicial functions. Social and Political reforms can hardly be introduced through judicial process. Judicial process must function within the prevailing social, economic and political atmosphere. In England, both Lord Mansfield and Lord Bentham were eager to introduce new legislation and reforms. The former preferred judicial legislation and the latter, parliamentary legislation. It was Lord Bentham who succeeded. Judicial process can only give directions to the spirit of law. Basic reforms whether social or political do not fall within the jurisdiction of the court.

7.7.2 JUDICIAL LAW-MAKING IMPOSING RESTRICTIONS ON CONSTITUTIONAL POWER

In any written constitution, there has to be provision for its amendment to avoid the stagnation of a Constitution. An unchangeable Constitution is incapable of fulfilling the aspirations of a changing society. The process of constitutional amendments is essentially counter-majoritarian. It prevents sudden and impulsive changes in a Constitution and entrenches certain provisions, making them non-amendable. The most controversial amendments were those by which judicial review in relation to the right to property was restricted. The question was whether a bill of rights that had been settled after long negotiations between various sections of society, and had been based on a consensus reflected in the Constituent Assembly, could be altered and abrogated through the process of Constitutional amendment.

Fundamental Rights are contained in Part III. Article 13 states the legal status of those rights. It declares that all laws in force in the territory of India before the commencement of the Constitution shall to the extent of their repugnancy with the

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fundamental rights be void from the date on which the Constitution comes into force. Clause (2) of that article further commands that the state shall make no law that takes away or abridges the Fundamental Rights. In Shankari Prasad v. Union of India\textsuperscript{708} it was argued that a constitutional amendment was law for the purpose of Article 13, and therefore it had to be tested on the anvil of Article 13. If it violated any of the fundamental rights, it should be void. Chief Justice Patanjali Shastri, speaking on behalf of a bench of five judges in a unanimous judgement, rejected that argument outright and held that the word law in that article did not include a Constitutional amendment. The Seventeenth Amendment which brought the Ryotwari estate within the definition of the word ‘estate’ in Article 31 (A) became controversial for many reasons. In Sajjan Singh v. Rajasthan,\textsuperscript{709} the court consisting of 5 judges was divided. Chief Justice Gajendragadkar held on behalf of the majority of three judges, that a constitutional amendment was not covered by the prohibition of Article 13 (2). The minority judgement of Justices Mudolkar and Hidayatullah observed that if our fundamental rights were to be really fundamental, they should not become ‘the plaything of a special majority’.\textsuperscript{710} These two dissents opened the door to future attempts to bring the exercise of the power of Constitutional amendment under judicial scrutiny. Seventeen amendments had been enacted in pursuance of that decision; any reversal of judicial view in 1965 would not only severely jeopardize India’s land reforms and other economic programmes, but also create problems in reverting to the pre-amendments position in respect of property relations.

In 1967, the Supreme Court held in Golaknath v. Punjab,\textsuperscript{711} that an amendment passed in accordance with the procedure laid down by article 368 was law within the meaning of that word as used in Article 13(2) of the Constitution. The Court by a majority of six to five judges held that Parliament had no power to pass any amendment that would have the effect of abridging or taking away any of the fundamental rights guaranteed by the Constitution. The petitioner had challenged the validity of the first, fourth and seventeenth Amendment Acts, which had foreclosed judicial review of the law pertaining to property. Chief Justice Subba Rao invoked the

\textsuperscript{708} AIR 1951 SC 458.
\textsuperscript{709} AIR 1965 SC 845.
\textsuperscript{710} Ibid., p. 862.
\textsuperscript{711} AIR 1967 SC 1643.
doctrine of prospective over-ruling to save existing Constitutional amendments from infirmity while mandating Parliament not to pass any constitutional amendment that would take away or abridge any of the fundamental rights in future. The learned Chief Justice also promised that the court would interpret the provisions of the Fundamental Rights liberally so as not to jeopardize the implementation of the directive principles of state policy. Justice Hidayatullah, in a separate concurring judgement expressed his views: ‘Since the court had acquiesced in the validity of those Amendment Acts through its previous decisions, it was stopped from declaring them invalid’.

Golaknath stirred a great controversy regarding the scope of judicial review. For the first time, the judges had openly taken a political position. They did not desire that Parliament’s power to amend the Constitution should be unlimited and that the Fundamental Rights should be at the mercy of the special majority of members of Parliament required for Constitutional amendment. Golaknath rejected the view that the court merely interpreted the Constitution and that it was not concerned with the consequences of its interpretation. Golaknath marks a watershed in the history of Supreme Court of India’s evolution from a positivist court to an activist Court. The Court was concerned about what would happen if the Fundamental Rights were made entirely dependent upon the whims of the legislative majority. The Judges did not merely interpret the Constitution as it was but interpreted it from the vantage point of what it should be. They brought in the natural law concept in understanding the position of Fundamental Rights in the constitution. Following the natural law theory, these judges held that Fundamental Rights were inalienable rights of the people. This decision had political implications because it changed the distribution of power-between the Court and the Parliament. Subsequently, the Supreme Court held invalid, the ordinance by which fourteen banks were nationalized by the Government,\textsuperscript{712} and the executive order whereby the privy purses given to the Indian Princes as consideration for the accession of their State to India were sought to be abolished through the device of de-recognition of those princes.\textsuperscript{713}

In the general elections held in 1971 for the Lok Sabha, Mrs. Indira Gandhi’s Congress won a landslide victory by securing more than two-thirds of the seats in the

