A STUDY OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS IN INDIA

ABSTRACT
THESIS SUBMITTED FOR THE DEGREE OF
Doctor of Philosophy
IN
Political Science

By
MD. NAFEES AHMAD ANSARI

Under the Supervision of
PROF. MOHAMMAD MURTAZA KHAN

DEPARTMENT OF POLITICAL SCIENCE
ALIGARH MUSLIM UNIVERSITY
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INTRODUCTION

In an open society with most of the democratic institutions defunct or in disarray, the citizen has very few avenues open to him for exercise of his constitutional rights, protection of life and property and redressal of his grievances. Where the government fails to govern, the civil service is neither civil nor a service, the police is more an oppressor than a guardian of law, the judiciary in India remains the last hope for the people. It is good to see the courts admonishing the politicians, warming the police and dispensing justice to people who could never afford the luxury of litigation. Judicial review is not only a boon for the citizen, it is also the only ray of hope in a sky filled with black clouds.

The Supreme Court which resolve many of the most important and controversial issues in the country is now undergoing a fundamental change and emerging as one of the most significant forces shaping policies that touch the daily lives of all people. Through its interpretation of law, the Supreme Court plays a critical role in the policy making system of the government.

Whatever the skeptics might say, the Supreme Court's achievement as regards the promotion of social justice
through public interest litigation, has been impressive. Of late, the scope of public interest litigation has been expanded. Any public spirited individual or voluntary organisation can get any public injury rectified through "public interest" petitions. Cleaning up of the public administration through some recent judgements has been the most striking achievement of the Supreme Court.

A couple of months ago, the Railway lodged FIR with Haryana Railway Police at Faridabad. The gist of the FIR was that certain persons had wrongly taken delivery of steel strips worth lakhs of rupees on the basis of forged documents. The investigation was on when the matter took a new turn. A petition was moved before the Chief Justice of India alleging that the Haryana Railway Police had abducted two persons from Agra to secure the surrender of one of their relatives, wanted in the case. These two persons were alleged to have been kept in illegal confinement for about three weeks. The court directed the Director-General of police, Haryana, to conduct an inquiry and file an affidavit. The D-GP threw a bombshell when he admitted that the two persons picked up by the police at Agra were actually kept in illegal confinement. This angered the Chief Justice, who told the counsel of the State Government that unless things improve in the state as regards the actions of police, the court will say "that the constitutional machinery in the state has broken down." Of course, the aggrieved person got instant relief.
What is most significant about judgement is the judicial pronouncement that holders of public offices big or small, civil servants and politicians, must behave. "It is highly regrettable" the court said "the holders of public office have forgotten that the offices entrusted to them are sacred trust". Cases of maladministration and misuse of public offices by politicians and bureaucrats have been legion, during the last three decades. But in deference to the principle of judicial restraint, the court had not so far gone beyond recording its disapproval or at the outset administering a wild rebuke to the executive. It is plain that the judiciary is the least competent to function as a legislative or the administrative agency. For one thing, courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan on inadequate information. On the other hand if courts have to rely on their own knowledge and research it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates. Moreover, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. Courts have also method to reverse their orders if they are found unworkable or requiring modification.
Scheme of Chapterisation:

The entire study has been divided into the following five chapters:-

Chapter I: Chapter I defines in details the concept of Judicial Review. In the words of Smith & Zurcher, "The examination or review by the courts, in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written constitution or are in excess of powers granted by it and if so, to declare them void and of no effect". Edward S. Corwin opines that judicial review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the state government, which in the courts opinion transgresses the constitution.

The interpretative function of the courts is referred to as 'Judicial Review' which can be direct as well as indirect. The direct judicial review involves the court to declare a legislative or executive act as null and void because it is unconstitutional. This type of judicial review is rather important. In the other type of judicial review, which is termed indirect, the court attempts to give such interpreation to the impugned statute so that it may be held constitutional. Such a situation can arise only in those cases where a statute is susceptible of double meaning- one
which would make the statute unconstitutional and the other
which would steer clear the element of unconstitutionality
and in such a situation the court would be prove to adopt
that construction of the statute which would save it from
being held unconstitutional. Douglas characterises this
practice as 'tailoring an Act to make it consitutional'.

The American judicial review is a peculiar Governmental
feature among the nations of the world. The judicial
review is not the judicial supremacy but judicial nationalism
to bring about all round progress of the country. This power
of the courts to interpret and enforce constitutioonal clauses
is not explicitly granted in the American Constitution. It
has been inferred by the courts from the existence of the
constitutional restrictions.

The historical background of Judicial review in
America can be divided into the following periods:

(i) The Pre-Marshall Age (Pre-Constitution to 1800 A.D.)
(iii) The Age of Taney (1836-1864).
(v) New Deal or Period of Unconstitutioanality(1933-36).
(vi) The Court Packing Plan or the year of Revenge(1937).
(vii) The New Era (1938 to the Present)
The institution of judicial review is attributed to Chief Justice John Marshall of United States Supreme Court who for the first time laid it down in *Marbury v. Madison*.

**Chapter-II: This chapter deals with the evolution of judicial review in India.** The doctrine of judicial review took a firm position in India after passing through various stages which are explained below.

(i) 1858: Government of India Act of 1858 imposed some restrictions on the powers of the Governor-General in council in enacting laws, but there was no provision of judicial review. The court had such power only by implication.

(ii) 1861: The Indian Councils Act of 1861 provided that measures passed by the Governor-Generals legislative council were not to become valid unless the assent of the Governor-General was received. It also contained constitutional restrictions against the making of any law or regulation which might have the effect of repealing or in any way affecting the provisions of Indian Council Act.

(iii) 1877: The case of *Emperor v. Burah and Book Singh* ILR$_3$ Cal.63(1877) was decided in the Calcutta High Court in which it was held that the aggrieved party had right to challenge the Constitutionality of a legislative Act enacted by the Governor-General in Council in excess of the power given to him by the Imperial Parliament.
(iv) 1913: In Secretary v. Moment, ILR 40 Cal.391 at p.401(1913) the Privy Council held that any legislation to take away the right of the Indian subject to seek relief in the civil court was in contravention of section 65 of the constitution Act of 1858 and was *ultra vires*.

(v) 1918: In Annie Besant v. Governor of Madraş, A.I.R. 1918 Mad.1210 S.B. at pp.1232-33, the Madras High Court held that any legislation of Indian legislature in violation or in excess of the power conferred by the Imperial Parliament is *ultra vires*.

(vi) 1930: Col. K.N. Haskar and K.N. Pannikar wrote in their book 'Federal India' that the Supreme Judicial authority in India should be invested with the power to declare *ultra vires* measures which would go against the constitution.

(vii) 1935: Government of India Act of 1935 which came into operation in 1937 embodied a federal constitution. The federal court gave numerous decisions regarding the constitutionality of legislature and executive Acts. The federal court impliedly got power of judicial review to maintain federal balance.

(viii) 1950: The Republican Constitution of India adopted in 1950, which has specifically provided for judicial review
regarding the infringement of Fundamental Rights and the Indian Courts have powers of Judicial review regarding constitutional violations of the distribution and separation of powers and other constitutional restrictions. Arts.13, 32 and 226 expressly provide for and envisage Judicial review.

Chapter III: Chapter III defines in details of Judicial review of Administrative actions through writs. Article 32 and 226 of the Indian Constitution makes provisions for the system of writs in the country. Under clause(2) of Article 32 the Supreme Court is empowered to issue appropriate directions, orders or writs including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari for the enforcement of any Fundamental Rights guaranteed by Part III of the Constitution. By this article the Supreme Court has been constituted as a protector and guarantor of the Fundamental rights and once a citizen has been shown that there is infringement of his Fundamental right the court cannot refuse to entertain petitions seeking enforcement of Fundamental Rights.

Article 226(1) employers every High Court, notwithstanding anything in art.32, throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any government, with those territories directions, orders or
writs including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and Certiorari for the enforcement of Fundamental Rights or for any other purpose.

The writ habeas corpus is used primarily to secure the release of a person who has been detained unlawfully or without any legal justification. The great-value of the writ is that it enables immediate determination of the right of a person as to his freedom. The writ of mandamus is an order by a superior court commending a person or a public authority to do or for bear to do something in the nature of public duty or in certain cases of a statutory duty. The writ quo-warranto is used to judicially control executive actions in the matter of making appointments to public offices under relevant statutory provisions. The writ is also used to protect a citizen from the holder of a public office to which he has no right. The writ Certiorari is a judicial order operating in personam and made in the original legal proceedings, directed by the Supreme Court or High Court to any constitutional statutory or non-statutory body or person, requiring the records of any action to be certified by the court and dealt with according to law. It is a remedy operating in personam, therefore writ can be issued even where the authority has become functus officio, to the keeper of the records. A writ of Prohibition is issued primarily to prevent an inferior court to tribunal from exceeding its jurisdiction or acting contrary to the rules of natural justice.
Chapter IV: Chapter IV entitled as Judicial response to Presidential rule. Art.356 of the Indian Constitution confers a very wide power on the President to dismiss democratically elected governments and impose central rule in the states. In this Chapter an attempt is made to examine the questions and issues relating to justiciability of Art.356 and to see how Indian judiciary has responded to use/abuse of Presidential power over the years ultimately leading to the latest pronouncement by a Constitutional Bench.

Provisions of the Article 356, which were expressed in the Constituent Assembly debates, as a necessary evil & which should be used to establish the constitutional governance in the country have been used for achieving the political ends. Since India a democratic polity 'Presidents' rule' has been used about 95 times during past 44 years.

The majority consisting of Justices Pandian, Sawant, Kuldip Singh, Jeevan Reddy and Agarwal, enlarged the scope of Judicial review. It held that the validity of the Presidential proclamation is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the proclamation was issued malafide or was based on wholly irrelevant and extraneous grounds. The Apex Court or a High Court can compel the Union government to disclose material on whose basis President's rule is imposed on a state.
Chapter V: The concluding Chapter V is the summary and contains observations based on the study. If these observations along with the other ones given in the preceding chapters are taken seriously, it may likely to give an effective check on malafide actions of executives. It has been widely accepted that Supreme Court which resolves many of the most important and controversial issues in the country is now undergoing a fundamental change and emerging as one of the most significant forces shaping policies that touch the daily lives of all people.
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DEDICATED
TO THE SWEET MEMORY
OF MY
LATE GRAND FATHER
(MOHD. ZAHOOR)
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CERTIFICATE

This is to certify that the thesis of Mr. Md. Nafees Ahmad Ansari entitled A Study of Judicial Review of Administrative Actions in India is fit for submission for the award of the Degree of Doctor of Philosophy in Political Science. To the best of my knowledge, the work is his original contribution to this field of study.

(M. MURTAZA KHAN)

Professor of Political Science,
A.M.U., ALIGARH
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Place: Aligarh
Date: Oct. 14, 1994
CHAPTER ONE

INTRODUCTION

* Judicial Review: The Concept
* Evolution of Judicial Review
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JUDICIAL REVIEW: THE CONCEPT

Judicial review is the power of the courts to determine the constitutionality of legislative acts. It determines the ultravires or intravires of the Act challenged before it. In the words of Smith & Zurcher, "The examination or review by the courts in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written constitution or are in excess of powers granted by it and if so, to declare them void and of no effect."¹ Edward S. Corwin opines that judicial review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the state government, which in the court's opinion transgresses the constitution.²

Judicial review is not an expression exclusively used in Constitutional Law. Judicial review, literally means the revision of the decree or sentence of an inferior court by a superior court. Under the general law, it works through the

remedies of appeal, revision and the like, as prescribed by the procedural laws of the land, irrespective of the political system.

Judicial review has however, a more technical significance in public law, particularly in countries having a written constitution where the courts perform the role of expounding the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.

A federal constitution effects division of powers - legislative, executive and in some cases judicial also between the General and Regional Governments established under it and which according to the true federal principles are coordinate and independent of each other in the areas allotted to them by the constitution. The two governments thus operate simultaneously upon the same people and territory. In view of the distribution of legislative powers which are strictly defined and limited in relation to the two governments, it is quite likely that the areas and limits may
be mistaken or forgotten, such constitution, although not required is strict theory, is invariably a written constitution.

The distribution of legislative powers, which is the hallmark of a federal constitution, quite often presents an important question as to who is to decide in case of a dispute as to whether the law made by the state legislative encroaches upon the area assigned to the central legislature or vice versa. The question referred to above is not necessarily limited to strictly federal systems but may also crop up in a constitutional set-up like ours, which, according to many\(^1\), is not federal. For the purpose of resolving such disputes, the power is given to the courts and they are vested with the power of JUDICIAL REVIEW, as to the validity of the laws made by the legislature. The power of judicial review is not limited to enquiring about whether the power belongs to the particular legislature under the constitution. It extends also as to whether the laws are made in conformity with and not in violation of other provisions of the constitution. For example in our constitution, if the courts find that the law made by legislature - union or state

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\(^1\) e.g. Dr. K.C. Wheare observes: 'The Indian Constitution has established a form of Government which is at the most quasi-federal, almost devolutionary in character, a Unitary State with subsidiary federal features rather than a federal state with subsidiary unitary features, 48 Allahabad Journal p-21.
is violation of the various fundamental rights guaranteed in Part III the law shall be struck down by the courts on unconstitutional under Article 13(2). Similarly where the courts find that the law is violation of Article 301 which makes available to all persons the freedom of trade, commerce and inter-course throughout the territory of India, the law shall be struck down. Again where the courts find that there has been excessive delegation of legislative power a particular case, the parent Act as well as the product, i.e. delegated legislation shall be struck down as unconstitutional.

