Chapter II
Policy-making in India: Judiciary Vs Parliament

Public policy and policy-making in India
In any society, governmental entities enact laws, make policies, and allocate resources. Public policy can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives. Individuals and groups often attempt to shape public policy through education, advocacy, or mobilization of interest groups. Shaping public policy is obviously different in different forms of government. But it is reasonable to assume that the process always involves efforts by competing interest groups to influence policy makers in their favour. In every political system, executive has a predominant role in public policy formulation. However, the other two organs of government, legislature and judiciary, can also influence the policy-making depend upon the form of government like parliamentary and presidential.

A major aspect of public policy is law. In a general sense, the law includes specific legislation and more broadly defined provisions of Constitutional or international law. There are many ways that the law can influence the public policy of the government. Legislation identifies areas and nature of governmental policies. Thus, it is not surprising that public policy debates occur over proposed legislation. In a parliamentary form of government, the role of legislature is increasing excessively in formulation of public policy. The judicial interference in policy making is based on the concept of judicial review.

Integrated judiciary is contradictory to the federal spirit of the country.\(^1\) The judicial intervention in policy-making, especially a subject like education included in Concurrent List, is creating more confusion and chaos in policy implementation. Diversification of policies is a merit of federal
form of government, but the judicial intervention is a hindrance to it. Supreme Court cases with regard self financing education is a best example for this.

**Separation of Powers and Judicial Review in India**

A truly liberal constitutional document is one which grants power, but also provides machinery for cutting down any arbitrary exercise of it. There are three ways in which this happens in Indian Constitution. First, the Constitution enumerates those things which the State cannot do and also enumerates all those things it must do. Secondly, the Constitution being federal, the power of the State is divided between the Union and the states. Thirdly, there is separation of powers, which is divided the powers of the state among the legislature, the executive and the judiciary by the Constitution itself (Hidayatullah 1966: 64-66). In these several ways no single body of men is entrusted with all the force possessed by the State. Montesquieu was absolutely right when he said, “By division of powers, government becomes the servant of the people and not the master.”

In India, unelected judges have effectively replaced the notion of the separation of powers among three governmental branches with a Unitarian claim of formal judicial supremacy. The concept of the rule of law is supposed to legitimate this claim, but whether judicial supremacy – either as such or as exercised by the Indian Supreme Court – actually upholds the rule of law remains an open question.

In order to understand how this situation has come about, it is helpful to know that in India, the power of judicial review is more or less explicitly spelled out in the 1950 Constitution, and that this Constitution has a dual goal. On the one hand, as a basic law in the liberal tradition, it seeks to check the power of government and to safeguard individual rights and liberties. On the other hand, it is the work of framers who believed, with good cause, that their country needed a state with the capacity to intervene massively in society in order to overcome structural injustices grave enough to threaten liberal democracy itself (Mehta 2007: 110). So the Constitution
allows the courts to intervene in the cause of what might be loosely termed ‘social reform’. Moreover, judges have gradually widened the definition of rights held to be constitutionally justiciable. Hence the scope of judicial intervention can include everything from civil liberty to urban planning. This constitutional practice, which licensed the courts to intervene, was bound to generate a promiscuity that would be the cause of some resentment.

It is hard to say what are the necessary and sufficient conditions under which independent judicial review will arise and take hold. It used to be a common argument that successful constitutional judicial review is caused and required by strong federalism. Federalism requires a ‘referee’ to protect boundary arrangements, the logic ran, so each unit of a federation will, despite incentives to deviate, support the creation and maintenance of some central institution designed to identify and stop noncompliance by others. The nature of the federal arrangement in India has turned on how judicial power is exercised, and judicial review has often eroded rather than strengthened federalism (Mehta 2007: 114). When it comes to define the federal character of the Indian polity, legislature and executive have largely followed the judiciary’s lead. This suggests that, as with a robust division of powers among different levels of government, a strong separation of powers among the various branches of government will encourage judicial power and independence. The general presumption has been that in parliamentary system, where the executive rises directly from the legislature, judicial review will be weak (Mehta 2007: 114). Yet strong judiciaries replete with doctrines of judicial review are appearing in such parliamentary countries as Australia and Canada.

The actions of judges themselves, and not federalism or the separation of powers, most cogently explain changes over time in the exercise of judicial power. Court rulings are the main means for institutionalising judicial review. In India as elsewhere, it is not simply the formal allocation of powers but an evolving constitutional jurisprudence that has enhanced the powers of judicial review. In democratic societies, it
seems that the degree of independence which a judiciary asserts is itself a creation of judicial power (Mehta 2007: 115). The thought that ‘judicial review causes itself’ is probably as good as any answer to the puzzle of judicial power.

The history of judicial power and its exercise in India suggests that the separation of powers doctrine is a highly misleading metaphor. It is still invoked all the time, of course, but in reality it offers neither an accurate empirical description of how actual courts work, nor a plausible conceptual account of any government. Policy making has become a routine part of the judicial role in many contexts, and adjudication likewise now belongs in many countries and in many ways to the realm of administrative functioning. The traditional distinction that holds legislatures to be forums for the balancing of interests and courts to be forums of principle is far less obvious than it seems. On the conceptual level, the plausibility of the separation of powers metaphor breaks down as soon as one asks: “who polices the boundaries between different branches of government?” each branch will want to patrol the borders on its own terms, rendering any idea of “separation” merely rhetorical. The Supreme Court of India has given to pronouncements that all the branches of the government are “under the Constitution,” suggesting that all legitimate power has its source in a legal or constitutional order that somehow regulates the conduct of men (Mehta 2007: 115). In short, judiciary has become more powerful because Court is not only the guardian of Constitution, but the separation of powers too. So Court can decide the boundaries between different branches of government, particularly between judiciary and other two branches.