\textsuperscript{712} \textit{R.C. Cooper v. India} \textit{AIR 1970 SC 564}.
\textsuperscript{713} \textit{Madhavrao Scindia v. India} \textit{AIR 1971 SC 530}.
Lok Sabha. The Government introduced the Constitution (Twenty-Fourth Amendment) Act 1971, with the purpose to restore to Parliament the unqualified power of Constitutional amendment. Parliament also passed the Twenty-fifth Amendment, which further restricted the right to property and the Twenty-sixth, which abolished all privy purses. These amendments were challenged in the Supreme Court in *Kesavanand Bharti v. Kerala*. While arguing their cases on behalf of the State, the Attorney General as well as the Advocates General of most of the States contended that Parliament’s power to amend the Constitution was unlimited. The Judges asked them to elaborate whether it could be used for changing India from Democracy to a Dictatorship or from a Secular State to a Theocratic State; the answer had to be in affirmative. Chief Justice Sikri summarized those arguments as follows:

The respondents claim that Parliament can abrogate Fundamental Rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one-party rule established. This contention was in the spirit of Dicey’s assertion that the Parliament of England was so supreme, that it could go to the extent of declaring that all men were women, or that all the blue-eyed babies should be massacred! That argument was hypothetical and made to convince the court that there could not be any legal restrictions.

On the Constituent power of Parliament, all the judges except Chief Justice Sikri and Justice Shelat, held that Golaknath had been wrongly decided. The Supreme Court held by a majority of seven judges against six that, while Golaknath stood overruled, the power of amendment was not unlimited. Seven of thirteen judges held that Parliament’s constituent power under Article 368 was constrained by the inviolability of the basic structure of the Constitution, or the basic features of the Constitution. The basic structure or the basic features of the Constitution could not be destroyed or altered beyond recognition by a Constitutional Amendment. These seven judges were Chief Justice Sikri and Justice Shelat, Hegde, Grover, Mukherjee, Jagmohan Reddy and Khanna. Six judges, Justices Ray, Mathews, Beg, Dwivedi,

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714 AIR 1973 SC 1463.
Palekar and Chandrachud, held that Parliament had unlimited power of constitutional amendment.\textsuperscript{717}

\subsection*{7.7.3 REACTION TO BASIC THEORY}

The Kesavanand Bharti decision was doubtless an attempt by the Supreme Court to rewrite the Constitution. Such limitation on the constituent power was unheard of till then. An attempt by the court to wrest finality to itself. Seervai reacted critically and said that there was no ratio in the decision.\textsuperscript{718} In no democratic country could a court say that the Constitution itself could not be amended so as to alter its basic structure when there was absolutely no such statement in the Constitution. What constituted basic structure, was unknown and had to be articulated by the Court from time to time. It means that court would decide which constitutional amendment was destructive of the basic structure and what constituted the basic structure. Mr. T.R. Andhyarujina, the former Additional Solicitor General, said, ‘the exercise of such a power by the judiciary is not only anti-majoritarian but inconsistent with constitutional democracy’.\textsuperscript{719}

Professor Tripathi observed that the function of the Courts in democratic countries was to ensure that all subordinate legal action complied with the law. They can interpret the Highest Law in accordance with which all legislative and executive acts must be carried out. But the Highest Law determination must be left with the freely elected representatives of the people.\textsuperscript{720} The basic structure doctrine appeared to be most unsustainable in 1973.

\subsection*{7.7.4 ACCEPTANCE OF BASIC STRUCTURE}

Mr. H M Seervai a bitter critique of the Golaknath supported the basic structure doctrine in the second edition of his book Constitutional Law of India.\textsuperscript{721} His view, that Golaknath was full of public mischief, should be overruled. However he supported that

\textsuperscript{717} Ibid, pp.870-84.
\textsuperscript{720} P K Tripathi, ‘Rule of Law, Democracy and Frontiers of Judicial Activism, 17 JILI pp. 17, 33 (1975)
the power of constitutional amendment conferred by Art 368 did not contain the power to destroy the basic structure of the constitution. Golaknath and Keshavanand were based on the ideal that unlimited power of the constitutional amendment should not be vested in a special majority of Parliament. In fact, the basic structure doctrine propounded by the Court in Keshavanand was a continuum of the doctrine of unamendability of the fundamental rights put forward in Golaknath.

The basic structure doctrine is an improvement over the Golaknath in so far as it is not located in any specific provision, such as Article 13 (2), it was difficult for Parliament to override it through another constitutional amendment. Since it is not located in any special provision but is ingrained in the very structure of the Constitution, the Court has greater freedom to use it in a political manner. Both Golaknath and Keshavanand were premised on the hypothesis that the Constituent power of Parliament under Article 368 of the Constitution could not be as unrestricted as the original constituent power possessed by the Constituent Assembly. While rejecting the majority view in Golaknath that Article 13 (2) constrained power under Article 368, the Keshavanand majority was liberating itself from the constraint on its activism, that the location of the limitation in a specific provision is implied. On the other hand, it derived legal justification for the basic structure doctrine from Article 368 itself, which said that after an amendment, the constitution shall stand amended. If the Constitution is to stand amended, obviously it cannot be totally repealed or disfigured. It must retain its basic structure. The Keshavanand majority said that in order that the Constitution shall stand amended, it must be a Constitution that has a definite identity, and that identity was its basic structure.722

Justice Shelat and Grover in their judgement said: 723 though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features’.

What basic structure was is to be articulated through the future decisions of the court. In respect of Article 31 B, the court took the position that all amendments by which the new Acts were added to the Ninth Schedule prior to the decisions in

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723 Ibid.
Keshavanand were valid. But the Court would examine all post Keshavanand amendments by which new acts would be added to the Ninth Schedule on the touchstone of the basic structure doctrine.