The interpretative function of the courts is referred to as 'Judicial Review' which can be direct as well as indirect. The direct judicial review involves the court to declare a legislative enactment or an executive act as null and void because it is unconstitutional. This type of judicial review is rather important. In the words of Dowling, "indeed the study of constitutional law .... may be described in general terms as a study of the doctrine of judicial review in action".

1. In Hamdard Dawakhana V. Union of India, A.I.R. 1960 S.C. 554; the Supreme Court for the first time struck down an Act made by Union Parliament on the ground of excessive delegation.
In the other type of judicial review, which is termed indirect, the court attempts to give such interpretation to the impugned statute so that it may be held constitutional. Such a situation can arise only in those cases where a statute is susceptible of double meaning— one which would make the statute unconstitutional and the other which would steer clear the element of unconstitutionality and in such a situation the court would be prove to adopt that construction of the statute which would save it from being held unconstitutional. Douglas characterise this practice as 'tailoring an Act to make it constitutional'.

The constitutions of Canada, Australia and U.S.A. do not contain any provisions for direct judicial review, but it has become an integral part of the constitutional law of these countries. It is realised that mere are not suffice to check abuse of power; these "a dependence on the people", Medison says in the content of USA "is, no doubt, the Government, but experience has taught mankind the necessity of auxiliary precautions". So our government is kept within bounds not only by the limitations set by the electoral process but also through separation of powers, federation, due process of law and the wellneigh doctrine of judicial review

1. Mason and Beaney: American Constitutional Law, 1960, pp. 5-6
If the court wants to ignore any law on the ground that it violates the constitution, declaration by the court of its constitutionality is essential. "Even though a law becomes void automatically under Art. 13, without the necessity of any declaration by a court, a declaration that a law has become void is necessary before a court can refuse to take notice of it. The voidness of law is not a tangible thing which can be noticed as soon as it comes into existence, a declaration that it is void is necessary before it can be ignored.\(^1\) The court does not Suo moto decide unconstitutionally in the present system of Judicial review in India or in America, unless moved by an aggrieved party and, also, unless the determination of unconstitutionality be necessary for the decision of the case. The legislature itself being the maker of law is not competent to determine the constitutionality of any legislative Acts. An unconcerned, independent and impartial body like the court is the proper authority to look into legislative lapses. This is necessary for the maintenance of the spirit of democracy.

Where Parliamentary sovereignty prevails and the legislature enacts atrocious, tyrannous and unjust laws or laws in violation of the constitution, the remedy available to the people is to remove the Government itself, or to get

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such law repealed by constitutional agitations, or to attract the mind of the legislatures by strong public opinion to amend or repeal such laws. But where the constitutional supremacy is in force, people have another effective remedy also, i.e. of challenging the legality of the law in law courts and in such case, they may not have any necessity of ending the Government itself. The English constitutional philosophers envisage only the first kind of remedy as Parliamentary Sovereignty prevails there "Democracy provides a peaceful way of getting rid of governments which fail to convince a majority of their adult subjects that they have lively concern for the interest of the governed". But in India, as in America, the aggrieved citizens have personal rights to challenge the validity of law in law courts also.

The decision of the question of constituionality of a legislative Act is the essence of the judicial power under the Constitution of America. Judicial review in its broadest context is the self-assured right of the court to pass upon the constitutionality of legislative acts.


Judicial review of the constitutionality of statutes is a peculiar American phenomenon which has been coped with varying degrees of success by other nations also.\(^1\)

The American judicial review, however, is a peculiar Governmental feature among the nations of the world.\(^2\) It is a limitation on popular government and is a fundamental part of the Constitutional Scheme of America.\(^3\) The concept of Judicial Review has its foundation on the doctrine that the constitution is the supreme law. It has been so ordained by the people, and in the American conception, it is the ultimate source of all political authority. The constitution confers only limited source powers on the legislature. If the legislature consciously or unconsciously oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to indicate and presence inviolate the will of the people as expressed in the constitution.\(^4\) The judicial review is not

\(^3\) Richard Hofstadter, "Great Issues in American Politics", Justice Frankfurter in Gobitis case (1940) p.49
the judicial of supremacy but judicial nationalism to bring about all round progress of the country. This power of the courts to interpret and enforce constitutional clauses is not explicity granted in the American Constitution. It has been inferred by the courts from the existence of the constitutional restrictions\textsuperscript{1}.

In this connection Merril Jensen observes, "by August 28, (1787) the convention had agreed on all the essentials of the judiciary as it appeared in the final draft of the constitution, and it did so with remarkably little disagreement. Neither then nor later did the delegates suggest that the supreme court be expressly authorised to rule on the constitutionality of state and federal laws. They took it for granted that it should and would do so\textsuperscript{2}.

The courts protect the legislative powers against their encroachments by other agencies. They defend the Union against the exaggerated claims of the states. They protect the public interests against the interests of private individuals. They conserve the spirit of order against the

innovations of excited democracy. Timothy Walker argues "one cannot easily conceive of a more sublime exercise of powers, than that by which few men through the mere force of reason, without soldiers, and without tumult, pomp, or parade, but calmly, noiselessly and fearlessly, proceed to get aside the acts of either Government, because repugnant to the constitution". Judicial review is the last word, logically and historically speaking, in the attempt of a free people to establish and maintain a non-auto-cretic government. Justice Goldberg also remarks "Judicial review is not a usurped power but a part of the grand design to ensure the supremacy of the constitution." Judicial review means that non-elective and non-removable branch of the Government, has rejected decisions reached by the two elective, removable branches. As: John P. Roche says-" The principle of equilibrium required that Judges be more than Puppets of a legislature. In the constitutional scheme of things, it was imperative that some institution exist to protect the fabric of the constitution to ensure that a legislature and an executive would not connive together, to break the equilibrium of forces.".

To take recourse to judicial review is the evolution of the mature human thought. Law must be in conformity with the constitution. If law exceeds in its limit, it is not law but a mere pretence of law. Law must be just, virtuous and capable to bringing human prosperity and not arbitrary, unjust and in violation of the constitution. Judicial review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked. Judicial review is the cornerstone of constitutionalism, which implies limited Government.

In this connection K.V. Rao remarks - "In a democracy public opinion is passive, and in India it is still worse, and that is all the reason why it is imperative that judiciary should come to our rescue. Otherwise the constitution becomes ill-balanced, and leans heavily on Executive Supremacy, and tyranny of the majority and that was not the intention of the Makers". The concept of Judicial review has its foundation on the following constitutional principles.

(a) The Government that cannot satisfy the governed of the legitimacy of its action cannot expect to be considered legitimate and democratic, and such government also cannot expect

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to receive the confidence and satisfaction of the governed.

(b) The government in a democracy is a government of limited powers, and a government with limited powers has to take recourse to a machinery or agency for the scrutiny of charges of legislative vices and constitutional disobedience, and such act of scrutiny can be done impartially and unbiasedly only by the court.

(c) Each citizen in a democracy, who is aggrieved of a legislative Act on the ground of constitutional violation, has to inherent right to approach the court to declare such legislative Act unconstitutional and void.

(d) In a federal state, judicial arbitration is inevitable in order to maintain balance between the Centre and the State.

(e) Where the constitution guarantees the fundamental rights, legislative violations of the rights can be scrutinised by the court alone.

(f) The legislature being the delegate and agent of the sovereign people has no jurisdiction and legal authority to delegate essential legislative function to any other body.

In the democratic state the court is the essential organ for maintaining the fundamental object of the constitution and for keeping the legislature within the limits assigned to its authority by the constitution for saving the people from the dangers of democratic tyranny and
for materialising the aim of the constitution of establishing a harmonious and cohesive society based on ideal common morality. In this way the court is a real participant in the living stream of national life.

Constitutional protection can be available to that person only who in fact is aggrieved. A person who desires to assert his constitutional rights must show that his rights are affected and infringed. The court, by evolving the rules of conduct for judicial review, has adhered to the principle that the person who challenges the constitutionality of a legislative Act must show that his right has really been infringed. One of the cardinal limitations on the courts power of judicial review of legislation on constitutional grounds is that it will decide only a ripened controversy in which the results are of immediate consequence to the parties¹. Willis has said - "In general, it may be said that appropriate person to raise a tax question is one whose taxes will be increased, an eminent Domain question, one whose property is being taken; a police power question, one whose personal liberty is being delimited"². Modern democracy demands that if any legislative Act is challenged by an

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aggrieved person in the court of Law, the validity of the Act has to be tested objectively. The Supreme Court of India has laid down that the court has abundant power to look into the validity of law, and the scrutinize if the legislature has over-stepped the field of compelency even indirectly by way of device

It is not open to the Legislature to contravene and flout the provisions of Part III of the constitution by asking shelter behind the plea that the infringement was accidental and not deliberate. In the case where the impugned provision is held to have violated a fundamental right, it is the bounden duty of the court to give redress to the party even if that involves the striking down of the provisions of a law enacted by the Parliament. It has been further said that the court is under a duty, imposed by Articles 13 and 14 of the constitution, to act as a sort of constitutional censor of all legislations and to scrutinise at the instance of any aggrieved citizen any law, or executive act, to examine its legality and thus ensure that no unconstitutional legislation or illegal state actions slips from its vigilant scrutiny. Judicial Review imprint

2. Deoman Upadhyaya V. State; AIR; 1960 Para 51.
governmental action with the stamp of legitimacy. It check the political branches of Government, when these encroach on the ground forbidden to them by the constitution as interpreted by the Court.

Judicial review relieves the legislature of great responsibility and strain. Through the view expressed by the courts in the process of judicial review regarding the constitutionality of any legislature Act, the legislature receives great inspiration, and arouses alertness and caution to rectify mistakes and it creates tendency of conformity to the constitution. James Madison spoke on Saturday July 21, 1787, in the constitutional convention, "It (Judicial review) would moreover be useful to the community at large as an additional check against a pursuit of those unwise and unjust measures which constituted so great portion of our calamities". Thus, if the legislature becomes alert and cases to consider the judicial verdict future constitutional lapses can easily be avoided, which may relieve the legislature of a great strain. Judicial review of legislation, has been combined with the theory to set up an effective system of checks and balances to restrict majority rule in favour of interests of minorities. By judicial review the legislature


realises its lapses and becomes alert against future lapses. Existence of judicial review on this consideration is also very essential.

It is now well-settled that the judicial interpretations create precedents and make new laws. Such law is judicial Legislation. It has not the sanction of the established legislature, but has the sanction of the people itself. The Judges in the process of judicial review are governed by the beliefs and feelings of the time, the current economic and social thoughts, constitutional mandates and intellectual and moral tone of nation, and are guided by the high judicial standard of reasoning, aim and philosophy of life and as such the constitutional decisions handed down by the Judges have legislative value. In England, "Judicial legislation, extending over more than two centuries, worked out an extra-ordinary and within certain limits a most effective reform which was logical, systematic and effectual, just because it was the application to the actual and varying circumstances of a clear and simple principle"\(^1\).

In America, judicial review has rendered great service to the nation. Though on occasion there were determined attempts to curtail its powers but the nation as a whole has accepted it. In India too judicial review has created a very healthy judicial legislation, which can be a perenial guide to the nation.

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The United States of America gave to the world a new gleam of judicial review. The concept of judicial review as evolved in America was the result of continuous thinking and growth. It had the heritage of Plato and Aristotle, inklings of Mague Carta and the Cockeian theory of Common right and reason and the assimilation of the practical philosophy of Locke and other legal thinkers of Europe. Megna Carta yielded a great influence on Coke and Locke and it gave a great heritage to America for judicial review. The impact of Megna Carta on the American Social Life was so great that the revolt against legislative tyranny was a common phase of the Americans since the time of the Colonial rule. As J.C.Holt remarks- "And just as the Charter was claimed by the English Radicals as a natural birth right, so in America some of its principles came to be established as individual rights enforceable against authority in all its forms, whether legislative, executive or judicial...."¹ Before the Federal Constitution was enacted in the United States of America James Otis, a constitutional lawyer of extraordinary flexibility of mind argued in 1761 in Panton's case on the precedent of Dr. Bonham's case decided by Chief Justice Coke in 1610. "As

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to Acts of Parliament, an Act against the constitution is void. An Act against natural equity is void. Justice Gray has said that "Otis argued that the Parliament was not final arbiter of its own Acts and contended that the validity of statutes must be judged by the courts of justice. This argument of Otis foreshadowed the principal of American constitutional law that it is the duty of the judiciary to declare unconstitutionaly statutes void. In America judicial review has tended to evolve the national outlook to a great magnitude. It (Judicial review) has guided the development of a very brief constitution of agrarian origins into a great body of constitutional doctrine for the governance of a highly technical industrial civilization. This in itself is a great achievement.