**Parliamentary Democracy in India**

India has a hybrid system of government. The hybrid system combines two classical models: the British traditions, drawn upon parliamentary sovereignty and conventions, and American principles upholding the supremacy of a written constitution, the separation of powers and judicial review. The two models are contradictory since parliamentary sovereignty
and constitutional supremacy are incompatible. India has distinct imprints in her constitution of both the British and American principles. In other words, following the adoption of the 1950 Constitution, India has evolved a completely different politico-constitutional arrangement with characteristics from both the British and American constitutional practices. The peculiarity lies in the fact that, despite being parliamentary, the Indian political arrangement does not wholly correspond with the British system simply because it has adopted the federal principles as well, it can never be completely American since parliament in India continues to remain sovereign. As a hybrid political system, India has contributed to a completely different politico-constitutional arrangement, described as parliamentary federalism, with no parallel in the history of the growth of a constitution (Chakrabarty 2009: 86). Based on both parliamentary practices and federal principles, the political system in India is therefore a conceptual riddle underlining the hitherto unexplored dimensions of socio-political history of nation-states imbibing the British traditions and American principles.

The Constitution of India provides for the system of Parliamentary democracy both at the Centre and in the States. This Parliamentary Government is the most difficult system to work. It has succeeded in a very few countries and the trend today definitely is towards a strong executive which can control the turbulence and turmoil of political life and the tremendous challenge of the modern world.

The most significant development in India’s constitutional history is the consolidation of a parliamentary form of government that broadly corresponds with the Westminster model. What is equally striking is the growth of federalism in India in spite of parliamentary government that, in its classical form, flourished within a unitary system of government. Whereas Britain is identified as a classical model of parliamentary government, the United States is always referred to as an ideal form of federal government. The Constituent Assembly while deliberating on the
form of government for independent India was in favour of executive federalism, which they presumed was appropriate for a stable political authority. Owing to radical changes in India’s political texture in recent times, parliamentary federalism has metamorphosed to a significant extent and the growing importance of constituent state in governance at the national level has created conditions for legislative federalism suggestive of equal and meaningful representation of the units in federal decision-making (Chakrabarty 2009: 84-85).

As a form of government, the democracy which is envisaged is a representative democracy and the people of India are to exercise their sovereignty through a parliament at the centre and Legislature in each State, which is to be elected an adult franchise and to which the real executive, namely the Council of Ministers, shall be responsible for the popular House (Asaiah 1987: 36). The Parliament is the nerve centre of the national activities. It is through Parliament that elected representative of the people ventilate people’s grievances and opinions on various issues, scrutinises the functioning of executive both on the floor of the House and through special committees constituted for the purpose and enacts laws.

**Judicial Review and Indian Constitution**

American constitutional thought and the work of the U S Supreme Court had a profound impact on the minds of the makers of the Indian Constitution. They opted for the British parliamentary system but consciously adopted the American model of a judicially enforceable Bill of Rights and a federal system with the Supreme Court to keep the jurisdiction of both the Union and the States within their respective spheres (Chatterjee 1998: 93). Nevertheless the ‘due process clause,’ one of the foundational concepts of the U. S. constitutional system, was not incorporated in Indian Constitution. To quote Alladi Krishnaswami Ayyar, “in the development of the doctrine of due process the United States Supreme Court has not adopted a consistent view at all and the decisions are conflicting. One decision is very often reversed by another decision. It all depends upon the
particular judges that presided on the occasion.” (Constituent Assembly Debates, vol. VII, 853-54). After a prolonged debate in the Constituent Assembly it was unanimously decided to accept merely the procedural aspect of due process in Indian constitutional system.  

In post-independence India, the inclusion of explicit provisions for ‘judicial review’ were necessary in order to give effect to the individual and group rights guaranteed in the text of the Constitution. Dr. B.R. Ambedkar, who chaired the drafting committee of our Constituent Assembly, had described the provision related to the same as the ‘heart of the Constitution’. Article 13(2) of the Constitution of India prescribes that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void.

While judicial review over administrative action has evolved on the lines of common law doctrines such as ‘proportionality’, ‘legitimate expectation’, ‘reasonableness’ and principles of natural justice, the Supreme Court of India and the various High Courts were given the power to rule on the constitutionality of legislative as well as administrative actions. In most cases, the power of judicial review is exercised to protect and enforce the fundamental rights guaranteed in Part III of the Constitution (Balakrishnan 2009). The higher courts are also approached to rule on questions of legislative competence, mostly in the context of Centre-State relations since Article 246 of the Constitution read with the 7th schedule, contemplates a clear demarcation as well as a zone of intersection between the law-making powers of the Union Parliament and the various State Legislatures.

The warrant for judicial review comes from a combined reading of Articles 13, 32 and 142 of the Constitution of India. Article 13(2) provides that “The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void (Govt. of India 2007: 55
5). Article 32 and 226 give any person the right to move the Supreme Court or the High Court, respectively, for the enforcement of fundamental rights guaranteed in Part III of the Constitution. Finally, Article 142 provides that the Supreme Court “may pass such decree or make such order as is necessary for doing complete justice in any cause or matter,” and such decree or order is “enforceable throughout the territory of India.” (Govt. of India 2007: 58). Article 142, especially the phrase “complete justice”, has given the judiciary a virtual license to intervene in any matter whatsoever. In addition to these textual enablers, the Court has over the years created its own powers in a number of domains.

It is, however, admitted that Indian Supreme Court is the ultimate interpreter and guardian of the Constitution. It can invalidate a law enacted by the legislature in certain circumstances (Chatterjee 2005):

1) If the legislature (whether Parliament or State legislation) makes a law by transgressing its jurisdiction.

2) If a law abridges the Fundamental Rights of the Citizens. The Constitution of India by Article 13(2) enjoins the state not to make any law which takes away or abridges the Fundamental Rights. Thus the Supreme Court is the final authority to decide whether a law has taken away and curtailed the Fundamental Rights and what would be the limits on Fundamental Rights.

3) The Supreme Court is also the ultimate authority to decide whether a law imposes unreasonable restriction on the enjoyment of the Right to Freedom guaranteed under Article 19 of the Constitution.