The Kesavanand decision supporters were of the view that the judges were to decide ultimately what future changes should be made in the Constitution. Those decisions ought to be taken by a popularly elected body and not by appointed judges. The conflict was between democracy and judicial review. Judicial review is essentially counter-majoritarian. It allows the judges to examine the decisions of a popularly elected legislature to find whether they infringe any of the rights given to the people. A written Constitution must have judicial review and where a Constitution contains a Bill of Rights, such a review is bound to acquire larger dimensions. Democracy means rule by the majority, but does it mean rule of the majority? Democracy has to be a just rule. Justice is essentially a value and has to be preserved for its own sake. It cannot be a means to anything but have to be an end in itself. The justness of a decision cannot be determined by the number of people who are in favour of it. It does not depend upon utilitarian considerations either. It may be argued that if you allow the police to torture suspects, investigation of crime might be more efficient and crime might even go down. Even then, no law of civilized society can permit such torture because it is unjust to do so. In terms of Rawls, a concept of justice, human rights is part of the original understanding that the people who made a hypothetical contract had agreed to preserve and protect against the majority. Human rights are essentially counter-majoritarian. According to Ronald Dworkin, the major concern of a bill of rights is to protect the unpopular or minority rights. In England, Parliamentary supremacy is posited on the notion that democracy will prevent the violations of individual liberty.

‘Liberty’ as distinguished from ‘right’ is the freedom to do what one likes as long as it does not violate any law or freedom of other people to do what they like. Liberty is a negative concept that requires others not to interfere with it. ‘Right’ is a positive concept, which imposes duty on others to do something to fulfil that right. Dworkin’s conception of right essentially imposes restrictions on the power of the

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726 Ronald Dworkin, Taking Rights Seriously (Gerald Duckworth and Co. 1977).
majority. Power means capacity to create rights or liabilities for others. Right therefore has duty as a co-relative and fundamental rights impose restriction on the power of the State. Where Parliament is supreme, as in England, people have liberties but no rights, but under a written Constitution with a Bill of Rights, people have rights as distinguished from liberties and these rights essentially impose restrictions on the power of the legislative majority. A person has the liberty to do what pleases him as long as the State does not restrict it by law. Liberty always depends on the will of the majority. But a bill of rights essentially restricts the majority from encroaching upon the rights of individuals. Such rights may be freedom of speech or freedom of religion.

Human Rights, all over the world have been counter-majoritarian. In times of crisis, even mature democracies have practiced majoritarianism. The majority justices in *Liversidge v. Anderson*,\(^{727}\) were willing to let individual liberty be curbed by the fiat of the executive, because they honestly felt that such vigilance against persons of German origin was necessary and desirable. The US Supreme Court behaves similarly in respect of Japanese Americans.\(^{728}\) It is Chief Justice Warren who established the counter-majoritarian character of judicial review after the Second World War. He used counter-majoritarian decisions in protecting the following minorities: (1) Political dissenters, i.e. the Communists (2) Socially condemned persons i.e. accused criminals and (3) Racial minorities that is black Americans.\(^{729}\) Judicial review is essentially a counter-majoritarian device for protecting unpopular or minority rights. It was said that the judicial review was undemocratic because it vested the power of deciding the validity of the laws enacted by a representative body in a non-elected elitist institution, the Judiciary.\(^{730}\) In *Keshavanand Bharti*, Justice Hegde said: Two-thirds of the members of the two Houses of Parliament need not necessarily represent even the majority of the people of this country. Our electoral system is such that even a minority voter can elect more than two-thirds of the members of either House of Parliament.\(^{731}\)

The basic structure norm for constitutional amendment is a non-textual norm of constitutionality. In legal positivism, the Constitution’s text is the exclusive source of

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\(^{727}\) (1942) AC. 205 (1941) ALL E.R. vol.2, p.612.


\(^{730}\) 319 US 624, 638: 87 L. ed. 1628, 1638.

\(^{731}\) AIR 1973 SC 1461.
constitutional law but the written text of Constitution is to be read between the lines, and such a reading helps a Court to find the unwritten Constitutional law without which the written Constitutional law would be incomplete. It is the function of an activist court to improvise the written Constitutional law with the unwritten Constitutional law.

How to sustain the basic structure doctrine without sacrificing democracy is a question the Court and Parliament will have to solve by co-operation. One way to do it is to entrust matters of policy to Parliament and matters of Principles to the Supreme Court. Ronald Dworkin has suggested an ideal division of responsibilities between judicial review and legislative supremacy. He says that while judicial review is concerned with sustenance of principles of constitutionalism and particularly the basic rights of the people, the legislature is concerned with policy. This means that the Court should not interfere with the choice of policy, unless such a choice is against a fundamental right, or is against the basic structure of the Constitution. For example, a Court has never interfered with the policies adopted in a budget, never asked what should be the exemption limit for liability to pay income-tax, what items should be exempted from excise duty, or what should be the rates of taxation. But where a legislature imposes tax in a discriminatory manner, it will be struck down because such discriminatory taxation violates the right to equality guaranteed by the Constitution.

The word ‘law’ has been interpreted in Article 21 as a just and fair law. Protective discrimination for backward classes is provided in the Constitution as an enabling provision; the Courts have said that it is to be read as supportive of the right to equality. To provide for reservation, how much, and for whom, are questions of policy, but if the extent of reservation is determined without regard to the effect of such an extent on the right to equality, the Court intervenes because the policy violates the constitutional right to equality. If the reservation is provided exclusively on the basis of caste, the Court will intervene because such a policy violates the Constitutional right, not to be discriminated against on the ground of caste.

In India, the Supreme Court has invoked the doctrine of basic structure as a counter-majoritarian device to sustain the liberal and democratic character of the

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Constitution. Doctrine need not be seen as a device for judicial supremacy as against Parliamentary supremacy. It has to be seen as the supremacy of the people against the ruling elite. The Court acts as a guardian of the people and tries to sustain the Constitution in its true spirit. ‘Basic Structure’ therefore must remain as the inarticulate premise of the Supreme Court of India. It will become delegitimized if the court over-exercises it or does not exercise it. Judicial review cannot remain a mere legalistic exercise. It inevitably becomes political, not mere legalism, but considerations of property, vision, and knowledge of the dynamics of social change, figure in judicial assessment of legality. The use of the basic structure doctrine will test the statesmanship of the court.733

The Government has been making several attempts to reverse the basic structure doctrine. One attempt was to intimidate the judges by packing the court. After the judgement of Kesavanand the majority three judges who were superseded resigned in protest after Chief Justice Sikri retired. When even the dissenting judges in Kesavanand struck down a clause in the Constitution (Thirty-Ninth Amendment) Act 1976 as being violative of the basic structure of the Constitution in the Prime Minister Election Case, another attempt was made to have basic structure doctrine reversed by the court itself.