The doctrine of judicial review of the United States of America is really the precursor of judicial review in other constitutions of the world which evolved after the 18th century and in India also it has been a matter of great inspiration.

The Americans have always pleaded for limited


sovereignty which means that the law-making function of the legislative organ is governed by the fundamental rights of the people and other constitutional limitations. No law can be framed which snatches away the constitutional rights of the people. "If sovereignty is considered to be all-powerful; and uncontrolled any person or party which can acquire by whatever means the happenings of sovereignty can make binding commands, and law would then rest on force and chicanery, which makes nonsense of the normal meaning of law".¹

Retrospect:

The historical background of Judicial Review in American can be divided into the following periods:

1. **The Pre-Marshall Age** (Pre-constitution Period to 1800 A.D.)

   In Bonham's case of Lord Chief Justice Coke is said to be a great heritage to the American System of judicial review. Willis remarks "Dr. Bonham's case was soon repudiated in England, but the doctrine announced in Coke's dictum found fertile soil in the United States and sprouted into such a vigorous growth that it was applied by the United States Supreme Court in the decisions of cases coming before it".²

This much is certain that the doctrine enunciated in Bonham's case by Chief Justice Coke laid on unshakeable foundation of judicial review in America. Carl J. Friedrich also supports the view that Coke laid down the foundation of the American System of judicial review".... one can see here clear basis for judicial review of legislature Acts as it later became reality under the written Constitution of the United States".  

The doctrine of Common Rights and Reason propounded by Chief Justice Coke and Blackstone's commentaries combined with the philosophy of Locke that the legislature was a were trustee of the sovereign people and has no right to enact law in derogation of the interest of the people, created a congenial atmosphere for judicial review. Colonial decisions, argument of Otis Hamilton Federalist, some Pre-Marshall decisions of the Supreme Court of the United States of America all fostered a broader scope for judicial review of legislative Acts.

The various events leading to the evolution of judicial review in the first period are:

(a) In three colonial decisions between 1630 to 1776, Colonial Acts were declared void and unconstitutional by the Judicial Committee of the Privy Council. The Premise upon which unconstitutionality was determined was that the

colonial legislature was subordinate to the British Parliament and any subordinate legislation enacted by the subordinate legislative body of the colonies in contravention of the Parliamentary Acts was void and unconstitutional. This colonial practice of judicial review afforded a background for the federal supreme court of America which assumed the power of judicial review. It appears that the colonial courts and on appeal, the Privy Council of England had the power to declare legislative acts void if in conflict with colonial charters.

(b) The argument by James Otis at Boston in February 1761 in the writs of Assistance case was a substantial step in the evolution of judicial review. The question involved was whether Panton and other British custom officials should be furnished with general search warrents enabling them to search smuggled goods. It was opposed for the Boston merchants mainly by Otis, who argued such an act of Parliament would be "against the Constitution" and "against natural equity" and therefore void. Crown says - "Otis doctrine met with a degree of success enough at least to make it a permanent memory with the men of the time"\(^1\). James Otis was Advocate - General under the Crown. He resigned his

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1. Edward S. Corwin, *Doctrines of Judicial Review*
   Peter Smith, 1963, p.31
office in 1761 in protest against the Writs of Assistance which authorised officers to enter any house without warrant to search for smuggled goods. He grounded his case on 'natural right' and argued that any act of Parliament against this was automatically null and void. Marjorie G. Fribourg remarks - "Otis did not win his case, but he did win the ever-growing support of his countrymen".

(c) The judge Cushing of Massachusetts on the eve of Declaration of Independence in 1776 charged a Massachusetts Jury to ignore certain acts of Parliament as void and inoperative on the Cokeian doctrine of Bonham's case (Rep.107,118) (1610) if the Parliament Act was against common right and reason.

(d) The state courts in several cases declared state Acts void which were contrary to the State Constitution on the natural right" dictum of Coke.

(e) In 1780 in the case of Holmes V. Walton the Supreme Court of New Jersey refused to carry out a State Act which was enacted in conflict with the provision of the state constitution. The state Act provided a trial of specified class of offenders by a jury of six where as the state constitution provided such trial by a jury of twelve. Thus the Act was enacted in direct conflict of the constitutional

provision and intention\textsuperscript{1}.

(f) Justice Blair of the Virginia court of Appeals concurring with other Judges held in the case of Commonwealth V. Caton in 1782 - "that the court had power to declare any resolution or Act of the legislature, or either branch of it, to be unconstitutional and void". (Thayer - Cases in Constitutional Law, Volume I, p.35)\textsuperscript{2}.

(g) Travett V. Weeden was decided by the state Supreme Court in 1786, which held that the law was out of harmony with the Rhode Island Charter and therefore unconstitutional. This decision also created a suitable background for future evolution of the doctrine of Judicial review.

(h) Marshall spoke in the Virginia Ratifying Convention of 1787 urging to approve the constitution: "If they (Congress) were to make a law not warranted by any of the power enumerated, it would be considered by the Judges as infringement of the constitution which they are to guard. They are to guard. They would not consider such a law as coming under their jurisdiction. They would declared it

\textsuperscript{1} Edward S. Corwin, \textit{American Constitutional History}, Harper Torch Books, New York, 1964, p.10

\textsuperscript{2} Charles Austin Beard, \textit{The Supreme Court and the Constitution}, Prentice Hall Inc., U.S.A., 1962, p.48
void"¹. The creation of national supreme court in the United States of America from the very beginning was intended to settle constitutional disputes regarding the constitutionality of legislative Acts either Congressional or enacted by the states.

(i) In Bowman V. Middleton, Bay (SC) 252 decided in 1792 the South Carolina Supreme Court declared an earlier colonial statute to have been void ab initio being contrary to "Common Right" and Magna Carta".

(j) In 1794 United States V. Yale Todd was decided by the Supreme Court of the United States of America in which Act of March 23, 1792 of Congress was declared unconstitutional. It is said that this was the first case in which the Supreme Court of America declared a statute of Congress unconstitutional and Marbury V. Madison was the second.

(k) In 1796-1798 the Supreme Court gave the decisions asserting the powers of the court for judicial review.

In 1796 Chief Justice Chase remarked in Hylton V. United States (3 Dall 171)- "It is unnecessary for me to determine whether the court constitutionally possesses the

power to declare an act of the Congress void on the ground of its being contrary to and in violation of the constitution, but if the court has such powers, I am free to declare it but in a clear case".

In 1798 again Chief Justice Chase in Calder V. Bill 3US, 386, 395 observed - "I will not decide any law to be void, but in a very clear case".

(1) Madison when submitting the national constitution for ratification to state conventions said - "A law violating a constitution established by the people themselves would be considered by the judges as null and void".

(m) The Federal Convention was much concerned with the problem of keeping of the powers of congress within constitutional bounds. Chief Justice Marshall before he expressed his view on judicial review in Marbury V. Madison spoke in the capacity of a delegate to the Virginia Convention. "If they (the legislative) were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void".

It is now the confirmed majority view in America that the constitution - makers themselves intended judicial review of the legislative Acts and Constitutional Supremacy which was further strengthened by the interpretations of Hamilton, Marshall and Taney.

Reviewing the constitutional literature in America on this point, it appears that judicial review of legislative Acts in the American Constitution was certainty. It unavoidably needed. It progress was natural. Its tendency was inherent. Its application was the victory of democracy. Laski observed - "The Supreme Court by exercising this power of judicial review, is in fact a third chamber in United States".


John Marshall was appointed the fourth Chief Justice of America in 1801, and he continued in his exalted office till 1835. This was a glorious period in the American Constitutional history for the evolution of the doctrine of Judicial review. His historic decision in Marbury V. Madison was preceded by the famous judiciary debate in the senate in which the power of the judges for judicial review was vigorously asserted.

1. 1 Cr. 137 (1803).
In 1803 Marshall wrote the decision of *Marbury V. Madison* in which he declared that the legislature has no authority to make laws repugnant to the constitution and in the case of constitutional violation the court has absolute and inherent right to declare the legislative act void. By Marbury decision Marshall did not invent the system of judicial review which was already in the process of evolution, but by this decision he strengthened the system to a remarkable extent. Benard Schwartz says - "From a historical point of view *Marbury V. Madison* is of crucial importance as the first case establishing the power of the Supreme Court to review constitutionality". The system of judicial review thereafter became the integral part of the American constitutional jurisprudence. Marshall was threatened openly by the Republicans of ousting him from office if his verdict were to go in favour of judicial control of legislative Acts. The threat was also a threat of impeachment. The highest judiciary of the country was overawed by the political party. But Marshall had a great sense of nationalism and he possessed extra ordinary strength of mind and coolness of temper and without being perturbed by


the threatening given to him he gave the solemn decision of *Marbury v. Madison* establishing constitutional supremacy. By his judicial decision he nurtured in the American mind a great unifying nationalism.

Thus, Marshall brought to the supreme court of America a sense of dignity and honour. Jerre S. Williams remarks - "In case after case, he had been building the constitutional structure with consistent plan and imperishable materials. The political winds blew and always against him. But Marshall withstood and built on and on"\(^1\).

On the whole, Marshall had a congenial background for the establishment of judicial review through his constitutional decisions. The doctrine of judicial review established by Chief Justice Marshall in *Marbury v. Madison* is still vibrant and its force stands unabated, although it has ever been criticised. By 1803 judicial review had a long history in America.

Marshall's theory of judicial review mostly depended upon his own personal view which he had held long before he became the Chief Justice of the Supreme Court of America. But he was also inspired in his view by Alexander Hamilton who through his essay in *The Federalist* (1788) had sought to

\(^1\) Jerre S. Williams, *The Supreme Court Speaks*, University of Texas Press, 1956, p.29.
establish the theory of judicial review. Hamilton's concept of Judicial Review has become a source of great inspiration in the Indian constitutional working. Marshall after Hamilton played a very significant part in the development of American democracy through judicial review.

The American Bar played a very substantial part in the development of the doctrine of judicial review and constitutional interpretations were due to the able and unstinted co-operation given by the members of the bar who possessed extra-ordinary forensic merits. However, Marshall's concept of judicial review had a limited scope. His philosophy of judicial review was that a legislative Act in violation of the constitution was void. He did not envisage that even an arbitrary and unjust legislation would be considered to be the legislation against the will of the sovereign people for which the sovereign people did not delegate power to the legislature and as such the law should be void. This development took place later on the enactment of the Fourteenth Amendment.

(iii) The Age of Taney (1835-1864)

Marshall was succeeded by Taney as Chief Justice of

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America. Chief Justice Taney also made a great contribution to the system of judicial review by upholding the supremacy of the constitution. He observed that "as the constitution is the fundamental and supreme law, it appears that an Act of Congress if not persuant to and within the limits of the power assigned to the Federal Government it is the duty of the courts of the United States to declare it unconstitutional". Chief Justice Taney was born in the tradition of the landed aristocracy. His judicial career has two important features in the constitutional interpretation:

(a) Extreme conservatism, and

(b) Personal conviction in the judicial decisions.

In the Dredscott case he was much swayed by the social philosophy of the time which treated the slaves as chattels and declared the Missorie compromise Act of 1820 void on the ground that it did not provide for compensation to the slave-owners for freeing the slaves. Taney on account of his conservatism did not allow the basic liberty to the slaves.

Though the decision of Dredscott case was against the nation's spirit and Civil liberty it considerably advanced the cause of judicial review. Francis H. Heller traces the

1. Dredscott V. Sanford, 19 How 393 (1857).
evolution of judicial review in three stages. The first stage according to him was the decision of *Marbury V. Madison*. The second stage in the development of the power of judicial review was reached in the Dredscott case decided in 1857. This case represented an important enlargement of the scope of judicial review over the doctrine of *Marbury V. Madison*. The court took up the task of determining whether congress has exercised power which the constitution had not delegated to it. The third stage in the development of judicial review starts with the emergence of the court's modern doctrine of *Due Process of Law*\(^1\). In *Ableman V. Booth* decided in 1859 Taney enhanced the power of the Supreme Court. Chief Justice Taney observed - "No power is more clearly conferred by the constitution and laws of the United States, than the power of this court (the Supreme Court)\(^2\). On the death of Taney congress refused to pass a bill providing funds for a Taney bust in the courtroom. Charles Summer spoke on the Senate floor - "He administered justice at least wickedly, and degraded the judiciary of the country, and degraded the age"\(^3\). But in recent years Taney's contribution to Judicial

Review has come into conspicuous prominence. Eminent personalities like Chief Justice Hughes and Chief Justice Warren eulogised the contribution of Taney to the field of constitutional jurisprudence. Rocco J. Tresolini remarks: "Recent Scholarship has demonstrated that Taney was a much better Chief Justice than his critics would have us believe"¹.