4) Under Article 31(2) (now repealed) it was for the court to determine if a property had been acquired or requisitioned for a ‘public purpose’ or not.

Thus although we did not accept the ‘due process’ clause of the US Constitution still there are a number of provisions in Indian Constitution which, in fact, authorise the Supreme Court to examine the reasonableness
or justness of the substantive content of very vital legislations intended to bring about socio-economic transformation of the country.

**Judicial Review in India**

Legislature, executive and judiciary under the Constitution are to exercise powers with checks and balances, but not in water-tight rigid mould. In India, by basis of Article 13 (2) the Supreme Court can exercise the power of judicial review. Judicial review in India comprises of three aspects:

1. Judicial review of legislative action,
2. Judicial review of administrative action,

The Constitution of India provides for judicial review under Article 13(2). The Supreme Court has pronounced that judicial review is a fundamental feature of the Constitution. The power of judicial review by courts therefore is not subject to amendment and thus has been effectively taken out of the field of Parliament’s power to amend or in any way abridge. The judiciary has declared a “hands-off” command to the legislature.

Thus, judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The court in its exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens’ rights of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds, which could be expended on building, hospitals, roads and the like, or overseas aid, or compensating victims of crime.

The limits on the power of judicial review are a recurring theme in the evolution of our Constitution. In some of its distinguished judgments, the Supreme Court has defined the outline of sovereign power as
distributed amongst the three branches of Government namely, the legislature, the executive and the judiciary.

In the initial years post independence, the Supreme Court tried to strike a balance between the much-needed programmes of economic and social reform (for example, land reform and land redistribution) on the one hand and establishing the credibility of the newly-born Indian State. It tried to promote the rule of law and respect the rights vested under laws that preceded independence and the very Constitution itself. (AIR 1951 SC 458).

During the first couple of decades when, for all practical purposes, India was functioning as a de facto one-party political system. The Supreme Court focused on promoting the values of constitutionalism, separation of powers and checks and balances over and in each organ of the State. The Supreme Court and the High Courts were ever-vigilant in their review of executive actions, hence ensuring to the public requisite protection against excesses of authority or abuses of power (AIR 1964 SC 962). They were equally vigilant in their review of legislative actions, both in respect of lawmaking as well as in balancing legitimate parliamentary powers, (necessary for the effective functioning of Parliament) with parliamentary privileges, notably that of punishing for contempt (AIR 1965 All 349).

In the decades thereafter, the Supreme Court turned its attention towards the frequency with which the Parliament was amending the Constitution using the dominance of a single political party at both the national and state levels to the maximum. The Court elaborated upon the distinction between the constituent and legislative power (AIR 1967 SC 1643). Moreover, as the judiciary and the Indian political system matured, the Supreme Court firmly established the primacy of the Constitution through its articulation of the basic structure doctrine, thereby safeguarding those features that are inherent in the Constitution from being altered through the mere exercise of legislative power (AIR 1973 SC 1461).
Judicial Review and Federalism in India

The traditional principle of federalism is to create an independent judiciary to preserve intact the federal structure, because federalism involves a division of powers between the central government and the provincial governments and there may be occasional conflicts between the two or the provinces inter se as regards the terms of the division of powers and the respective areas of their authority. All such disputes are to be settled with reference to the Constitution which is the supreme law of the land and which prescribes the manner in which powers are distributed between the centre and the units. Justice demands that such conflicts should be settled by an impartial arbiter. A Supreme Court under a federal constitution is such an arbiter and is, therefore, an integral part of a federal system. It is the highest interpreter of the Constitution and acts as the guardian of the Constitution.

The Rise of Judicial Sovereignty

The Indian Supreme Court’s chief duty is to interpret and enforce the Constitution of 1950. It contains, at latest count, 450 articles and 12 schedules. Since its original adoption, it has been amended more than a hundred times. It is fair to say that the Supreme Court, operating under the aegis of this book-sized liberal constitution, has by and large played a significant and even pivotal role in sustaining India’s liberal democratic institutions and upholding the rule of law. The Court’s justices, who by law now number 26, have over the years carved out an independent role for the Court in the matter of judicial appointments and transfers, upheld extensive judicial review of executive actions, and even declared several constitutional amendments unconstitutional. The Court upon which they sit is one of the world’s most powerful judicial bodies with implications for democracy that are both positive and problematic (Mehta 2007: 107).

The Court has a relatively weak record when it comes to questioning executive action in cases of preventive detention. While the Court has generally upheld the right to free expression, it has given the state more
leeway in banning books that officials fear may threaten public order. During the period of emergency rule declared at the instigation of Prime Minister Indira Gandhi from June 1975 to March 1977, the Supreme Court shrank from its duty and chose supinely to concur with the executive’s suspension of the writ of Habeas Corpus (Mehta 2007: 108).

Besides protecting the basic liberties that put the “liberal” in India’s liberal democracy, the Court has helped to ensure the polity’s democratic character by safeguarding the integrity of the electoral process. The Court has acted to curb the central government’s tendency to misuse Article 356 as a pretext to sack elected state governments and install president’s rule instead. Supreme Court interventions have also promoted democratic transparency by making political candidates meet fuller norms of disclosure. The Supreme Court’s record in promoting decentralised governance is mixed. On the one hand, the Court has ensured the integrity of Indian federalism by pronouncing that the central government cannot dismiss a state government without a high threshold of public justification. On the other hand, courts across the country have been less receptive to the claims of lower tiers of government against state governments. The Supreme Court has so far proven unable to clarify the law in this area. While the social and economic rights that the Constitution lists were not at first deemed justiciable, the Supreme Court has managed over the years to apply a more substantive conception of equality that justices have used to uphold rights to health, education and shelter, among others. To one degree or another, the executive branch has responded by at least trying to make provisions for the guarantee of these rights.

The Court’s greatest judicial innovation – and the most important vehicle for the expansion of its power – has been its institution of Public interest litigation (PIL). In PIL cases, the Court relaxes the normal legal requirements of standing and pleading, which require that litigation be pressed by a directly affected party or parties, and instead allows anyone to approach it seeking correction of an alleged evil or injustice. Moreover, in
PIL matters the Court has expanded its own powers to the point that it sometimes takes control over the operations of executive agencies.