7.7.5 DEBATE ON BASIC STRUCTURE DOCTRINE

Chief Justice Ray was persuaded to constitute a special bench of thirteen judges to reconsider the majority decision in Kesavanand Bharti. The new bench consisted of Ray himself and Justices Khanna, Beg, Mathew, Chandrachud, Bhagwati, Krishna Iyer, Sarkaria, Goswami, Gupta, Singhal, Fazal Ali and Untwalia. Khanna alone had committed himself to the basic structure doctrine. Others were not committed. So the Chief Justice might have hoped that it would not be difficult to get at least seven judges to vote against the basic structure doctrine. When the Court asked the Attorney General to establish prima facie that the basic structure limitation on Parliament’s power of constitutional amendment would come in the way of social progress, no satisfactory evidence of such an eventuality was produced and, ultimately, the Chief Justice had to

733 S P Sathe, Judicial Activism in India (Oxford University Press, New Delhi, 2002), pp. 63-85.
dissolve the special bench.\textsuperscript{734} The executive made another attempt to destroy it through a Constitutional amendment. The Constitution (Forty Second Amendment) Act 1976 added Clause (4) and (5) to Article 368 as follows:

4. No amendment of the Constitution (including provisions of Part-III) made or purporting to have been made under this article (whether before or after the commencement of section 55 of the constitution (Forty-Second Amendment) Act 1976 shall be called in question in any court on any ground.

5. For removal of doubts, it is hereby declared that there shall be no limitation whatsoever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

The validity of these two clauses was challenged before the Supreme Court in \textit{Minerva Mills v. India}\textsuperscript{735} and the Court -Five judges namely Chief Justice Chandrachud, and Justices Bhagwati, Gupta, Untwalia and Kailasam-unanimously held that Clause (4) was violative of the basic structure of the Constitution and was therefore void. The Court read down Clause (5) to mean that as long as Parliament did not violate the basic structure of the constitution, its constituent power was subject to no limitation.\textsuperscript{736}

Since Minerva Mills, no effort was made on behalf of the Government to overturn the basic structure doctrine. Also the Court has been most reticent in using the basic structure doctrine to strike down a Constitutional amendment. Though the court had asserted that it would review constitutional amendments that added new Acts to the Ninth Schedule, it has not held any additions invalid. Till the Kesavanand decisions, the Ninth Schedule contained only 64 Acts. Since then the total number of Acts in the schedule has increased to 285.

\textsuperscript{735} AIR 1980 SC 1789.
7.8 ‘ACTIVIST’ INSTANCES OF ‘JUDICIAL LAWMAKING IN INDIA’

In the light of above discussion, it can very well be made out as to what actually is the nature of a judicial legislation and how it stands at a different and restricted footage as compared to the laws enacted by the legislature in its representative capacity. The process of interpretation necessarily results in law-making by interpretation of statutes and the Constitution up to the permissible extent constitutes a purely ‘activist’ category of judicial legislations. Under this category, decisions rendered by the Supreme Court with regard to speedy trial, prisoner’s rights, preventing children from being engaged in match manufacturing, protection of ecology, laying down the principle for the award of compensation, right to privacy, handcuffing of prisoners, right to free legal aid etc. fall which illustrate legitimate ‘judicial activism’.

There is yet another category of cases that can be considered in nominating to the ‘activist’ and ‘overreaching’ instances of judicial lawmaking. They are ‘activist’ in the sense that they provide a plethora of reasons for showing a fundamental recodification of legislative power with an express justification to the effect that they would operate only till the legislature comes up with an enacted law. They are ‘overreaching’ in the sense that they have manifestly and clearly entered the constitutional domain of lawmaking akin to the legislature. Interestingly, though they appear to have overreached, they do not actually overreach because any time the legislature can come up and enact law as it wishes to.

The court under the instances has used Art.32 for a much wider purpose than its ordinary purpose, viz. to lay down general guidelines having the effect of law to fill the vacuum till such time the legislature steps ;in to fill in the gap by the making the

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745 See Scope of Article 32.
necessary law. The Court has derived this power by reading Art.32 with Article 141 and Article 142.

In *Union of India v. Association for Democratic Reforms*[^746^], the Supreme Court issued certain directions to the Election Commission that it should inter alia call for information from each candidate contesting election on an affidavit regarding his past criminal record, his financial assets (including those of his spouse or dependants), and his liabilities to public sector bodies and educational qualifications, justifying this, the Supreme Court confessed.[^747^]

It is not possible for this court to give any directions for amending the Act or the statutory rules. It is for the Parliament to amend the Act and the Rules. It is also established law that no directions can be given, which would be contrary to the Act and the Rules. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

Similarly basing its opinion on the same reasoning, the Supreme Court in *Vishakha v. State of Rajasthan*, declared sexual harassment of a working woman at her workplace as amounting to violation of Articles 14, 15 and 21 of the Constitution. To this effect, the court came up with model legislation with elaborate guidelines[^748^].

In *Vineet Narain v. Union of India*,[^749^] the court laid down directions to ensure the independence of the Vigilance Commission and to reduce corruption among government servants. The court did so since there was no legislation enacted by the Parliament to cover the said field so as to ensure proper implementation of the rule of law.

To the same tune, in *Common Cause v. Union of India*,[^750^] the Supreme Court issued directions for revamping the system of blood banks in the country. These directions provided for how blood banks in the country.