The fourth period began with the constitutional agitation, which brought into existence in 1868 the Fourteenth Amendment by which principle of Due Process of Law was introduced. The Fourteenth Amendment came into existence as a result of constant thinking and necessity. No one, in fact, was wholly satisfied with the constitution. It was a patchwork of compromises, a delicate adjustment of checks and balances......². The growing dissatisfaction with the constitution urged the United States Supreme Court to create a new constitutional horizon through judicial review. The year 1868 was a critical year in the development of the constitutional law of America. The phrase 'Due Process of Law' is an equivalent of the phrase "the law of the land" in


Magna Carta. In America the "Due Process of Law" became a bulwark against arbitrary legislation. It imposes a limitation upon all the powers of government legislative executive and judicial. Thus the Due Process clause was a great weapon for the enforcement of judicial review in America. G.G. Venkata Subba Rao says - "Due Process is thus a formula which means that a legislation would be struck down as unconstitutional if in the opinion of the Supreme Court it imposes unreasonable restrictions upon vested rights or upon liberty"\(^1\).

The Dredscott case decided by Chief Justice Taney had created great reaction in the minds of the American people and the Fourteenth Amendment introducing Due Process Clause was intended to give wider power to the Supreme Court in judicial review.

In 1874 the Supreme Court in Loan Association case\(^2\) adopted the Cokeian doctrine of Bonham's case that the statute was void being against common right and reason. It was doctrine different from Marshall's dictum of constitutional supremacy. In the Cokeian doctrine adopted in Loan Association case the Judges had greater freedom in voiding a

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2. Loan Association V. Topeka, 20 Wall 655,(1874).
legislative Act. The doctrine of constitutional supremacy enunciated by Marshall and Taney demanded that a statute can be declared void and refused to be enforced only when it is repugnant to the constitution. But the Supreme Court of the United States of America in some later decisions have also taken the view that the legislative Acts which are arbitrary, unjust and anti-social are also void. These decisions are founded on the theory that the legislature is a mere agent of the people and as such the legislature has no authority to make such laws which are not for the public good.

In 1905 in Lochner's case the Supreme Court invalidated a New York statute which limited employment in Bank to a maximum of sixty hours a week and ten hours a day. The supreme court held that there was a deprivation of liberty without due process. In this case the objective standard of invalidating the statute was not the constitutional violation but arbitrary laws violating the personal liberty of a man and this was the guiding principle in many cases.

The court's attention during the periods of Marshall and Taney was confined to the doctrine of the constitutional supremacy, expansion of Federal powers and strengthening of government and the expansion of trade and commerce etc. The

individual liberty was ignored. But in this period the Supreme Court applied its mind in constitutional policy-making for the safety of individual liberty. A number of laws dealing with the question of legal tender, child labour, minimum wages etc. were declared void. The Supreme Court took a wide view in voiding the legislative Acts.

The period of judicial review from 1865-1932 was seriously engrossed with the policy-making and had a great impact on the American National System. The justices in deciding the questions of constitutionality of a legislative Act had to look to the social and economic conditions of the country in order to judge whether the statute is in conformity with the constitution. The Judges of the Supreme Court of the United States of America in this period always attempted to go by the current of time and their decisions do not react merely the personal feelings of the judges but they are based on social and economic visions of the great country.

(v) The Era of New Deal or the Period of Unconstitutionality (1933-36)

Between January 7, 1935 and May 25, 1936, the Supreme Court of America declared acts of Congress unconstitutional in twelve decisions, dealing with the New Deal Legislation. Five entire Acts of the New Deal Legislation were declared unconstitutional. The speed of declaring the congressional Acts unconstitutional was abnormally high and alarming. The
previous history of declaring congressional and State Acts unconstitutional was most normal which did not cause any concern in the American life. But in the new deal period a new situation grew up and the unprecedented action of the Supreme Court in the process of judicial review evoked an alarming political sentiment causing a great concern to the President and it created an epoch in the history of judicial review of America.

President Roosevelt assumed his office on March 4, 1933. America was in the grip of great depression when Roosevelt became President. He promised to take bold steps to end the depression. President Roosevelt introduced certain new legislative measures which were characterised as "New Deal" and it occupies an astounding position in the constitutional history of America. He said, "The New Deal implied a new order of thing designed to benefit the great mass of the farmers, workers and businessmen would replace the old order of special privilege".¹

President Roosevelt was confident of success in his plan by his new socio-economic policy. A large number of Socio-Economic enactments in the field of industry, agriculture and labour were brought into existence to remove the economic depression. But out of ten New Deal measures the Supreme Court declared eight statutes unconstitutional.

It is said that the court had wrecked the New Deal in the Shoals and Rocks of unconstitutionality, and by nullifying the New Deal measures the court destroyed the heart of the New Deal Programme. The Supreme Court held that New Deal measures were unconstitutional on the ground that they involved an unwarrantable use of the taxing powers of the Federal Government and violated the rights of the individual States.

The supporters of the New Deal contended that the test laid down in Lochner case\(^1\) was to be rigidly applied in this period. The constitutional violation could not be the guiding principle. The test adopted was whether the legislation was arbitrary, unnecessary and unreasonable. It was asserted that the court assumed the legislative function and acted as "super legislature". But really the Court was dominated with the social feeling that the New Deal legislations vitally affected the economic liberty of the governed and they are vitally against the spirit of the constitutional guarantee.

(vi) The Court-packing Plan or the Year of Revenge (1937).

President Roosevelt was re-elected in 1936 by the largest electoral majority. He had a great prejudice against those Judges of the Supreme Court who had opposed the New

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\(^1\) Lochner V. New York 198 U.S. 45(1905).
Deal legislation. On February 5, 1937 he made his proposals to reorganise the judiciary, that is, to "pack the court". Six judges at that time were aged about 70. The President planned that if they did not retire, the President would increase the number of judges to fifteen by appointing six more judges. There were already three judges who were supporting the legislation.

In this connection the President openly stated that the old judges on account of their cloistered existence had lost with the spirit of the time and so he wanted retirement of judges who had reached the age of 70.

The Court packing programme became very much debatable and could not go through. The Bar Association of America seriously opposed it by launching agitations against the plan and defended the judiciary. Alphens Thomas Mason says—"The Court packing plan itself left judicial power intact. The judiciary retreated, it did not surrender."¹

But inspite of all attempts to pack the court, Roosevelt failed to subjugate the judiciary. There was a great public agitation against the court-packing plan and the American people did not support this plan of President Roosevelt.

But one thing is very significant. The court packing plan had a great slackening effect on the progress of judicial review in the United States of America as for several years no legislation of congress was invalidated by the Supreme Court. "Mean while, the Supreme Court began to find constitutional support for later New Deal Laws. No act of congress was declared unconstitutional by the Supreme Court from 1936 until 1952."^1

(vii) The New Era (1938 to the Present)

From 1938 a new era emerged in the constitutional history of the United States of America. The remarkable feature of this period is that there grew up a tendency in the judicial atmosphere of the Supreme Court to show a great restraint in invalidating the laws either enacted by congress or the state legislatives. It is said that though the justices of the Supreme Court have not abrogated the power of judicial review, but there developed a marked change in their judicial approach. "The tendency of the court to uphold legislative enactment expansive of national power probably reflected judicial aguiescence in these policies rather than retirement from the umpire's role. In sum, the

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Supreme Court's policy of selective self-restraint, which has been so much in evidence since 1937, ought not be mistaken for abandonment of its determinative role as federal arbiter. For rather than an indication of abdication, such a policy is manifestation of the Supreme Court's continued exercise of the power as guardian of American federalism.¹

The year 1954, is a remarkable year of the American Constitutional jurisprudence. On May 17, 1954 Chief Justice Warren gave majority decision in Brown's case.² It was in that year that the Supreme Court of America attempted to establish through the process of judicial review the long-craved social equality. Thus in America in judicial review, the Judges have been mostly governed by the impulse of the time and the constitutionality of a legislative Act has been determined after consideration of the social, economic, religious and moral sentiments of the people. The period of Chief Justice Earl Warren is to be in gold in the annals of the Constitutional history of the world.

In Ferguson's case the Supreme Court of America through Mr. Justice Black expressed the majority opinion that the Supreme Court cannot strike down a law which is not in

violation of some specific constitutional prohibition. But Justice Black's view in the present American Society can not claim to have much effect on the judicial environment of the United States of America, and it also can not be claimed to be the representative view of the American Judicial temperament and environment.

The Supreme Court of America in this new era though not consistent in opinion on some points, has functioned as the 'living voice of the Constitution', as Lord Bryce characterised it. "The Supreme Court is the Chief Protector of the constitution, of its great system of balances, and the people's liberties. It may have retreated even yielded to pressures now and then, but without its vigilance of liberties would scareely have survived". 

MAR BURY Vs MADISON

The institution of judicial review is attributed to Chief Justice John Marshall of U.S. Supreme Court who for the first time laid it down in *Marbury V. Madison*. The circumstances in which that decision was given were somewhat remarkable and require a brief analysis. Marshall belonged to the Federalist party and was Secretary of state in the Cabinet of President Adams, who succeeded Washington as the President of the United States. He was nominated by President Adams to the additional office of Chief Justice of the Supreme Court in January, 1801. He held both offices during the final weeks of the Adams administration. In November, 1800, Adams was defeated in the Presidential election and Jefferson, author of the declaration of American Independence and leader of the Republican party was elected as President. The Federalists who had been the ruling party in control of the destiny of the country till then faced a future in which the country was no longer to be theirs to rule. They still had a card up their sleeves. Until the inauguration of the New President on 4th March, Adams would still be President and congress would still be Federalist. Congress hastily set about providing for the future of many faithful Federalists. Following a plan of Hamilton the mastermind of the

1. (1803) 1 Cranch 137=2L.Ed.60.
Federalists, they passed a law creating many new Federal Districts courts. The Judges were to be appointed for life, so that they could not be removed by the incoming Republican administration. As Jefferson, still sitting at the head of the Senate pointed out there were at that time already more Federal Courts than the country needed, but that had nothing to do with the plan. The main purpose was to fill the new posts with Federalists. The law was hurriedly passed and the judges were appointed. Time was passing swiftly and by the evening of 3rd March, several of the commissions had not yet been signed. Late into the night, Chief Justice Marshall, acting as Secretary of state, sat at his desk filling out the commissions and signing them. Jefferson chose Levi Lincoln as his Attorney - General, gave him his watch and ordered him to take possession of the state Department on the stroke of midnight when Jefferson would become President. At midnight, Lincoln dramatically entered Judge Marshall's office. "I have been ordered by President Jefferson" he said solemnly" to take possession of the office and its papers". "Why, Mr. Jefferson has not yet qualified," exclaimed that startled Chief Justice and Secretary of State. "It is not yet twelve O'Clock" and he draw out his watch. Thereupon Levi Lincoln drew out his and showed it to Marshall. "This is the President's watch", he said," and rules the hour."

John Marshall looked longingly at the unfinished commission on his desk. But in his pocket he had a few of the
commissions and the men who finally received them were called "John Adams, midnight Judges". Among papers left on the table were seventeen commissions as Justices of the Peace, which had been duly sealed by John Marshall as Secretary of State. John Madison, the new Secretary of state refused to deliver them after the close of the Adams administration. William Marbury was one of these midnight appointees and he brought an action invoking the original jurisdiction of the Supreme Court to secure a writ of mandamus to compel Madison to deliver his commission. The writ of mandamus was the usual remedy to compel executive officers to perform ministerial acts. Thus arose the case of *Marbury v. Madison*¹, the most famous case in American Judicial annals.

Marshall made up his mind to give effect at the earliest opportunity to the power of judicial review proclaimed by the Federalists. That opportunity came to him in *Marbury v. Madison*. It might be supposed that John Marshall who as Secretary of state had been responsible for the failure to deliver the commission, would refuse to sit on the case because of his personal connection with it. Nevertheless, with characteristic boldness, he proceeded to seize the opportunity believing as he did that constitutional opportunity knocked but once. He held, first,

¹. (1803) 1 Cranch 137=2L.Ed.60.
that Marbury had a right to the Commission because the appointment was legally completed with the signing and sealing of the commission and that the Government was acting illegally in withholding it. Secondly, he held that mandamus was unquestionably the appropriate remedy. Thirdly, he held that under S.B of the Judiciary Act of 1789, invoked by Marbury, the Court had been expressly granted jurisdiction to issue the writ of mandamus to any person holding office under the authority of the United States and so to the Secretary of State who definitely came within that description. He then proceed to observe that "if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional and so void". He than argued that the constitution prescribed specifically the Supreme Courts' original jurisdiction, that this jurisdiction did not include the power to issue writ of mandamus to federal officers and that congress had no power to alter this jurisdiction. Therefore, the attempt of congress in the judiciary Act of 1789 to give the supreme court authority to issue writs of mandamus to public officers" appears not to be warranted by the constitution". Consequently, Marbury's application for a mandamus was dismissed. Thus while the application before the court was dismissed, an Act of congress, the supreme legislative body of the nation, had be pronounced unconstitutional and void. John Marshall had
proclaimed the power of judicial review while deciding immediate issue in favour of the administration. In order to appreciate fully the origin of the doctrine of judicial review, it would be better to reproduce the opinion of Chief Justice John Marshall in *Marbury V. Madison* (1803) which runs as under:

"The question whether an Act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well-established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduse to their happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it; nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental and as the authority from which they proceed is supreme, and can seldom act they are designed to be permanent.