**Parliamentary Sovereignty vs. Judicial Review**

Disputes between the judiciary and the other two branches have been common in Indian political life. The basic question in the conflict between Parliament and Judiciary is “Do we have the Rule of Laws or the Rule of Men?” (Mehta 2007).

During the first 17 years of the Supreme Court’s existence, when it was supposedly in its restrained period, it struck down 128 pieces of legislation. Of the first 45 constitutional amendments, about half were aimed at curbing judicial power. The 104th constitutional amendment is designed to reverse the result of the Inamdar Case, in which the Court ruled unconstitutional the central government’s effort to control who is admitted to half of all the seats in private institutions of higher education every year and to set the fees that these schools could charge (Mehta 2007: 111).

If the frequency of amendments meant to reverse Supreme Court decisions is significant, so is the legislative assumption that amendments are needed at all. Court decisions may infuriate Parliament, in other words, but Parliament thinks that they cannot simply be ignored. Even during the 1975-77 emergency, the government took care to curtail the authority of the courts by formally legal means. This deference has ensured that even constitutional amendments have not been able to alter the basic structure of the Constitution and the formal allocation of powers within it.

The foregoing suggests that there is profound inner conflict at the heart of Indian constitutionalism. The Court has declared itself to be the ultimate judge, the final arbiter, and has even assumed the power to override duly enacted constitutional arrangements. Yet in a polity where parts of the Constitution can be amended by as little as a majority vote of each of the two houses of Parliament, there is no reason to suppose that a court decision regarding the constitutionality of a particular matter will
suffice to remove it from the political agenda. In India, Parliament and the judiciary have been and are likely to remain competitors when it comes to interpreting the Constitution. It is by no means settled who has the final word. The decisions of each are episodes in an iterative game of action-response-rejoinder that can be played out any number of times (Mehta 2007: 112). Parliament can pass a law, the courts can strike it down, Parliament can try to circumvent the courts by amending the Constitution, the courts can pronounce that Parliament’s amendment power does not apply to the case, and so on.

It is true that the 1990s saw no full scale parliamentary assault on the courts’ interpretation of what the “basic structure” doctrine requires, but that was an accidental side effect of a fragmented political system in which no one party could achieve dominance in Parliament. Should any party gain enough parliamentary majority to wield the amendment power, the judicial-legislative tussle will almost certainly resume, and it is impossible to predict what the outcome will be, either in the nearer or the longer term (Baxi 2001).

The judicialisation of politics and the politicisation of the judiciary turn out to be two sides of the same coin. The legitimacy and power that India’s judiciary does enjoy most likely flow not from clear and consistent constitutional vision, but rather from its opposite. The Supreme Court in particular has given enough players enough partial victories to leave them feeling as if they have a stake in keeping the game of political give and take going (Baxi 2001).

In the early post-independence years, the Supreme Court tried to block land-reform legislation, virtually denied that the Constitution requires substantive due process, and gave serious scrutiny to government regulation of publications. The government’s response was typically to seek a change in the letter of the Constitution, which helps to explain why India’s basic law is so heavily amended. During the late 1960s and early 1970s, the judiciary struck down major planks of Indira Gandhi’s development agenda,
including her scheme for nationalising the banks (Mehta 2007: 110). This era also saw the Court make its first strong claim that Parliament may not, even via amendment, override the fundamental rights elaborated in part III of the Constitution. Later, the Court would extend and revise this claim to argue that the legislature may not, through amendment, override the “basic structure” of the Constitution. Yet when Prime Minister Gandhi declared her State of Emergency on 25th of June 1975, suspended Article 21 of the Constitution and had hundreds of people detained by executive order, the Supreme Court overruled 9 High Courts and upheld her actions (Baxi 2001).

Despite the Court continued to emerge stronger over judicial appointments. Judges then framed far-reaching interpretations that would lay a constitutional basis for future judicial bids to curb the powers of the two other branches. The Supreme Court managed to legitimise itself not only as the forum of last resort for questions of governmental accountability, but also as an institution of governance. The Court’s Public Interest Litigation initiatives allowed judges to make policy and demand that executive officials carry it out (Mehta 2007: 110).

The Constitution’s Article 124 is ambiguous on judicial appointments, calling for consultation between the executive and the judiciary but leaving it unclear who has the final say. In a decision in The Third Judges’ Case (1993), the Supreme Court held that the power to name new judges to the highest bench rests primarily with the chief justice and the next four most senior justices of the Supreme Court itself. Extensive consultations with the executive are required, but in the end the Court’s highest ranking jurists have the lion’s share of the appointment power (Mehta 2007: 111). Thus the Court may have secured its autonomy at a cost to its transparency and perhaps its legitimacy as well.

It appears that Parliament and the Supreme Court largely differed in their respective approaches to significant issues having bearing on socio-economic transformation of society. A background study of several constitutional amendments reveals that these amendments were
necessitated by the urgency to counteract the effect of the decisions of the Supreme Court in a number of cases wherein the Court struck down progressive legislations, including land reforms ones, enacted by the State legislatures, which were considered so essential for bringing about radical changes in our agrarian system and thereby reducing disparity in income and wealth, the Supreme Court itself changed its own decisions within a brief span of time on the same issue (Chatterjee 1998: 97). It is within the province of the Supreme Court to reverse its earlier decisions. But frequent shift in stand on the part of the apex court of the country leads to uncertainty, making it difficult for Parliament and the executive to follow a well-planned long-term policy.