[^747^]: Id. at 309.
[^750^]: AIR 1996 SC 929.
how blood should be collected, stored, and given for transfusion and how blood transfusion could be made free from hazards. In *Vishwa Jagriti Mision v. Central Governments*, the Supreme Court issued guidelines against ragging in educational institutions.

Similarly the Supreme Court laid down directions as to how children of prostitutes should be educated; on what grounds should be the fee structure in private medical or engineering colleges and on preparing a scheme for the housing of pavement dwellers or squatters. These directions issued by the Supreme Court under Article 32 have the force of law. Since they are to remain in force till the legislature enacts a suitable law, they can be referred to as being in nominate to the instances of ‘Activism’ and ‘Overreach’.

### 7.9 ‘OVERREACHING’ INSTANCES IN LEGISLATIVE FUNCTIONS

Appropriate judicial intervention or legitimate judicial activism is founded on an established or evolved juristic principle having a presidential value and performed within judicially manageable standards. It should only compel performance of duty by the designated authority in case of its inaction or failure, while a takeover by the judiciary of the function allocated to another branch is inappropriate. Judicial creativity may produce good results if it is the result of principled activism but if it is propelled by partisanship, it may result in catastrophic consequences resulting in conflicts. In the words of Prof. Sathe, “When populism prevails over legal requisites, the rule of law suffers and it is in the long run adversely affects the legal culture.”

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751 JT 2001 (6) SC 151.
752 Gujar Jain v. Union of India AIR 1990 292.
759 S.P.Sathe, *Judicial Activism in India* 144 (2002).
In *Mohini Jain v. State of Karnataka*, the Supreme Court held that right to education was included within right to life. The Court, realizing the impracticability of such a proposition, tried to narrow down the dictum in *Unni Krishnan v. State of Andhra Pradesh*, where it said that the right to life included the right to primary education. This decision can rightly be branded as a decision rendered by the judiciary overstepping its constitutionally prescribed domain. The Constitution in one of the directive principles of state policy specifically enjoins on the state to provide within a period of ten years free and compulsory primary education for all children below the age of fourteen years. It is not for the court to convert a directive principle of state policy into a fundamental right. Moreover, even if it does so, it will merely amount to conversion of a non-enforceable directive principle into a non-enforceable fundamental right. Further, the court said that all private institutions shall charge different fee for half of the students. Half of the seats were called ‘free seats’ and the others were called ‘payment seats’. Such kind of judicial lawmaking of a substantive nature is legally untenable. If the Parliament feels to induct such directive principles into the fundamental rights, it is competent to do so; and to this effect it did the same when it inserted Art.21-A into the Constitution. Moreover, the policy of subsidizing cannot be attained by way of judicial process. It is purely a legislative function. Unlike the category discussed above, it seems apparent in these cases that the Supreme Court has merely interpreted the provisions of the Constitution. However, after having a detailed analysis, one cannot deny that in fact, the Supreme Court has made a law which otherwise fall into the exclusive domain of the legislature.

In *All India Judges Association v. Union of India*, the Supreme Court issued directions to the government to create an All India Judicial Service so as to bring about uniform conditions of service for members of the subordinate judiciary throughout the country. This was, in fact, a policy question requiring a constitutional amendment and the judiciary clearly overreached since it was not proper for the Supreme Court to direct the Parliament as to what policy it should adopt.

760 (1985) 3 SCC 545.
761 (1993) 1 SCC 645.
762 Art.45 of the Constitution of India.
763 AIR 1992 SC 165.
In *Prakash Singh v. Union of India*, a petition under Article 32 was filed in the Supreme Court praying for the issue of directions to the Union Government to frame new Police Act on the lines of the model Act proposed and suggested inter-alia by the National Police Commission in order to ensure police accountability to the law of the land and the people. It was contended that the existing legislation, that is, the Indian Police Act, 1861 is inadequate to cater to the changing needs of the system since it had not been renewed for many years. The Court, in addition to what was suggested by the Commission; issued time bound directions ranging inter-alia from the constitution of State Security Commission, selection and minimum tenure of the DGP and IG’s separation of investigation, Constitution of Police Establishment Board, Police Complaints Authority to the Constitution of National Security Commission. Further, to seek compliance of the said directions passed, the court directed the Cabinet Secretary to the Government of India and the Chief Secretaries to the respective State Governments as well as union territories to file affidavits stating compliance of the said directions. At the outset, this case can be distinguished from *Vishakha* since there was no legislation to cover the malady of sexual harassment caused to women in their workplaces. However, in the present case, there was a legislation to regulate the police force and it is for the legislature or the Government, as the case may to be decide whether a new law is required to this effect or not. The Supreme Court, through this judgment clearly and patently encroached in the legislative domain.

In *State of U.P. v. Jeet Singh Bisht*, the Supreme Court was approached by the respondent Uttar Pradesh Govt. against the order of Allahabad High Court where the High Court apart from making observations on the merits of the case, directed the respondent Government to constitute at least five State consumer forums at the State level under section 16 of the Consumer Protection Act by making necessary amendments. Further, direction was also issued by the High Court to the effect that the Presiding Officer of a bench shall be a retired High Court Judge who would enjoy the same facilities and amenities as enjoyed by the sitting High Court Judge. The dividing opinion amongst the division bench eventually led the matter to be referred to the larger bench. Interestingly, creation of tribunals and deciding the amenities to be

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given to their presiding officers along with their eligibility criteria and qualifications is purely a legislative function which can only be prescribed by the legislature through an enactment and not by the judiciary.

The recent enhancement of fines pertaining to traffic violations in Court on its own Motion v. Union of India & Ors.,\textsuperscript{767} can be cited as a glaring example of ‘judicial overreach’ where the Delhi High Court, taking suo-motu cognizance of increasing death toll on Delhi roads enhanced the traffic fines. This illustrates how the judiciary has transgressed its functions and took over the job which falls exclusively in the domain of Parliament. On account of legitimate judicial activism, what it could at the most do was to only reflect the need of revising the fine charges or could have commanded the government to do so by way of issuing a writ of mandamus since enhancement or revision of fines is purely a legislative function which can only be done by way of an amending enactment by the legislature.