"This original and supreme will organise the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments."
The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time, be passed by those intended to be restrained. The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.

"Between these alternatives there is no middle ground. The constitution is either a superior paramount law unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people to limit a power, in its own nature, illimitable....

"Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and
paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

"If an act of the legislature, repugnant to the constitution, is void, does it, not withstanding its invalidity, bind the courts, and oblige them to give it effect? or in other words though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory, and would see at first view, an absurdity too gross to be insisted on.

"It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and
constitution apply to a particular case, so that the court must either decide that case, conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case; this is the very essence of judicial duty. If then the courts are to regard the constitution and constitution is superior to any ordinary act of the legislatures the constitution, and not such ordinary act, must govern the case to which they both apply.

"Those then who controvert the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which according to the principles and theory of our government is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces
to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence for rejecting the construction......

"There are many other parts of the constitution which serve to illustrate this subject. It is declared that no tax or duty shall be laid on articles exported from any state'. Suppose a duty on the export of cotton, of tabacco, or of flour; and a suit instituted to recover it. Ought judgement to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law.

"No person' says the constitution' shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"Here, the language of the constitution is addressed specially to the courts. It prescribes directly for them a rule of evidence not to be departed from. If the legislature should change that rule and declare one witness or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

"Frome these and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of
courts, as well as of the legislature....

"It is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned: and not the laws of the U.S. generally but those only which shall be made in pursuance of the constitutions have that rank.

"Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all the written constitutions, that a law repugnant to the constitution is void; and that courts as well as other departments are bound by that instrument".
CHAPTER TWO

NATURE OF INDIAN CONSTITUTION AND JUDICIAL REVIEW

* Emergence of Judicial Review in India.
* Judicial Review under the Constitution of India.
* Judicial Review of Constitutional Amendment.
EMERGENCE OF JUDICIAL REVIEW IN INDIA

The land-mark decision of Chief Justice John Marshall in Marbary v. Madison (1803) thus established fully and finally the doctrine of judicial review as a necessary corollary of a written constitution. Since our constitution is also a written federal constitution like that of the United States, it applies with equal forces under our constitution also. For this reason "if the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution". So observed Patanjali Sastri, J., in State of Madras v. V.G. Rao. Mr. Justice H.R. Khanna, former Judge of the Supreme Court of India has in his book "Judicial Review or Confrontation" made the following remarks in this connection.

"Judicial review has thus become an integral part of our constitutional system and a power has been vested in the High Court and the Supreme Court to decide about the constitutional validity of the provisions of Statutes".

According to Dr. M. P. Jain, the Indian Constitution expressly provided for the doctrine of judicial review in Articles 13, 32, 131 to 136, 143, 226 and 246 which in the words of Sri M. C. Stalvad is the outstanding feature of our constitution.

The laws may be declared to be invalid if they are violative of fundamental rights is clear from Article 13 of the Constitution. Kania, C.J., in A. K. Gopalan v. State observes: "The inclusion of Art. 13(1) and (2) in the Constitution appear to be a matter of abundant caution. Even in their absence if any of the fundamental rights was infringed by any legislative enactment, the court has always the power to declare the enactment to the extent it transgresses the limits invalid."

The doctrine of judicial review is not revelation to the modern world. In India the concept of judicial review is founded on the Rule of Law which is the proud heritage of the ancient Indian culture and traditions. Only in the method of working of judicial review and its form of application there have been characteristic charges, but the basic philosophy upon which the doctrine of judicial review hinges is the same.

In the modern world also where the doctrine of judicial

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review hinges is the same. In the modern world also where the doctrine of judicial review prevails, the system of its working and the method of its application are dissimilar in different countries. The basic idea of judicial review is that law should be the generator of peace, happiness and harmony the rule has no legal authority to inflict pain, torture and tyranny on the ruled and to usurp the basic rights of freedom and liberty of the people which are rooted in the ancient Indian civilization and culture. The fundamental object of judicial review is to assure the protection of rights, avoidance of their violation, socio-economic uplifts and to alert the legislature to be in conformity with the constitution. In ancient India such spirit was prevalent.

The ancient Indian concept of law is that law is the king of kings and nothing can be higher than law by whose aid even the weak may prevail over the strong. The vedic concept of sovereignty was that the state was trust and the monarch was the trustee of the people. The address of the people to the monarch at the time of coronation and the reply of the conseerated king to his people on the occasion of Abhishekha (coronation) embodied in the Yayurveda reveals the concept of ideal kingship and the democratic concept of law and order which is enshrined in the doctrine of judicial review. Thus the spirit of judicial review can be drawn from the fundamental concept of law and governance which required ancient India.
In all history no republic had as rich a heritage of the system of judicial review as in India. The nascent Republic of India possessed enormous sources, materials and precedents from its own as well as from several other countries which afforded it magnificent opportunity to build up a unique tradition for a new democracy based on constitutional supremacy. The roots of judicial review go long back into ancient India, ancient and medieval Europe, pre-Revolution England, and into Colonial and Post-Constitution regimes in the United States of America and of certain other countries which had a heritage of judicial review from United States, such as Canada Australia, Ireland, Japan etc.

In ancient India the Rule of Law had a firm stand which meant that the law was above the ruler and that the government had no constitutional authority to enforce any arbitrary or tyrannical law against the governed. Thus the people of ancient India visualised and cherished the supremacy of law and not the supremacy of the king.

In the colonial courts the legality of law in several instances, was vehemently challenged on the basis of the principle enunciated by Chief Justice Coke. Subsequently, the United States of America not by any specific and clear provision in the Constitution but by judicial precedents created before the world a new pattern of democracy and demonstrated
to the world that judicial review could act as a potent and powerful check on democracy against degenerating into autocracy and submitting to a rule of tyranny. India was wiser in incorporate into the Constitution itself the provision of judicial review and by this method India has established a Constitution which has its individuality and uniqueness in so far as it lays down new standards of constitutional rule in the modern world. Chief Justice Patanjali Sastri of the Supreme Court of India remarked- "while the court naturally attaches a great weight to the legislative judgement it can not desert its own duty to determine finally constitutionality of an impugned statute".

The Indian Courts had authority to determine constitutionality of legislative acts. In Empress v. Burah and Book Singh the Calcutta High Court held that a particular legislative enactment of the Governor-General in Council was in excess of the authority given to him by the Imperial Parliament and therefore invalid. The Privy Council held on appeal that the enactment was within the legal power of the council and therefore valid, but the jurisdiction of the High Court of Calcutta to consider whether the legislation of the Governor-General was or was not constitutional was not questioned by the Privy Council.

A historical interpretation of constitutional evolution of India becomes necessary in order to appreciate the growth, functioning and practical operation of judicial review. The system of judicial review in India is not an event of sudden emergence but it has a gradual evolution which predominantly depended on the constitutional thoughts and ideas in the different stages of the constitutional evolution in India. The enactment of Government of India Act, 1858 to the Government of India Act 1935, the Indian legislature was subordinate to the English Parliament and any legislative Acts in India in contravention of the Parliamentary directions and restrictions were void. By the Government of India Act of 1935 federalism was introduced which led to the expansion of the concept of judicial review in India. From 1885, when the Indian National Congress was established, to the inauguration of the Indian Republic there were constant and vigorous agitations for the establishment of federalism and for the state recognition of fundamental rights. India which had the heritage of the Rule of Law from ancient India acted strenuously and assiduously towards establishing the judicial control of the legislative powers. As a result the provisions for judicial review were incorporated in the Constitution itself.

The various stages of evolution of judicial review in India are as follows:-
(i) 1858: The Government of India Act of 1858 imposed some restrictions of the powers of the Governor-General in Council in enacting laws, but such power only by implication.

(ii) 1861: The Indian Councils Act of 1861 provided that the measures passed by the Governor-General legislative council were not to become valid unless the assent of the Governor-General was received. It also contained constitutional restrictions against the making of any law or regulation which might have the effect of repealing or in any way affecting the provisions of the Indian Council Act. The provision to Section 22 of the Indian Council Act 1861 lays down constitutional restrictions in framing laws which reads:

"Provided always that the said Governor-General Council shall not have the power of making any law or regulations which shall repeal or in any way affect any of the provisions of this act...."¹

(iii) 1877: The case of Emperor v. Burab and Book Singh ILR 3 Cal.63(1877) was decided in the Calcutta High Court in which it was held that the aggrieved party had right to challenge the constitutionality of a legislative Act enacted by the Governor-General in Council in excess of the power given to him by the Imperial Parliament.

(iv) **1913:** Lord Haldane in 1913 in a Privy Council case laid down that the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. Government of India Act of 1858\(^1\).

(v) **1918:** Abdur Rahim, officiating Chief Justice of the Madras High Court relying on the Privy Council case decision observed in 1918 in a Special Bench case of Madras High Court that there was a fundamental difference between the legislative powers of the Imperial Parliament and the authority of the Subordinate Indian legislature. Any enactment of the Indian legislative in excess of the delegated powers or in violation of the limitation imposed by the Imperial Parliament will null and void\(^2\).

(vi) **1930:** Col. K.N. Haskar and K.N. Pannikar wrote in their book 'Federal India' that the Supreme Judicial authority in India should be invested with the power to declare ultra vires, measures which would go against the Constitution\(^3\).

(vii) **1935:** Government of India Act of 1935 which came into operation on December 6, 1937 embodied a federal Constitution. It was impliedly empowered to pronounce judicially

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1. Secretary of State v. Moment, ILR 40 Cal.391 (1913).
upon the validity of the Statutes, though there was no specific provision for the same. Sir Brojender Mitter, Advocate-General of India in his address to the judges of the Federal Court on the occasion of its inauguration said that the function of the Federal Court would be to expound and define the provisions of the Constitution Act, and as guardian of the Constitution to declare the validity or invalidity of the Statutes passed by the legislatures in India.

The Federal Court of India vigorously worked for more than a decade wisdom and dignity and by various constitutional decisions, it developed and brightened the constitutional atmosphere of the country from which the makers of Present Constitution received abundant inspiration and light. M.C. Setalvad, the first Attorney-General of India spoke on January 28, 1950, on the occasion of the inauguration of the Supreme Court of India. "The main function of the Court (Federal Court) was the interpretation of the constitution Act of 1935 and the resolving of the constitutional disputes".

The Federal Court treated the Constitution of India as a living organism. The Federal Court through various constitutional decisions created a congenial constitutional atmosphere in India which developed a background for the

1. (1939) Federal Court Reports, p.4.
growth of the constitutional jurispedence in the present set-up of the constitutional Government.

The British Parliament introduced Federal Constitution by enacting the Government of India Act of 1935. The Central as well as the State Legislatures were given plenary powers in the sphere allotted to them. Wide legislative power to the Central as well as State Legislatures were provided. The legislatures under the Government of India Act were not the delegates of the British Parliament. They were, in their subjects allotted to them, as supreme as the British Parliament.

The Federal Court was introduced by the Government of India Act of 1935 to function as an arbiter in the Central and State relationship and to scrutinise the violation of the constitutional directions regarding the distribution of the powers on the introduction of federalism in India. It was highly essential to have an independent and impartial superior court to maintain balance between the centre and the provinces. The powers of judicial review were not specifically provided in the constitution, but the constitution being federal, the federal court was entrusted impliedly with the function of interpreting the constitution and to determine the constitutionality of legislative Acts. A large number of cases cropped up involving the question of the validity of the legislative Acts. The question of repugnancy
was one of the main topics of decision before the Federal court and the Privy Council. Maurice Gwyer C.J. of the Federal Court of India observed. "We must again refer to the fundamental proposition enunciated in (1878) 3 A.C. 889 (Reg. v. Burah) that Indian Legislatures within their own sphere have plenary powers of legislation as large and of the same nature as those of Parliament itself. It it was true in 1878, it cannot be less true in 1942". But the court's power to examine the constitutionality of a statute under the Government of India Act of 1935 became rather very much widened. The Rt. Hon'ble Sir Lyman Duff, Chief Justice of Canada in his message to the inauguration of the Federal Court of India said- "while in exercising one of its great primary functions, the interpretation of the Indian Constitution the court will pronounce judicially upon the validity of the statute as well as of administrative act".