From a perusal of the working of Supreme Court since independence, two major conclusions having bearing upon the legislature may be drawn up. Firstly, the Supreme Court has almost consistently taken up positions contrary to those held by Parliament and has nullified many progressive legislations intended to bring about a socialistic transformation of Indian society in a peaceful way. Secondly, the Court has put the whole state of the law and, in particular, constitutional law into a state of uncertainty by reversing continuously its own decisions. When Parliament proceeded to legislate or the executive branch of government sought to pass an executive order on the basis of existing decisions of the Court, the latter set aside the law or the government order by reversing its own previous decisions. This led to a total uncertainty about the state of law. In fact, the judiciary sat over the verdict of Parliament on issues relating to social and economic justice, and this led to conflict, real or apparent, between the judiciary and Parliament. The slugfest between Parliament and Judiciary has, in fact, turned into a tussle between Civil and Political Rights (FR) on the one hand and the Economic and Social Rights (DPSP) on the other hand, the Court support the former one.
Shankari Prasad Singh Vs. Union of India (1951)

In the case of Shankari Prasad, the question was raised whether the 1st Amendment Act, 1951 seeking to abridge the right to property was constitutionally void or not. The petitioner’s argument against the validity of the Act was that Article 13(2) prohibited enactment of any law abrogating a fundamental right. The court, however, rejected this argument saying that the word ‘law’ referred in Article 13 did include only ‘legislative law’, that is, the law made by the legislature ordinarily, not the ‘constituent law’ i.e. a law made to amend the constitution.

The Court adopted a similar view in 1964 in Sajjan Singh Vs. State of Rajasthan when it upheld the 17th amendment Act. But this is also to be remembered that on this question the judges were not unanimous. For example, Justice Hidayatullah observed, “I would require stronger reasons than those given in Shankari Prasad’s case to make me accept the view that fundamental rights were not really fundamental but were intended to be within the powers of the amendment in common with the other parts of the constitution and without the concurrence of the states’ because the constitution gives so many assurances in Part III that it would be difficult to think that they were play things of a special majority.” (Jain 2000). This argument of Justice Hidayatullah became the basis of the judgment of the Golaknath case in 1967.

Sajjan Singh Vs State of Rajasthan

The validity of the Seventeenth Amendment was challenged in this case. The main contention before the five-judge bench of the Supreme Court was that the Seventeenth Amendment limited the jurisdiction of the High Courts and, therefore, required ratification by one-half of the States under the provisions of article 368. The court unanimously disposed of this contention, but members of the court chose to deal with a second submission, that the decision in the Shankari Prasad case should be reconsidered. The Chief Justice (Gajendragadkar C.J.) in delivering the view of the majority (Gajendragadkar C.J., Wanchoo and Raghubar Dayal JJ.)
expressed their full concurrence with the decision in the earlier case. The words "amendment of this constitution" in article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution; it would, therefore, be unreasonable to hold that the word "law" in article 13(2) took in Constitution Amendment Acts passed under article 368.

Golaknath Vs. State of Punjab (1967)

A highly confusing stand of the Supreme Court was apparent in a very sensitive field of constitutional structure, which is the limitation upon the power of Parliament to amend the Constitution. In Golaknath Case the Supreme Court held by a majority of 6 to 5 that Parliament had no power to amend any of the provisions of Part III of the Constitution so as to take away or abridge any of the Fundamental Rights enshrined therein (AIR 1967 SC 1643). The Supreme Court held that in the context of Article 13 of the constitution the law includes the amendments of the constitution with the result that Article 13(2) affects the amendment made under the Article 368. In other words, the court declared that even the constitutional amendments if they affect the fundamental rights were liable to be held void. The stand of the Supreme Court was clear that every provision of the Constitution could be amended freely as desired by Parliament, excepting the provisions relating to Fundamental Rights. The effect of this majority judgement was to overrule its unanimous judgement in Shankari Prasad's case (1951) as well as its majority judgement in Sajjan Singh's case (1964). In these two cases the Supreme Court held that the terms of Article 368 were perfectly general and empowered Parliament to amend the Constitution without any exception whatever.

24th Constitutional Amendment in 1971

To counteract the effect of the decision of the Supreme Court in the Golaknath case and to restore the power to amend any provision of the Constitution, including the provisions of Part III, to Parliament, the Constitution was amended in 1971. It was provided by the said Amendment that parliament could in exercise of its constituent power amend by way of
addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in Article 368. The 24th and 25th amendments restored the parliament’s right to amend the fundamental rights.

To get over the decision of the Supreme Court in Golaknath case the 24th Constitution Amendment Act was passed in 1971. The 24th Amendment made changes to Articles 13 and 368:

(i) A new clause was added to article 13: "(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

(ii) Amendments were made to article 368:
   a) The article was given a new marginal heading: "Power of Parliament to amend the Constitution and procedure therefore."
   b) A new clause was added as clause (I): "(I) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
   c) Another clause was added as clause (3): "(3) Nothing in article 13 shall apply to any amendment under this article."

Another amendment to the old article 368 (now article 368(2)) made it obligatory rather than discretionary for the President to give his assent to any Bill duly passed under the Article.

Keshavananda Bharati Vs. State of Kerala (1973)

The constitutional validity of the 24th amendment, along with the 25th and 29th Amendments, was challenged before the Supreme Court in Keshavananda Bharati case in 1973. The Supreme Court reversed its earlier ruling in Golaknath’s case and upheld the validity of 24th Amendment, Parliament’s power to amend the Constitution. But in the same case the Court formulated the doctrine of ‘basic features or structure of the Constitution’. Previously these were unknown concepts in Indian political
system. It was a judicially innovative doctrine and the Supreme Court did not define the ‘basic structure’. The court held that the parliament’s power of amending the constitution was always subject to implied limitations. The phrase ‘basic structure’ remained delightfully vague and has become subject to judicial interpretation. Obviously the verdict of this case significantly increased the court’s authority of judicial review (Ghosh 2005: 126).

A total uncertainty prevailed about the ambit of parliament’s power to amend the Constitution after the ruling of the Supreme Court in Keshavananda Bharati case. The prevailing situation is worse than the one created by the judgement in the Golaknath case in which the stand of the Supreme Court was clear in one respect at least. But the judgement in the Keshavananda Bharati case provided a vague and a subjective concept of the basic structure of the Constitution which appears to include the Fundamental Rights and which may also include anything else which the Judges feel that it should include. Thus the certainty of the Constitution in respect of the most vital power of amendment is thrown to the winds (Chatterjee 1973).