Recently in Vishnu Dutt Sharma v. Manju Sharma\textsuperscript{768} the Supreme Court rightly rejected the conditions of the petitioner for the granting him divorce solely on the ground of ‘irretrievable breakdown of marriage’. The court negated the precedential sanctity of its earlier pronouncements which ‘overreaching’ recognize such ground as a valid ground for divorce.\textsuperscript{769} Taking a right step towards the mandate of the Constitution, the court held that adding such a ground in section 13 of the Hindu Marriage Act, 1955 would tantamount to adding a clause to the provision by way of a judicial verdict. In fact, the court took a right stand since it is for the legislature to decide as to what grounds should be provided for affecting the divorce.\textsuperscript{770}

The Supreme Court has put an interim stay on an edict of the Delhi High Court. The high court directive had imposed a penalty of Rs 500 on violations of traffic rules, over and above the usual fee for such offenses. Commentators and legal experts have

\textsuperscript{767} 139 (2007) DLT 244.
\textsuperscript{768} Civil Appeal No. 1330/09 arising out of SLP(C) No 13166/07 decided on 27.02.09, reported in MANU/SC/0314/2009.
\textsuperscript{770} The present status does not accord a direct recognition to ‘irretrievable breakdown of marriage’ and places more reliance on the guilt theory of divorce in recognizing it. See Sec. 13(1) A of Hindu Marriage Act, 1955.
unanimously typecast the directive as yet another instance of judicial interference in policy matters, a breach of the constituent principle of separation of powers.

The Supreme Court's directive to the government of Uttar Pradesh to stop using public funds to install myriad statutes of Dalit leaders including Chief Minister Mayawati herself can't be faulted. The court also has rightly followed through with prompt strictures on the state government's putative violation of its own undertaking to stop construction.

The Supreme Court's interventions in areas such as the 2G investigation and in the matter of appointment of the Chief Vigilance Commissioner have top bureaucrats and politicians fuming yet again about the judiciary "overreaching" itself. Ironically though, 83 former civil servants led by ex-Union cabinet secretary TSR Subramanian recently filed a petition in the Supreme Court asking for civil service reforms, including the fixing of tenure for bureaucrats mainly to ensure stability and insulation.

7.9 JUDICIAL LAW MAKING – HOW MUCH JUSTIFIED?

There is a limit up to which the courts can go in law making. They have to operate in the four corners of the language of the statute, and cannot question it. Yet the law may be such, that it has outgrown its utility, or is not in consonance with the current dominant thinking and leads to results which are abhorrent to the conscience of the society. Such a law needs to be replaced and this can only be done by the legislature. Further, a law may be such as needs change and amendment to widen its scope and cover new areas. For this purpose also the appeal has necessarily be to the legislature. There are possibilities that at times, law itself may be unjust and that creates a dilemma for the judge. Though law has generally been considered to be a close ally of liberty and constitutes an important means of fostering personal freedom, safeguarding human rights and furthering broad social goals of equality and general well-being, it is not always so. The law also has been used as a powerful tool for the control of individual, a means by which some segments of the society can maintain social and economic superiority over others, a device with great potential for tyrannical rule. An increase in the rights of some individuals will normally entail some restrictions on the rights of others.
There are historical records showing instances of abuse of judicial power demonstrated by the fact that the agencies of criminal justice and law enforcement are those first seized and subverted by an emerging totalitarian regime. The most glaring example is of the Nazi regime in Germany. Most often, the totalitarian regimes start with proclaimed profession of allegiance to the rule of law and as the custodian of the legal order. But gradually, and often insidiously under cover of objects ostensibly munificent, the presumptions in favour of the right of citizens are eroded, and ultimately there emerges a police state favouring the coercive power of the State. The totalitarian States are never tried for the claiming of a legal basis for their actions. It may be unfortunate but it is nonetheless true that instances have shown in some of the countries, of persons in judicial robes who are prepared to lend their services for furthering the political ambitions of the rulers and to pander to their wishes. In such a situation justice has to bow out because the court becomes an instrument of power, judges are soldiers putting down rebellion and the so-called trial is nothing but a punitive expedition or ceremonial execution.

The White population of South Africa used the law to discriminate and to adopt repressive measures against the African population. Law thus provides a convenient means by which one section of the population can maintain social and economic superiority over the others. Thus it is plain that the law can on occasions degenerate into potential device for tyrannical rule.

The function of the judge is most difficult when those in power enact discriminatory and harsh laws. He is left with no choice except to carry out the mandate of such a law. It is admitted that a judge cannot go into motive of the legislature in making a law, nor can he look into the ethics or wisdom behind a law. His role as a judge compels him to enforce the law as he finds it. Sometimes there is a difference of opinion among the judges, hearing a matter with regard to the final decision to be pronounced, or with regard to the reasons in support of that decision. In the former case, there is a majority judgment and there is also a minority or dissenting judgment. In the latter case, there are concurring judgments, in question, relating to
principles of law and their application, what the Court cannot look for physical precision or arithmetical certainty.\footnote{Quoted in H R Khanna, \textit{Judiciary in India and Judicial Process}, 1st ed. (Tagore Law Lectures, University of Calcutta, Ajay Law House, 1985) p.53.}

In a judgment unanimity is desired, if possible unanimity obtained without the sacrifice of conviction, commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in the court of last resort. As observed by Chief Justice Hughes, judges are not there simply to decide cases, but to decide them as they think, they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.\footnote{H R Khanna, \textit{Judiciary in India And Judicial Process}( Tagore Law Lectures, Calcutta, Ajay Law House, S.C. Sarkar and Sons Pvt. Ltd., 1985) pp. 52-60} A dissent in a court of last resort, according to Justice Hughes words, is an appeal of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.