During the span of a decade of their career as constitutional interpreters the Federal Court and the High Courts of India reviewed the constitutionality of a large number of legislative Acts with fully judicial self-restraint insight and ability. The Supreme Court of India as the successor of the Federal Court intended the great traditions built by the Federal Court. Thus though there was no speci-

fic provision for judicial review in the Government of India Act of 1935 the constitutional problems arising before the court necessitated the adoption of judicial review of legislative Act in a wider perspective. This is a natural phenomenon where the sovereignty of legislature is not absolute.

(viii) 1950:- The Republican Constitution of India, adopted in 1950, which has specifically provided for judicial review regarding the infringement of fundamental rights and the Indian Courts have powers of judicial review regarding constitutional violations of the distribution and separation of powers and other constitutional restrictions. Art 13, 32 and 226 expressly provide for and envisage judicial review.

Under the Constitution of India, 1950, the scope of judicial review has been extremely widened. The Courts in India, in the present democratic setup, are the most powerful organ for scrutinising the legislative lapses. The spirit of protection of individual liberty and freedom yielded a great influence on the constitutional agitationists in India. The ancient Indian heritage is rooted in the constitution of India, 1950, in which are enshrined the various provisions of individual liberty and freedom against the state. Under the impact of ancient Indian heritage the constitution of India of 1950 evolved a unique system of judicial review.
The Constitution of India envisage a very healthy system of judicial review and it depends upon the Indian Judges to act in a way as to maintain the spirit of democracy. In the present democratic set up in India, the court cannot adopt a passive attitude and ask the aggrieved party to wait for public opinion against legislative tyranny, but the Constitution has empowered it to play an active role and to declare a legislation void and may refuse to enforce it, if violates the Constitution. Glanville Austin's historical analysis regarding the introduction of the provisions of judicial review in the Constitution of India of 1950 is noteworthy. "The judiciary was to be an arm of the social revolution upholding the equality that Indians had longed for during colonial days, but had not gained not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule .... The courts were also idealized because as guardians of the Constitution they would be expression of the new law created by Indians for Indians.... judicial review, Assembly members believed, was an essential power for the courts of a free India, with a federal constitution". "The word of the constitution is supreme in India

and the legislative and executive Acts to be valid will have to conform to it. The only agency capable of upholding the supremacy of the Constitution being the national judiciary, the process of judicial review is expected to play a no mean role in the working and development of the Constitution. The remark is amply justified. The Indian Judges have enough power under the Constitution to declare a legislation void if it is in violation of the Constitution or if the law is highly tyrannous and arbitrary against the intention of the Constitution and the sovereign people. Much depends upon the way the court approaches the matter and the degree of self-restraint the court exercise. The Constitution does not limit the powers of the Indian Court in the matter of judicial review but the constitution has left the matter entirely on the dignity and rational thinking of the courts.

JUDICIAL REVIEW UNDER THE CONSTITUTION OF INDIA

Judicial review is the process applied by the court to determine the constitutionality of legislative Act, Ordinance or customs having the force of law if enacted or having come into existence against the constitutional directions intention, prohibitions and limitations. The court has right to declare such law, ordinance or custom void and to refuse its enforcement. The legislature has to work under constitutional limitations. The legislature may not be able to decipher its own lapses free from bias and as such it is the constitutional policy that the court being an independent and impartial body is the best legal authority to scrutinise the validity of any legislative Act.

The Indian Constitution of 1950 is a unique institution and a model in itself, which might be a matter of emulation for other nations in framing their constitution. India has a written constitution with specific provisions for judicial review. The fundamental rights have been specifically guaranteed in Part-III of the Constitution, and in Part IV the Directive principles of the state policy have been enumerated in fifteen articles. Article 37, which is in Part IV lays down that the provisions contained in Part-IV shall not be enforceable by any court, but the principles embodied therein are nevertheless fundamental in the governance of the
country and it shall be the duty of the state to apply these principles in making laws. The articles of Part IV are very helpful in the interpretation of the Articles on the fundamental rights. Judicial review is the corner-stone of liberty and freedom and so the constitution-makers have incorporated specific provisions for judicial review in the constitution of India.

The nation grows with a good constitution and a good constitution envolves a good and effective system of judicial review. The relationship between the democratic written constitution and judicial review is inseparable. In the democratic federal state the nation prospers because of an efficacious system of judicial review. Since the existence of the system of Judicial review has an intensive and beneficial impact on the evolution of a good constitution, reciprocally the existence of a good constitution has similar impact on the growth of a better and efficient system of judicial review.

In India, judicial review is a process having the explicit sanction of the Constitution. Underlining this aspect of the matter, the Supreme Court stated in Madras v. Row that the constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution and that the courts "face up to such important
and none too easy task" not out of any desire "to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the constitution". As the Supreme Court emphasized in Gopalan. "In India it is the Constitution that is supreme" and that "statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not" and if a legislature transgresses any constitutional limits, the court has to declare the law unconstitutional "for the court is bound by its oath to uphold the constitution." Therefore, the courts in India cannot be accused of usurping the function of constitutional adjudication, it is a function which has been imposed on them by the constitution. It is a delicate task, the courts may even find it embarrassing at times to discharge it, but they cannot shirk their constitutional responsibility.

Just after the Constitution of India of 1950 came into force the Calcutta High Court in a Special Bench case gave a memorable decision by which the entire Bengal Criminal Amendment Act of 1930 was declared void. The court held- "The legislatures in his country have only those powers of legislation which are bestowed upon them by the Constitution

Act. If they pass an Act in excess of these powers, the Act becomes void to that extent. Under our constitution, the court i.e., the judiciary is to decide this and no body else. We recognise that great powers necessarily involve grave responsibilities but we are not dismayed. Amidst the student clamour of political strife and the tumult of the clash of the conflicting classes we must remain impartial. This court is no respector of persons and its endeavour must be to ensure that above this clamour and tumult, the strong Calan voices of justice shall always be heard". ¹ This view of the Calcutta High Court has been echoed in the several decisions of the Supreme Court and the High Courts of different states.

In 1958 even the law commission adopted the same view - "The constitution in express terms requires the courts to act as a supervisory body in the matter of laws alleged to encroach upon the exercise of fundamental rights. The line as to how far a law shall go in derogation of the citizens fundamental rights is, according to the constitution, to be drawn by none other than the judiciary". ²

The judiciary in free India thus showed a great promise in its constitutional career in preserving the liberty and freedom of the people. But in subsequent years a perceptible change in the judicial thinking came which was

noticed by the eminent jurists with great concern. M.C. Setalvad, Ex-Attorney General of India has observed— "The history of the court's attitude in regard to the interpretation of Article 14 seems to present a reserve picture". Having started in Anwar Ali Sarkar's case with a bold assertion of the doctrine of equality, later decisions have, in the guise of geographical and other kinds of classification, greatly diluted the citizen's right under Article 14.

A similar tendency has been apparent in the interpretation of Articles 32 and 226. The right to approach the court guaranteed by Article 32 received recognition in the amplest measure in early decision of the court. Later, the decisions in Daryao's case and in Ujjambai's case have sought to restrict the scope of both the articles 32 and 226 of the constitution. But again by the majority decision of Golaknath's case the Supreme Court has resurrected partially the fundamental rights of the citizen of India which were eclipsed by the constitutional amendments. In judicial review the Judges have to maintain balance between Union or State authority on the one hand and the liberty and prestige of the citizen on the other and also between the rule of the majority and the rights both relational and fundamental of the individuals.

Under the Constitution of 1950 judicial review assumed an important role in Indian democracy. Its working under the present Constitution of India, is a real protection of liberty and freedom of the people. Some Indian writers have observed that the scope of judicial review in India is very limited and the Indian Courts do not enjoy as wide jurisdiction as do courts in America. In their opinion it is due to the, 'Due Process' clause that the American Courts have wider rope, in India the scope of judicial review is narrower. But it does not appear to be in consonance with the spirit of the Indian Constitution. The Chapter on fundamental rights itself is so vast that fresh avenues of judicial review shall always continue to emerge. The changing social and economic standards and ideals generate new openings for judicial review under the constitutional working and it is very difficult to assign a limit to its exhaustion.

The Indian Constitution is a federal structure. Sovereignty is distributed between the Union and the states with greater weightage in favour of the Union. The supremacy of the Constitution is protected by the authority of an independent judicial body to act as an interpreter of a

scheme of distribution of powers. It is the fundamental principle of a federal state that the centre should be strong and not feeble. But the centre should not be autocrat having unlimited powers to swallow up the authority of the states. About the Indian federalism, K.R. Bombell remarks "The detailed and carefully spilled out distribution of powers of judicial review vested in the Supreme Court provide the necessary guarantee that such subversion cannot occur".¹

Political, social and economic conditions of India after 1935 urged and necessitated a new pattern of new constitution having combination of the concept of federalism, separation of powers with checks and balances, guarantee of fundamental rights and various other restrictions and limitations on the powers of the Government. The drafters of the Indian Constitution on the basis of their wide experiences and knowledge of the American and other Constitutions tried to avoid confusion and complexity by evolving quite a new system of federalism, conferring upon the court power of judicial review. In this connection G.N. Joshi observed:

Dicey says federalism means legalism and this is practically true of the Indian Constitution. Its most outstanding feature is the faith it places in law, in judicial process and judicial review"².

The Indian Constitution also intended to enlarge and preserve freedom by introducing the process of judicial review. The theory of social contract has thus been renovated by the introduction of judicial review in the Indian Politico-constitutional system. It is the moral obligation on the part of the people to subject themselves only to the valid law and not to the arbitrary and invalid law. The aggrieved person has right to challenge in the Law Court the validity of a particular law. In Indian federalism the system of judicial review has been introduced under Art. 226 read with Articles 245 and 246 and Schedule VII where the Federal and State powers have been demarcated. But regarding the remedy in respect of legislative lapses concerning distribution of powers, there is great lacuna in the Indian Constitution as there is no provision in the Constitution to approach the Supreme Court direct. The founding fathers of the Indian Constitution could not envisage this lacuna then, but it deserves to be rectified by a suitable constitutional amendment incorporating an article in the Constitution like Art. 32 enabling the party concerned to move the Supreme Court direct. It is for the Indian Parliament to rectify this lacuna by a suitable amendment. But in India unlike America, the amending power has been misused to curbing the power of judicial review. The judiciary must be given a free hand in judicial decisions as by its sound and analytical reasonings
and prudent view the judiciary can best harmonise the conflicting interest in different walks of life. The guarantee of relief by judicial review is a moral assurance to the nation. Without morality no nation can sustain its vitality. Therefore, curbing the power of judicial review is wholly unethical and the courts in India shall have to assert their existence in discharging the constitutional obligations. In any view of the case, constitutional amendments in any degree curbing or extinguishing the power of judicial review, are ultravires and the judiciary has to ignore such constitutional amendments. Judicial review is founded on the natural and eternal rights which are even above the constitution itself.

The growth of Commerce and enterprise and the development of an interdependent economy and nationalism are considered to be the factors in the evolution of co-operative federalism. In Co-operative federation the question about the scope of judicial review is a pertinent one. Any undue leniency in the spirit of judicial review by tolerating unconstitutionality of laws on a plea of co-operative federalism may seriously affect the centre-state and inter-state relationship and the social and economic structure of the country. In India the residuary powers vest in the Union Parliament and, as such, in India there is greater fear of interference from the side of the union. The Indian judiciary
has to keep this aspect in view while dealing with the constitutionality of the law violating the mandates of the constitution regarding distribution of powers. The Chairman of the Indian Constituent Assembly Drafting Committee had said - "A Federal Constitution means a division of the law of the Constitution between the federal Government and the States, with two necessary consequences:

(a) That any invasion by the Federal Government in the field assigned to the States and vice-versa is breach of the constitution, and

(b) Such breach is a justiciable matter to be decided by the judiciary only\textsuperscript{1}.

But inspite of the fact that the founders of the Indian Constitution had intended unrestricted power of judicial review, certain constitutional amendments have begun to make serious inroads on the power of judicial review.

India is a welfare state. Indian in its wake of nationalism is attending to evolve a socio-economic philosophy for the reconstruction of the society and for the prosperity of the nation. The Constitution of India contains various provisions for the social and economic reconstruction

of the society and judicial review has been provided to help in this pursuit. The courts in India have often joined hands with the legislatures in their activities of agriculture reforms, and development of rural economy. As for instance, by the Bombay Laws (Amendment Act 1956) which amended Bombay Act LXVII of 1948, the legislature sought to distribute equitably the lands between the landlords and the tenants by way of compulsory purchase of surpluslands from tenants in possession thereof. N.H. Bhagwati J. of the Supreme Court of India upholding this Act observed "with a view to achieve the objective of establishing a socialistic pattern of society in the State within the meaning of Articles 38 and 39 of the Constitution, a further measure of agrarian reform was enacted by the State Legislature being the impugned Act herein before referred to, which was designed to bring about such distribution of the ownership and control agriculture lands as best to subserve the common good, thus eliminating concentration of wealth and means of production to the common detriment\(^1\). M. Hidayatullah J. (as he then was) following the said view observed in another case "The scheme of rural development today envisage not only equitable distribution of land so that there is no undue unbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few, on the other, but envisages also the raising of economic standards and bettering rural health

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and social conditions".  