42nd Constitutional Amendment Act in 1976

After the decision of the Supreme Court in Keshvanand Bharti case, the 42nd Constitution Amendment Act was passed in 1976. It added two new clauses, namely, clause (4) and (5) to Art.368 of the Constitution. It declared that there shall be no limitation whatever on the constituent power of parliament to amend by way of addition, variation or repeal of the provisions of the Constitution under this Article. This Amendment would put an end to any controversy as to which is supreme, Parliament or the Supreme Court. Clause (4) asserted the supremacy of the parliament. It was urged that Parliament represents the will of the people and if people desire to amend the Constitution through Parliament there can be no limitation whatever on the exercise of this power. This amendment removed the limitation imposed on the amending power of the Parliament by the ruling of the Supreme Court in Keshvanand Bharti case. It was said that the theory
of ‘basic structure’ as invented by the Supreme Court is vague and will create difficulties. The amendment was intended to rectify this situation. The 42\textsuperscript{nd} Amendment Act curtailed drastically the jurisdiction of the court, placed an act of constitutional amendment beyond the scope of judicial scrutiny and more particularly the Act tried to minimise the ‘basic structure’ doctrine. The Act also significantly enlarged the powers of the executive.

\textit{Minerva Mills Vs. Union of India (1980)}

In Minerva Mills vs. Union of India, it was observed by the Supreme Court that the clauses of art. 31-C as introduced by the Constitution (42\textsuperscript{nd} Amendment) Act, 1976, which required to take away the power of judicial review were unconstitutional. However, judicial review was not held to be part of the basic structure of the Constitution by the majority in this decision, although Bhagwati J in his minority decision traced the power of judicial review to Arts. 32 and 226 and observed it to be a part of the basic structure of the Constitution, and if taken away by a constitutional amendment would amount to ‘subversion of the Constitution’.

In this case the validity of 42\textsuperscript{nd} amendment Act was challenged on the ground that they are destructive of the ‘basic structure’ of the Constitution. The Supreme Court by majority of 4 to 1 struck down clauses (4) and (5) of the Article 368 inserted by 42\textsuperscript{nd} Amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the constitution. It was ruled by court that a limited amending power itself is a basic feature of the Constitution. The historical Judgement laid down that:

"The amendment made to Art.31C by the 42\textsuperscript{nd} Amendment is invalid because it damaged the essential features of the Constitution. Clauses (4) and (5) are invalid on the ground that they violate two basic features of the Constitution viz. limited nature of the power to amend and judicial review. The courts cannot be deprived of their power of judicial review. The procedure prescribed by Cl.(2) is mandatory. If the amendment is passed without complying with the procedure it would be invalid. The Judgement of the Supreme Court thus makes it clear that the Constitution is
Supreme not the Parliament. Parliament cannot have unlimited amending power so as to damage or destroy the Constitution to which it owes its existence and also derives its power.”

_Waman Rao vs. Union of India (AIR 1981, Supreme Court, 271)_

The decision of _Waman Rao Vs Union of India_ is regarded as one of the landmark judgement in the constitutional jurisprudence of India. This case in a way a unique one as it re-clarifies various doubts arose out of _Keshavananda Bharati_ case. In this case the main challenge was the constitutional validity of Articles 31A, 31B and un-amended article 31C. It was strongly argued against the protective nature of these articles which exclude all possibilities of challenge to the laws included under the shield. They argued that such shield will violate certain Fundamental Rights enshrined under Part III of the Constitution. The appellants replied that the very provisions of the Constitution which the respondents rely to save impugned laws are invalid as the later amendments infringe the basic essential structure of the Constitution as propounded in _Keshavananda Bharati_ Case.

The Ninth Schedule was added to the Constitution after the first amendment to the constitution. Here the Court proposed to treat decision of _Keshavananda Bharati_ as the benchmark. Several Acts were put in the Ninth Schedule prior to that decision on the supposition that the power of the Parliament to amend the Constitution was wide and untrammelled. Therefore the Court would not be justified in upsetting the settled claims by leaving those Acts open to challenge.

The Court said that as far as the validity of the Ninth Schedule is concerned, the Acts and regulations included in the Ninth Schedule prior to the date of _Keshavananda Bharati_, will receive the full protection of this Article. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with any of the provisions of part III of the Constitution. But the Acts and regulations which have been included after the date of _Keshavananda Bharati_ judgment would be open to scrutiny and
would not automatically receive the blanket protection of the Ninth Schedule. Therefore the Acts and regulations added after the said date can only find themselves placed in the Ninth Schedule if they can satisfy that they do not harm the basic structure of the Constitution.

**Public Interest Litigation and the Scope of Judicial Review in India**

In Public Interest Litigation (PIL), the nature of proceedings itself does not exactly fit into the accepted common-law framework of adversarial litigation. The courtroom dynamics are substantially different from ordinary civil or criminal appeals. While an adversarial environment may prevail in cases where actions are brought to highlight administrative apathy or the government’s condonation of abusive practices, in most public interest related litigation, the judges take on a far more active role in the literal sense as well by posing questions to the parties as well as exploring solutions (Balakrishnan 2009). Especially in actions seeking directions for ensuring governmental accountability or environmental protection, the orientation of the proceedings is usually more akin to collective problem-solving rather than an acrimonious contest between the counsels. Since these matters are filed straightaway at the level of the Supreme Court or the High Court, the parties do not have a meaningful opportunity to present evidence on record before the start of the court proceeding. To overcome this problem, Courts have developed the practice of appointing ‘fact-finding commissions’ on a case by-case basis which are deputed to inquire into the subject-matter of the case and report back to the Court. These commissions usually consist of experts in the concerned fields or practicing lawyers. In matters involving complex legal considerations, the Courts also seek the services of senior counsels by appointing them as amicus curiae on a case-by-case basis (Desai & Muralidhar 2000). The Public Interest Litigation has considerably strengthened the power of Judiciary.