Since the time of framing the Constitution till today, its most conspicuous feature has been the expansion of the power of the Indian judiciary and it’s pre-eminence over the other two political branches of the government, namely, the legislature and the executive. Chief Justice Pathak in \textit{Union of India v. Raghubir Singh} said of the Indian Judiciary, ‘the range of judicial review recognized in the superior judiciary of India is perhaps the widest and most extensive known in the world of law’.\footnote{(1989) 2 SCC 754-766; AIR 1989 SC 1933-1938.} The Indian Supreme Court is today the most powerful of all apex courts in the world.

Since 1973, the Judiciary has claimed the power to nullify on substantive grounds even an amendment made to the Constitution by legislature, if it had changed ‘the basic structure or framework of the Constitution’. The concept of judicial control over the Constitution evolved by and known to courts in India only in the case of Keshavanand \textit{Bharti v. State of Kerala}.\footnote{(1973) 4 SCC 225; AIR 1973 SC 1461.} No other judiciary in the world has asserted such power. The Supreme Court has pronounced that the Judicial review exercised by Supreme Court and High Court, to be an unalterable ‘basic structure of the Constitution’. “Any amendment which abrogates judicial review of superior courts will
be void”, the Supreme Court held in *S.P. Sampat Kumar v. Union of India.*\(^775\) The Court can stay the disqualification order by the speaker of MLAs even though it involves the legislative privileges, in respect of their internal proceedings are controlled by the Court and made subject to the Courts scrutiny. Disobedience of the Court’s stay orders in such cases is threatened with notice of contempt of the court *Shri Kihota Hollohon v. Zachilhu & Ors.*\(^776\) In the *Municipal Council of Ratlam v. Vardichan*\(^777\) the Municipality was ordered to provide a drainage system by the Court irrespective of its budgetary limitations and the subordinate Court was ordered to oversee the implementation of the scheme. In *D S Nakara v. Union of India*\(^778\) the Central Government was ordered by the Court to reframe its scheme of increase of pension to its retired employees and to pay the increase to employees who had retired long before the new scheme was brought into force.

In the *Workers of Rohtas Industries v. Rohtas Industries Ltd,*\(^779\) an industrial undertaking was ordered by Court to be vested in a Court appointed Administrator to review the order of closing down the company by an Industrial undertaking. The State and the Union of India were ordered to provide funds to review the company. A moratorium was ordered on claims against the assets of the company, and the law of limitation was judicially suspended under the order of the court. In *Kehar Singh v. Union of India*\(^780\) the exercise of the President’s prerogative of pardon is corrected by the Court on the ground that it was vitiated by self-denial on an erroneous appreciation of the full amplitude of his power’. In *S.P. Sampat Kumar v. Union of India*\(^781\), in the course of a challenge to the validity of the Administrative Tribunal Act, 1985 Court advised the Parliament to amend the Act to save it and the Constitutional Amendment Act (323 A) authorizing the Act from being struck down by the Court. Parliament duly obliged by amending the Act twice at the instance of the Court.

In *Pradeep Jain v. Union of India,*\(^782\) and *Dinesh Kumar v. Motilal Nehru Medical College, Allahabad*\(^783\) in the interest of the unity and integrity of India, the

\(^{775}\) (1987) 1 SCC 124; AIR 1987 SC 386.
\(^{776}\) J.T. 1991 (4) SCC 281.
\(^{777}\) AIR 1980 SC 1622.
\(^{778}\) AIR 1983 SC 130.
\(^{779}\) AIR 1990 SC 481.
\(^{780}\) AIR 1989 SC 653.
\(^{781}\) AIR 1987 SC 386.
\(^{782}\) AIR 1985 SC 1420.
Court legislated an elaborate scheme for ‘nationalising’ medical education by taking away 15% and 25% of medical seats at the graduate and post-graduate levels respectively from the medical colleges established and financed by the States, and vested the control of these seats in a Central Government agency to be filled in by an all-India examination ordered by the Court whose basic principles and programme were fixed and monitored by the Court. These are all the hallmarks of an all-pervading judicial review over the legislature, the executive, administration and the Constituent power to amend the Constitution.

Nehru drew the limits of the judicial power at an appropriate Constitutional amendment to override a judicial veto. The source of supremacy of the Indian judiciary Mr. Justice P.N. Bhagwati, the most activist and articulate judge of the Supreme Court expounded the concept of limited government under the Constitution and at the same time the Supreme Court’s power over other organs under the Constitution in the following words:

It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is supreme, the paramount law of the land, and there is no department or branch of Government above or beyond it. Every organ of government is it executive or the legislature or the judiciary derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed, and no authority however lofty, can claim that it shall be the sole judge of the extent of its power under the Constitution, or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court, is assigned the delicate task of determining of what the power conferred on each branch of government is, whether it is limited and if so, what are the limits and whether any action of that branch transgresses such limits, as in the State of Rajasthan v. Union of India. Though a formulation like this appears to be acceptable, there can be three criticisms raised against such dicta. (1) Whilst the Constitution is undoubtedly the source of power of, and limits every organ in it, it rarely gives simple answers by a mere reading of the text. Constitutional problems raise questions of the limits of power and the inter-relationship of the several organs to

each other, including those of the courts’ power, which are not evident from a reading of the text. Hence the necessity of interpretation of the Constitution is required by the court. Though appearing as self-evident and unchallengeable, no Constitutional text can be discovered to have the proposition that the Supreme Court is the interpreter of the Constitution or that it is assigned the task (delicate or otherwise) to determine what is the power conferred on each branch of Government. Like Chief Justice Marshall’s famous pronouncement in *Marbury v. Madison*\(^ {785} \) that, It is emphatically the province and duty of the judicial department to say what the law is’, pronouncements like this and other similar ones giving the Court itself the final say in the limits of other organs of government rest as self-emphatic assertions of judicial power. Prof. Archibald Cox reminds us, as with reference to Chief Justice Marshall’s pronouncement that, it is hardly self-evident, that only judges can interpret laws.\(^ {786} \)