The courts in India had all along been vigilant in safeguarding the fundamental rights and realising the social needs but they have not recognised the claims which in fact were unrighteous but were pressed under the pretence of fundamental rights. In the case of *State of Uttar Pradesh v. Kartar Singh* the respondent claimed fundamental right to carry on business in adulterated food but the Supreme Court denounced it and held that a person cannot assert fundamental right of carrying on business in adulterated food. Another respect of the matter is that though the courts in India have always tried to respect the wishes and policies of the legislature yet, on many occasions realising that the legislative Acts are sometimes so discriminatory and violative of the guaranteed rights of the citizens of India, that instead of developing the social and economic wellbeing of the people they may positively destroy it. The courts in India have been always alert in declaring such unsocial and uneconomic laws void as to relieve the people of hardship and worries and to maintain social standard and dignity. In a democratic India legislature has no constitutional authority to enact discriminatory laws which might lead to legislative

tyranny The present prevalent concept of judicial review in India the basis of declaration of unconstitutionality is the violation of the express provisions of the constitution.

The fundamental rights are the conscience of the Constitution of India. The insertion of fundamental rights in the Constitution of India is the result of constant struggle for freedom and the fundamental rights guaranteed in Part III are the manifestations and recognition of the cravings of the people for the blessings of liberty and freedom. The constitution-makers considered it necessary to recognise the right of judicial review in order to control the legislative actions of the state to take away the guaranteed rights without jurisdiction. The constitution-makers of India could not at the time of framing foresee and visualise all the aspects of the constitution mechanism which they were laying down. Although the Indian Constitution is elaborata, all the necessary provisions to safeguard the individual freedoms and rights could not expressly be made in the constitution. As such the courts is the only legal body to help the nation in reading the constitution into life and give a practical application of it through judicial interpretations.

In India, so long as the constitutional democracy prevails, judicial review is sure to have a firm stand. The Indian Judiciary, specially the Supreme Court, is the great
organ to protect individual rights and to operate as a balancing force between the individual rights and the social interests. The Indian courts have to interpret the constitution in Judicial review not always within a rigid frame, but they have to rise to the need of the hour and encounter new circumstances in order to relieve the citizens of India of the legislative impositions which are against the national spirit.
The Amendment of the Constitution is made with a view to overcome the difficulties which may encounter in future in the working of the constitutions. No generation has monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of Government according to their requirements. If no provision were made for the amendment of the constitution, the people would have recourse to extra-constitutional method like revolution to change the Constitution.  

"It has been the nature of the amending process itself in federation which has led political scientists to classify federal constitution as rigid. A federal constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American Constitution is very difficult. It is a common criticism of federal constitution that is too conservative, too difficult to alter and that is consequently behind the times."  

The framers of the Indian Constitution were keen to avoid excessive rigidity. They were anxious to have a docu-

ment which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. The nature of the 'amending process' envisaged by the framers of our constitution can be best understood by referring the following observation of the late Prime Minister Pt. Nehru, "while we want this constitution be as solid and permanent as we can make it, there is no permanence in the constitution. There should be a certain flexibility. If you make anything rigid and permanent you stop the nation's growth, of a living vital, organic people .... In any event, we could not make this constitution so rigid that it cannot be adopted to changing conditions. When the world is in a period of transition, what we may do today may not be wholly applicable tomorrow".

But the framers of Indian Constitution were also aware of the fact that if the constitution was so flexible it would be a plaything of the whims and caprices of the ruling party. They were therefore, anxious to avoid flexibility of the extreme type. Hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. The machinery of amendment should be like a safety value, so devised as neither to operate the machine with too great facility nor to require, in order to set in motion, an accumulation of force sufficient to explode it. The Constitution-makers have, therefore
kept the balance between the danger of having non-amendable constitution and a constitution which is too easily amendable

Under the American Constitution, the courts have stayed away from deciding upon the validity of constitutional amendments. The Supreme Court of America has time and again declared that the court is not a proper forum for deciding political questions. The constitutional amendments involve political question and, therefore, the court applying the doctrine of judicial review abnegation has consistently refused to employ the power of judicial review in relation to amendments to the Constitution. In India also in the beginning the position was the same. The question whether fundamental rights can be amended under Article 368 came for consideration of the Supreme Court in Shankari Prasad v. Union of India¹. The Supreme Court was faced with the constitutional validity of the constitution (First Amendment) Act, 1951. This Amendment had made various changes throughout the length and breadth of the constitution including those in the area of fundamental rights². Not the whole but those parts of this Amending Act which interfered with fundamental rights particularly the right to private property in Article 31, were challenged. The amendment was challenged on the ground that it purposed to take away or abridge the rights conferred

². Articles 31-A, 31-B and Schedule IX were added by this Amendment.
by Part III which fell within the prohibition of Article 13(2) and hence was void. It was argued that the "state" in Article 12 includes Parliament and the word "law" in Article 13(2), therefore, must include constitutional amendment. The Supreme Court, however, rejected the above argument and held that the power to amend the constitution including the fundamental rights was contained in Article 368, and that the word 'law' in Article 13(2) include only an ordinary law made in exercise of the legislative powers and does not include a constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridged or takes any of the fundamental rights. This judicial pronouncement made by Supreme Court as early as 1951 remained unchallenged and undisturbed for fourteen long years. In 1965 the Supreme Court was once again invited to reconsider its opinion in Sajjan Singh v. State of Rajesthan\(^1\) and once again the court reiterated its earlier view that constitutional amendments made under Article 368 are outside the purview of judicial review of the courts\(^2\). In this case the Constitution (Seventeenth Amendment) Act, 1964 was challenged and upheld.


2. Unlike Shankari Prasad's case, this was not a unanimous judgement. Only three out of five judges who constituted the Bench for the purpose held that Shankari Prasad's case was rightly decided. The remaining two judges (Justice Madhokar and Hidayatullah did not express any opinion).
Within a short period of two years the same Seventeenth Amendment Act, 1964 was once again challenged in Golak-Nath v. State of Punjab\(^1\) and the Supreme Court once again invited to reconsider its decision in the earlier two cases. The Supreme Court by a majority of 6 to 5 prospectively overruled its earlier decisions in Shankari Prasad and Sajjan Singh case and held that Parliament had no power, from the date of the decision to amend Part III of the Constitution so as to take away or abridge the fundamental rights ensured therein. Subha Rao, C.J., supported his judgement on the following reasonings:

(a) The Chief Justice rejected the argument that power to amend the constitution was a sovereign power and the said power was supreme to the legislative power and that it did not permit any implied limitations and that amendment made in exercise of that power involve political question and that therefore they were outside of judicial review.

(b) The power of Parliament to amend the constitution is derived from Article 245, read with Entry 97 of list I of the Constitution and not from Art.368. Art.368 only lays down the procedure for amendment of constitution. Amendment is a legislative process.

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(c) An amendment is a 'law' within the meaning of Article 13(2) included every kind of law. Statutory as well as constitutional law and hence a constitutional amendment which contravened Article 13(2) will be declared void.

The Chief Justice said that the fundamental rights are assigned transcendental place under our constitution and therefore they were kept beyond the reach of Parliament. The majority held that the (17th Amendment) was void in as much as it took away or abridged the fundamental rights under Article 13(2) of the constitution. The Chief Justice applied the doctrine of Prospective overruling and held that this decision will have only prospective operation and therefore, the Ist, 4th and 19th Amendments will continue to be valid. The majority did not express any final opinion on the question whether the word 'amendment' in Article 368 included the power to destroy the basic structure of the constitution or abrogation of the constitution or the complete rewriting.

The majority view of five out of eleven judges was the word 'law' in Article 13(2) refers to only ordinary law and not a constitutional amendment and hence Shankari Prasad and Sajjan Singh cases were rightly decided. According to them, Article 368 dealt with only the procedure of amending the constitution but also contained the power to amend the constitution.
Hidayatullah and Madholkar, J.J., however, by a separate judgement doubled the correctness of the majority view, as to whether fundamental rights were really fundamental and should be amended under Article 368. Mudholkar, J., posed a further question, whether making a change in a basic feature of the constitution can be regarded as merely as amendment or would it, in effect be rewriting a part of the Constitution, and if the latter would, it be within the purview of Article 368.

It was, therefore, held that if a constitutional amendment had the effect of abridging or taking away any of the fundamental rights guaranteed in Part III of the constitution it would be struck down by the court as unconstitutional. The Seventeenth Amendment which was in challenge before Supreme Court in Golaknath's case, however, was validated by resorting to the American doctrine of 'Prospective overruling' which the Supreme Court applied in this country for the first time. The net result of the Supreme Court decision in Golaknath's case was that Parliament was deprived of its power to amend the fundamental rights so as to abridged or take them away with effect from February 27, 1967 the date of decision of the case.

The Supreme Court decision in Golaknath's case came as a stumbling block and prevented the Government and the
Parliament from proceeding further with socio-economic measures because the Government argued that nothing worth in this direction could be attempted without interfering with the fundamental rights particularly the right to property. With a view to obtaining mandate from the people for important and pressing amendments in the Constitution (including those in the area of fundamental rights) Smt. Indira Gandhi, the then Prime Minister of India went to the polls by getting the Lok Sabha dissolved on December 27, 1970. She returned to power with record majority and plunged headlong and rushed through a series of constitutional amendments beginning with the Twentyfourth Amendment in 1971 remodelling Article 368 which provides for Amendment of the Constitution.

In order to remove difficulties created by the decision of Supreme Court in Golak Nath's case Parliament enacted the Twentyfourth Amendment Act, 1971. The amendment added a new clause(4) to Article 13 which provides that "nothing in this Article shall apply to any amendment of this constitution made under Article 368. In all the amendment has made four changes in Article 368. (1) It substituted a new marginal heading to Article 368 in place of the old heading "Procedure for amendment of the Constitution". The new heading is "power of Parliament to amend the constitution and Procedure therefore". (2) It inserted a new subsection (1) in Article 368 which provide'that "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". (3) It substituted the words, "it shall be presented to the President who shall give his assent to the Bill and thereupon" for the words" it shall be presented to the President for his assent and upon such assent being given to the Bill". Thus section 3(c) makes its obligatory for President to give his assent to the Amendment Bill. (4) It has added a new clause (3) to Article 368 which provides that nothing in Article 13 shall apply to any amendment made under this Article". Thus the Twentyfourth Amendment not only restored the amending power of the Parliament but also extended its scope by adding the words" to amend by way of the addition or variation or repeal any provision of this constitution in accordance with the procedure laid down in this Articles".

The flood-gate having been declared open fresh onslaughts on fundamental rights were effected ;through the twentyfifth, twentysixth and the twentyninth amendments. The constitutionality of all these Amendments were challenged in Supreme Court in the famous case, Kesvanand Bharti v. State of Kerala\textsuperscript{1}, popularly known as the Fundamental Rights case, decided by Supreme Court on April 24, 1973. The question involved was, what is the extent of the amending power

\textsuperscript{1} A.I.R. 1973 S.C. 1461.
conferred by Article 368 of the constitution? On behalf of the Union of India it was claimed that amending power is unlimited and short of repeal of the constitution any change may be effected. On the otherhand, the petitioner contended that the amending power was wide but not unlimited. Under Article 368, Parliament cannot destroy the 'basic feature' of the constitution. A Special Bench of 13 judges was constituted to hear the case. Out of the 13 judges 11 judges delivered separate judgement. The Twentyfourth Amendment was upheld and Golaknath expressly overruled. The Supreme Court, however, laid down a much complex, complicated ;and vague doctrine of basic structure. According to the court, the power of the Parliament to amend the constitution under Article 368 did not extend to abrogating or destroying the basic features or framework of the constitution. What features were considered by the Supreme Court as 'basic' were not spelt out or enumerated consistently in the various opinions given in this case¹. The majority held that Article 368

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¹. It would be interesting to note that largest ever Bench consisting of 13 out of 14 judges in Supreme Court was constituted in this case and the decision in the case was in a way worse than that in Golaknath for six judges held one view, six others held the opposite view and the judgement of the 13th Judge, Mr.Justice H.R. Khanna, was in no way clear as to whom he sided with. The Judgement ultimately was not 7-6 but 6.6 and 1. The judgement of Mr.Justice Khanna was very crucial for determining the exact ratio of the case.
even before the Twentyfourth Amendment, contained the power as well as the procedure of amendment. The 24th Amendment merely made explicit what was implicit in the unamended Article 368-A. The 24th Amendment does not enlarge the amending power of the Parliament. The amendment is declaratory in nature. It only declares the true legal position as it was before that amendment hence it is invalid.