**Issues and Debates on Judicial Review in India**

Indian Supreme Court’s undeniable contributions to democracy and the rule of law, to say nothing of its reaching for power in service of these aims, are
shadowed by three profound ironies. First, even as the nation’s most senior judicial panel engages in high profile PIL interventions, routine access to justice remains extremely difficult. India’s federal judicial system has a backlog of almost 20 million cases, thousands of prisoners are awaiting trial, and the average time it takes to get a judgement has been steadily increasing (Mehta 2007: 109). There is a saying in India that you do not get punishment after due process – due process is the punishment.

The second irony is that even as the Supreme Court has established itself as a forum for resolving public-policy problems, the principles informing its actions have become less clear. To the extent that the rule of law means making available a forum for appeals, one can argue that the Court has done a decent job. To the extent that the rule of law means articulating a coherent public philosophy that produces predictable results, the Court’s interventions look less impressive.

The third irony is that the Court has helped itself to so much power – usurping executive functions, marginalising the representative process – without explaining from whence its own authority is supposed to come (Mehta 2007: 109). In theory, democracy and constitutionalism can reinforce each other, but in practice their relationship is complex and even problematic. The question of where one begins and the other ends has taken on global significance in light of the widely observed trend toward “post democracy”, according to which representative institutions are losing power to nonelected centres of decision making the world over.

The supremacy of the Constitution itself is and should be amenable to the sovereign will of the people which is and ought to be capable of constitutional expression, not once but as often as the exercise of this power becomes a national necessity. There should be no scope of judicial review of constitutional amendments on any ground except that or those expressly stated in Article 368. The constitutional amendment is the outcome of a political decision. It is for Parliament to decide whether an amendment is necessary or not. The judiciary should not in any way be
concerned with the wisdom of the amendment (Chatterjee 1998: 99). The possibility that the power of amendment may be abused in future furnishes no ground for denial of its existence or putting implied limitations on it, judicially discovered. Consequences of misuse of amending power are political in character with which the judiciary is not concerned.

From ‘Judicial Conservatism’ to ‘Judicial Activism’

The policy formulation is the sole prerogative of the legislative-executive departments of the government. The judiciary just keeps vigil whether the parliamentary enactments and the executive actions are in accordance with the laws of the constitution. This reveals that neither the parliament and the cabinet nor the court can claim independently to be truly sovereign. The parliamentary form of government in India is thus a compromise of powers of different organs of the government. Indian constitutional system adopts the via media between the American System of judicial supremacy and the English principle of parliamentary supremacy (Ghosh 2005: 124). However, the court’s hold receptiveness to the social reforms initiated by Parliament made it subject to criticism by the Indian National Congress, the left radical political parties like CPI and CPIM etc about the very role of the Indian judiciary (Ghosh 2005: 125-26). The verdicts of the Supreme Court in the Golaknath case, in the bank Nationalisation case and in the Privy Purse case raised a huge political uproar. It was argued further that the social philosophy of the judges reflected in their verdicts was highly conservative.

However, the emergency period made the judiciary ‘deaf and dump’ due to its absence of positive interference during this period. But post 1977 scenario witnessed proactive role with judiciary supporting DPSP, PIL, SIL etc. The weakness of the political process provides fertile soil for judicial activism, and judges keen to compensate for their failure to defend democratic principles during the 1975-77 emergency have avidly taken up the task of preserving the republic. In many instance, the executive has almost invited the judiciary to play a leading role (Mehta 2007: 116).
decision after decision, be it the authority to review constitutional amendments or the mode of appointing judges, the Supreme Court has created its own powers.

Judicial activism can mean many things: scrutiny of legislation to determine constitutionality, the creation of law, and the exercise of policy prerogatives normally reserved for the executive. But whatever its form, judicial activism raises two questions: Is it legitimate? And is it effective? The democrat in all of us is rightly suspicious when a few people assume such broad powers over our destiny without much accountability. At least, we ruminate, we can throw the politicians out once in a while, but judges are mostly shielded from accountability. And it must be an unenviable task for judges to steer a middle course between usurping too much power on the one hand, and doing too little to sustain the fundamental values of constitutional democracy on the other (Mehta 2007: 116-17). Judicial activism is justified to the extent that it helps to preserve democratic institutions and values. Court interventions could be judged successful if they were fostering a constitutional culture wherein certain fundamental values and aspirations become authoritative constraints on the behaviour of governments and citizens alike.

The eminent Indian legal scholar Upendra Baxi called judicial activism a dire cure for a drastic disorder: “chemotherapy for a carcinogenic body politic” (Baxi 2001: 3). And certainly judges have an important role to play in strengthening Indian democracy. But they will have to exercise great discretion and resist the intoxication which comes from the view that judges are the last, best hope of the republic. Learned Hand, an eminent U. S. jurist, observed, “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it.” (Hand 1960: 190).

The so called judicial activism cannot be a substitute for executive inactivism. Leaving aside the controversy whether the judiciary is encroaching upon the domain of the executive, the point is that the court
cannot take over the function of the executive. The former lacks the required expertise to do so and has not been assigned such role by the Constitution. The judiciary has to see whether any action or administrative order of the executive is in conflict with the statute enacted by the legislature or any provision of the Constitution. It is none of the business of the court to implement the law or to compel the executive to do the same as judiciary has been doing (Chatterjee 1998: 103). There is difference between implementing a law and executing an order. The court interprets the law and applies it to a given case and passes an appropriate order in accordance with the law. The court has also an obligation to ensure implementation of the order or decree. But that must be done in accordance with the prescribed methods. If the courts go on issuing directions to the executive in each and every matter, under pressure of endless flow of public interest litigations, this may inevitably result in an unfortunate collision between the judiciary and the executive. The judiciary-executive conflict, like the judiciary-legislature tussle is not a desirable phenomenon for the smooth functioning of a constitutional government.