Secondly, according to the formulation, the Court as the ultimate interpreter is stating only what the Constitution truly prescribes, but this camouflages the reality that it is the Court, which is controlling the Constitution by its interpretation. Felix Frankfurter when he was a professor at Harvard wrote to President Franklin Roosevelt, ‘People have been taught to believe that when the Supreme Court speaks it is not they who speak, but the Constitution, whereas of course, it is they (the judges) who speak and not the Constitution. And truly believe that, that is what the country needs to understand’.\(^ {787} \)

Thirdly, it will be noticed that there is an obvious contradiction in the last two sentences of this formulation. If the Supreme Court is the ‘ultimate’ interpreter of the Constitution’ inevitably it will be the ‘sole judge of the extent of its own power under the Constitution’ a power which ex-hypothesis is to be denied to every organ functioning under the Constitution.

The Indian judiciary claims the power to define the powers of the other branches of the Government, vis-a-vis its own powers but also, annuls any amendment to the Constitution which takes away or curtails its judicial power for violating ‘the basic structure of the Constitution’. The Constitution not only has a prescription for

\(^ {785} \) (1803) U.S. 1 Cranch 137, 2 ed. 60.
\(^ {786} \) *The Role of Supreme Court in American Government*, (Oxford University Press, 1976) p. 12.
judicial primacy but one for judicial supremacy over all other powers under the Constitution. The law declared by the Supreme Court is binding on all Courts in India under Article 141.

The Article creates confusion; as if by it, the Supreme Court is given the power to make substantive law of the land and its declaration are binding on everybody. In reality, the Article only means that the declarations of the Supreme Court are binding on courts subordinate to it. The Court’s declarations cannot change the Constitution or confer power on any organ or on itself, which the Constitution never prescribed. Charles Warren the eminent historian has said, however the Supreme Court may interpret the Constitution, it is still the Constitution which is law and not the decision of the court’. 788 Justice Frankfurter says, ‘the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. 789 Constitutional democracy implies that the ultimate interpreter of fundamental law is not an autonomous judiciary, but the interactive understanding of the people, their representatives and judges together. 790 Thus judicial power and judicial pronouncements should therefore be subjected to the same active, but respectful scrutiny for their legitimacy as the actions of political branches are subject to Judicial Review.

By the near collapse of responsible government in India and the pressures on the judiciary to step in aid, the judiciary is forced to respond and to make political or policy making judgement. By the so called public interest ‘litigation’ in purely administrative matters, the judiciary is diverted from its traditional duties and functions and made to enter into fields in which it has no competence or safe standards for judicial action. Should the nation make the judiciary carry on such services? Should there not be recognition by the judiciary itself of its limitations and of the fact that it cannot be made a substitute for the failure or the irresponsibility of the other branches of government? Will the judiciary maintain its independence, detachment and respect if it increasingly descends into problems of people’s politics or delivers legislative or administrative judgements’?

788 The Supreme Court in United States History II, I pp. 470-471.
If a judicial veto nullifies a Constitutional change for all times, on the grounds that the measure is not permissible at all in the subjective view of the judges, no legal means exists for re-asserting the popular will over the veto. Judges thus become the final and conclusive umpires of the changes to be made in the Constitution and the necessity for changes in the basic law of the nation. A judicial veto in the case of invalidation of a Constitutional amendment is in reality an exercise of Constituent power itself by the court.

In fact, the Court has even gone to the extent of making Constitutional law by its verdict. In *Woman Rao v. Union of India*791 the court held in 1981 that the amendment of Article 31-B of the Constitution in 1951 was prospectively invalid from 24 February 1973, to give immunity to Fundamental Rights and was fully valid prior to that date. This judgement is nothing short of amending the Constitution. In the *Golak Nath case*, Justice Bhagwati in his dissent, said to say that they (the laws) were valid in the past and will be invalid in future is to amend the Constitution. Such a naked power to amend the Constitution is not given to judges’.792

The very purpose of a written Constitution is to contain the basic structure of the government, without that Constitution serves no purpose. To find out what is the basic in the basic law of the nation is an esoteric exercise, akin to finding out a double distilled essence from refined spirit. Exercise of such significant power of nullification of a constituent law, by the use of vague, undefined and necessarily subjective notions of judges of basic or non-basic structure or framework inevitably involves exercise of political and social policy making.

As regards the capability of judges dealing with wide considerations, which address only to the particular judgement of legislative body, it is said; Judges are not philosophers or legislators. At best they are legal scholars. Judicial review of reasonableness of fundamental changes in the Constitution with total irreversibility of the decision means the testing of the whole social process by a single outlook of men of law. There are no safe objective standards for invalidation in the theory of basic structure.

792AIR 1967 SC 1643-1728.
7.10 FINDINGS

To summarize, one can say that when the judges make law it is essentially a sort of a restricted form of legislation which cannot go beyond the limits of the statutes itself. Such lawmaking is essentially a rule making power to be used as a judicial tool to apply and administer the statute law to adjudicate upon disputes between the parties inter se. A judge made law in its essence is an extension of the statute law; its flexibility is pragmatic as the judge has the comfort of dealing with a concrete situation. However, a mere remarkable advantage to a judge does not authorize him with respect to law-making in a generic nature. ‘Judicial Activism’ in order to be appreciated, demands a distinction from ‘judicial overreach’ or ‘judicial excessivism’ since it requires a delicate combination of discretion, tact, and vision. Any exercise of which transgresses the four walls of the Constitution is counterproductive since it disturbs the delicate balance and harmony of the respective organs of the state.