In the words of Justice J S Verma (former Chief Justice of India):

"...the judiciary 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 activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial ‘adhocism’ nor judicial tyranny."

The acknowledgement of this difference between “judicial activism” and “judicial overreach” is vital for the smooth functioning of a constitutional democracy with the separation of powers as its central characteristic and supremacy of the constitution as the foundation of its edifice.

Justice Dr A S Anand, former Chief Justice of India and former Chairperson of the Human Rights Commission of India, while addressing on “Judicial review – judicial activism – need for caution” said:
“The legislature, the executive and the judiciary are three coordinate organs of the state. All the three are bound by the Constitution. The ministers representing the executive, the elected candidates as Members of Parliament representing the legislature and the judges of the Supreme Court and the High Courts representing the judiciary have all to take oaths prescribed by the Third Schedule of the Constitution. All of them swear to bear true faith and allegiance to the Constitution. When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony.

“A judicial decision either ‘stigmatises or legitimises’ a decision of the legislature or of the executive. In either case the court neither approves nor condemns any legislative policy, nor is it concerned with its wisdom or expediency. Its concern is merely to determine whether the legislation is in conformity with or contrary of the provision of the Constitution It often includes consideration of the rationality of the statute. Similarly, where the court strikes down an executive order, it does so not in a spirit of confrontation or to assert its superiority but in discharge of its constitutional duties and the majesty of the law. In all those cases, the court discharges its duty as a judicial sentinel.”

The adoption of such an all powerful attitude by the judiciary does not augur well for a healthy democracy. This is underscored by the fact that judiciary as an institution is not accountable to the people in the same way as the legislature and the executive. The actions of the executive are subject to judicial review when there is social, economic or political injustice – or departure from the provisions of law and the constitution. When the
legislature makes laws beyond constitutional bounds or acts arbitrarily contrary to its basic structure, the highest court examines and corrects. When the judiciary is guilty of excesses, only a larger Bench or a constitutional amendment can intervene. Even today, the only mode of removal of judges as prescribed in the constitution is impeachment, which is too Herculean a task to be easily undertaken. This lack of accountability requires the judiciary to watch its step and exercise self-restraint.

The use of the power of contempt by the higher courts has often been uncalled for and unregulated. There are more instances of abuse of the contempt power than its use. Veteran journalist Kuldip Nayar states that “the unpalatable truth is that the judiciary, for some years, has been struck with its own image of authority and truth.” The governance of our Republic, in the totality of administration, is vested in the trinity of executive, legislature, and the judiciary. In a democratic Republic like India the constitution is supreme, and the rule of law requires that every organ of the state, adhere to constitutional policy.

1 As a federal polity, India has two sets of government. Powers and responsibilities are divided between these two levels. The Constitution of India divides powers between the Union and the State governments. The Seventh Schedule of the Constitution includes three lists of subjects - the Union List, the State List and the Concurrent List. The Central or Union Government has exclusive power to make laws on the subjects which are mentioned in the Union List. The States have the power to make law on the subjects which are included in the Concurrent List. With regard to the Concurrent List, both the Central and State governments can make laws on the subjects mentioned in the Concurrent List. Finally, the subjects which are not mentioned in the above three lists are called residuary powers and the Union government can make laws on them. Education is a subject included in Concurrent List since 1976. It may be noted here that in making laws on the subjects of the Concurrent list, the Central government has more authority than the State governments.

2 Due Process is the legal requirement that the state must respect all of the legal rights that are owed to a person and laws that states enact must confirm to the laws of the land like - fairness, fundamental rights, liberty etc. It also gives the judiciary to access the fundamental fairness, justice, and liberty of any legislation. Procedure established
by law means that a law that is duly enacted by legislature or the concerned body is valid if it has followed the correct procedure. Say a law enacted by Indian legislature. Article 21 of Indian Constitution says that- ‘No person shall be deprived of his life or personal liberty except according to procedure established by law’. There is no mention of the word 'Due Process' in Indian Constitution. A strict literal interpretation of Procedure established by Law give the legislative authority an upper hand and they may enact laws which may not be fair from a liberal perspective.

The difference between "due process of law" and "procedure established by law" is that under the American system, a law must satisfy the criteria of a liberal democracy. In India "procedure established by law", on the other hand, means a law duly enacted is valid even if it is contrary to principles of justice and equity. However, in India a liberal interpretation is made by judiciary after 1978 and it has tried to make the term 'Procedure established by law' as synonymous with 'Due process' when it comes to protect individual rights. In Maneka Gandhi vs Union of India case (1978), Supreme Court held that, 'Procedure established by law' within the meaning of Article 21 must be 'right and just and fair' and 'not arbitrary, fanciful or oppressive' otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. Thus, the 'procedure established by law' has acquired the same significance in India as the 'due process of law' clause in America. See Bernstein (2011), Breyer (2005) and Sharma (2007).

3 See, e.g., Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458 (upholding the validity of the first amendment to the Constitution that shielded land acquisition laws from legal challenge under Part III of the Constitution.) However, in later judgments starting with State of West Bengal v. Bella Banerjee, AIR 1954 SC 170 the Court ruled that the meaning of ‘compensation’ in Art. 31(2) meant just equivalent for the property acquired, making meaningful land reform impossible. This in turn led to Parliament’s adoption of the undesirable practice of shielding laws from constitutional challenge by placing them in the Ninth Schedule added to the Constitution by Parliament through a constitutional amendment.

4 The Supreme Court recognized 'Basic Structure' concept for the first time in the Kesavananda Bharati case in 1973. Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by parliament. In this case validity of the 25th Amendment Act was challenged along with the Twenty-fourth and Twenty-ninth Amendments. The court by majority overruled the Golak Nath case which denied parliament the power to amend fundamental rights of the citizens. The majority held that article 368 even before the 24th Amendment contained the power as well as the procedure of amendment. The Supreme Court declared that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution and parliament could not use its amending powers under Article368 to 'damage', 'weaken', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the constitution. This decision is not just a landmark in the evolution of constitutional law, but a turning point in constitutional history.