Delivering the leading majority judgement Sikri C.J. said: "in the Constitution the word 'amendment' or 'amend' has been used in various places to mean different things. In some articles, the word 'amendment' in the context, has a wide meaning and another context it has a 'narrow meaning'. In view of the great variation of the phrases used all though the constitution it follows that the word "amendment" must derive its colour from Article 368 and the rest of the provisions of the constitution. Reading the Preamble, the fundamental importance of the freedom of the individual, its inalienability and the importance of the economic, social and political justice mentioned in the Preamble, the importance of directive principles, the non-inclusion in Article 368 of Provisions like Articles 52, 53 and various other provisions, an irresistible conclusion emerges that it was not the intention to use the word 'amendment' in the widest sense. It was the common understanding that the fundamental rights would remain in substance as they are and they would not be amended
out of existence. It seems also to have been a common understanding that the fundamental features of the constitution namely, secularism, democracy and the freedom of the individual would always subsists in the welfare state. In view of the above reasons a necessary implication arises on the power of Parliament that the expression 'amendment of this constitution' has consequently a limited meaning in our constitution and not the meaning suggested by the Attorney-General. The expression 'amendment' of this constitution in Article 368 means any addition or change in any of the provisions of the constitution within the broad colours of the Preamble and the constitution of carry out the objectives in the Preamble and the Directive Principles applied to fundamental rights' it would mean that while fundamental rights, cannot be abrogated reasonable abridgements of fundamental right can be effected in the public interest". If this meaning is given, the Chief Justice said, "it would enable Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen". The Chief Justice said, that the concept of amendment within the contours of the Preamble and of constitution cannot be said to be a vague and unsatisfactory idea which Parliamentarians and the public would not be able to understand. He said that the argument that because something
cannot be cut and dried or nicely weighed or measured and therefore does not exist is fallacious. There are many concepts of law which are not capable of exact definition, but it does not mean that it does not exist. It was also argued that every provision of the constitution is essential, otherwise it would not have been put in the constitution. The Chief Justice further said, "But this does not place every provision of the constitution in the same position. The true position is that every provision of the constitution can be amended provided in the result, the basic foundation and structure of the constitution remains the same". The right to property was held not to be a basic feature and, therefore, could be freely amended. The Supreme Court had no objection of even if it were to be completely wiped off from part III by a constitutional amendment. It is for this reason that the constitutional Twentyfifth Amendment which made various amendments in the area of fundamental right to property was upheld. The constitution Twenty Sixth Amendment, which abolished the Privy Purses and consequently interfered with right to property was similarly upheld.

Applying the basic structure doctrine enunciated above, the Supreme Court for the first time in the Constitutional History of India struck down as unconstitutional a part of Article 31-C introduced by the Twentyfifth Amendment. The portion which was struck down had provided for exclusion of
judicial review in respect of a particular matter\(^1\), even by the Supreme Court of India. The Kesavanand Bharti doctrine was subsequently applied by the Supreme Court in \textit{Indira Gandhi v. Raj Narain}\(^1\) (The Prime Minister's Election Case). In this case the Supreme Court applied the theory of basic structure and struck down Cl.(4) of Article 329-A, which was inserted by the Constitution (39th Amendment) Act 1975\(^3\), as unconstitutional and beyond the amending power of Parliament as it destroyed the 'basic features' of the constitution. The amendment was made to validate election of the Prime Minister which was declared void by the Allahabad High Court. Khanna J., struck down the clause on the ground that it violated the free and fair elections which in an essential postulate of democracy which in turn is a part of the basic structure of the constitution, Chandrachud, J., struck down cls(4) and (5) as unconstitutional on the ground that they are outright negation of the right of equality conferred by Art.14, a right

\(\text{1. Article 31-C reads as follows: Notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing the principles specified in clause(b) or clause(c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy". The underlined portion was struck down in K.Bharti's case and Article 31-C has further been amended by 42nd amendment in 1976.}

\(\text{2. A.I.R.1975 S.C.2299 decided by Supreme Court on Nov.7,1975.}

\(\text{3. The Presidencial assent to this Amendment was given on Aug. 1975.}\)
which is a basic postulate of our constitution. He held that these provisions are arbitrary and are calculated to damage or destroy the Rule of law. The Supreme Court thus has added few features as basic features of the constitution to the list of basic features laid down in the Keshavananda Bharti's case are Rule of law, Judicial Review and Democracy, which implies free and fair Election. It has been held that the jurisdiction of the Supreme Court under Article 32, is the basic feature of the Constitution.

In Minerva Mills Case, the Supreme Court held that the following are the basic features of the constitution:

(a) limited power of Parliament to amend the Constitution.

(b) harmony and balance between fundamental rights and directive principles.

(c) Fundamental rights in certain cases.

(d) Power of judicial review in certain cases.

Dr. P.K. Tripathi, Member Law Commission of India has pointed out that the Supreme Court of India is the only court in the world which has taken upon itself the power to judicially review constitutional amendments. This, according to him is a great responsibility of India has undertaken and it should proceed with due care and caution in handling constitutional amendments. Dr.Tripathi is of the view that there ought not to be any limitations whatsoever on the power of

Parliament to amend a Constitution. He has expressed doubt as to whether the so-called basic structure doctrine alleged to have been laid down by the Supreme Court in Kasavanand Bharti's case has at all taken firm roots and has become firmly established in Indian constitutional law. He emphatically contends that the Supreme Court in Kesavanand Bharti did not lay down the doctrine of basic structure and in the Prime Minister's Election case the fact that the Supreme Court had laid down the doctrine of basic structure in Kesavanand Bharti's case was not at all argued but the court proceeded to apply it because the learned Attorney-General and others appearing on behalf of the Union of India had conceded without argument that the Supreme Court in Kesavanand Bharti case had laid down the basic structure doctrine. This question of law being accepted and applied by the Supreme Court without arguments leaves the law in a state of flux.

The doctrine of basic structure has been vehemently criticised. It has been said that the court has not precisely defined as to what are the essential features of the basic structure, and if this doctrine is accepted every amendment is likely to be challenged on the ground that it effects some or the other essential features of the basic structure. In other words, the amending power of the Parliament cannot be subjected to this vague and uncertain doctrine if the historical background, the Preamble, the entire scheme
of the constitution and the relevant provisions thereof including Art. 368 are kept in mind then there can be no difficulty in determining what are the basic elements of the basic structure of the constitution. These words apply with greater force to the doctrine of the basic structure, because the federal and democratic structure of the constitution, the separation of powers, the secular character of our state are very much 'more definite than either negligence or natural justice'.

Forty-Second Amendment and Article 368 :

Lastly, we may consider the impact of the latest Amendment in Article 368 introduced by the Constitution (42nd Amendment) Act, 1976. The Amendment added two new clauses, namely, cl.(4) and cl.(5) to Art.368 of the constitution. The new clause(4) provided that "no constitutional amendment (including the provision of Part III) or purporting to have been made under Art.368 whether before or after the commencement of the constitution (42nd Amendment) Act, 1976 shall be called in any court on any ground. Clause(5) removed any doubts about the scope of the amending power. 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. Thus by inserting clause(5) it makes it clear that even the "basic feature" of the Constitution could be amended.

This amendment would, according to Mr. Swaran Singh, the Chairman, Congress Committee on Constitutional Amendments, put an end to any controversy as to which is supreme, Parliament or the Supreme Court. Clause(4) asserts the supremacy of Parliament. 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 removes the limitation imposed on the amending power of Parliament by the ruling of the Supreme Court in Kesavanand Bharti's case. It was said that the theory of 'basic structure' as invented by the Supreme Court is vague and will create difficulties. The amendment seeks to rectify this situation. It was, however, not pointed out clearly as to what were the difficulties faced by Parliament due to the basic structure theory.

Thus, the amended Article provides that constitutional amendments shall not be challenged in any court on any grounds. The Amendment has not to pass judicial scrutiny at the hands of the Supreme Court of India, although many constitutional experts have expressed their view that the change
effected by the 42nd Amendment in Article 368 is meaningless and redundant and they shall continue to exercise its power of judicial review over constitutional amendments in the same way as before the 42nd Amendment. They projected the view that the constitutional amendments made under Article 368 can still be challenged on the ground that they are destructive of any of the essential elements of the basic features of the constitution. In Kesavananda's case the Supreme Court has held that Parliament cannot alter the "basic structure" of the constitution exercise of amending power under Article 368 of the constitution. The 24th and the 42nd amendments were intended to bat the judicial review of constitutional amendments. But so long as the ruling in Kesavanand Bharti's case stands constitutional amendments can be challenged on the ground that they destroy some of the basic features of the constitution.

In Minerva Mills v. Union of India the Supreme Court by 4 to 1 majority (Mr. Chandrachud, C.J. and Gupta, Untawalia and Kailasam, JJ for majority and Bhagwati, J. dissenting) held that section 55 of the 42nd Amendment 1976 which inserted sub-sections (4) and (5) in Art.368 is beyond the amending power of the Parliament and is void since it removes all limitations on the power of Parliament to amend the

constitution and confers unlimited amending power which is
destructive of its basic or essential features or its basic
structure. Applying the principles laid down in Kesavanand
Bharti's case the court struck down sub-clauses (4) and (5) of
Art. 368 of the Constitution as unconstitutional and void and
declared that the Parliament cannot have unlimited power to
amend the constitution. "Limited amending power" is the basic
feature of the constitution.

The order of the Supreme Court thus declares in cate-
gorical terms that the constitution— not Parliament— is
supreme in India. This is in accordance with the intention
of the framers who adopted a written constitution for the
country. Under the written constitution there is a clear
distinction between the ordinary legislative power and the
constituent power (amending power) of Parliament. Parliament
cannot have unlimited amending powers so as to damage or
destroy the constitution to which it owes its existence and
also derives its power. The Parliament elected for a fixed
period of five years is meant for certain specific purposes
and cannot be vested with unlimited amending power. The
Court, however, held that the doctrine of basic structure is
to be applied only in judging the validity of amendments to
the constitution and it does not apply for judging the
validity of ordinary laws made by legislatures.
Forty-Fourth Amendment Act, 1978:

This Amendment seeks to remove the distortions that the 42nd Amendment had brought about in the constitution during the Emergency. Beside, the Amendment has considerably modified the emergency provisions of the Constitution so as to ensure that it is not abused by the executive in future.

Article 71 "as originally enacted" gave jurisdiction to the Supreme Court to decide election disputes of the President and the Vice-President. The 42nd Amendment took away the jurisdiction of the Court in this respect. The 44th Amendment has restored the original.

The 44th Amendment Act has amended Article 132, 133 and 134 relating to appeals in the Supreme Court from the decisions of the High Courts. The 44th Amendment has inserted a new Article 134A under which the High Court can now grant a certificate for appeal to the Supreme Court under Article 132, 133 and 134(1)(c) either suo motu or on an oral application by the aggrieved party immediately after the delivery of the judgement, decree, final order or sentence. It has also omitted clause(j) of Article 132 relating the grant of Special leave by Supreme Court in cases where the High Court refuses to give a certificate cases of special leave to appeal by Supreme Court will thus be left to be
regulated exclusively by Article 136 of the Constitution. This Amendment is intended to avoid delay in matters of appeal to the Supreme Court from High Courts.

Article 139-A, which was added by the 42nd Amendment gives power to the Supreme Court in certain circumstances to withdraw cases from the High Courts and decide them itself. This Article is retained subject to some modification. Prior to 44th Amendment, the court could take action under this Article only if an application was made by the Attorney-General. The 44th Amendment enables the court to do so also on the application of a party to any such case. Thus the court may do so either suomoto or on the application of the party to any such case.

The Amendment omits sub-clause(c) of clause (e) of Article 217 which was inserted by the 42nd Amendment. This clause made provision for appointing distinguished jurists as judges of the High Court.

The Proviso to Article 225, as originally existed, gave original jurisdiction to the High Courts in revenue matters. The 42nd Amendment omitted this proviso and took away jurisdiction of the High Courts in revenue matters. The 44th Amendment now restores the said proviso to Article 225 and again given original jurisdiction to the High Courts on revenue matters.
Subject to a modification this amendment restores Article 226 as it existed prior to the 42nd Amendment Act, 1976. The provisions relating to the issue of an interim order as introduced by the 42nd Amendment was very cumbersome and detrimental to litigants. Instead of this, 44th Amendment introduces a simple provision in new clauses (3) and (4). Clause (3) provides that when an interim order is passed against a party ex parte (without giving him opportunity of being heard) that party may make an application to the High Court for the vacation of such order and the High Court must dispose of such an application within two weeks. If the High Court does not dispose of the application within two weeks, the interim order shall stand vacated after the expiry of two weeks.

The Amendment restores Article 227 to the form in which it was prior to the 42nd Amendment Act, and this gives their power of superintendence over the tribunals. The 42nd Amendment has taken away this power of the High Courts.
CHAPTER

AND MODES

* Writ of Habeas Corpus
* Writ of Mandamus
* Srit of Quo-Warranto
* Wrdit of Certiorari
* Writ of Prohibition
The Constitution of India assured greater protection of individuals rights and afforded larger freedom to the court to look into executive lapses. The judiciary showed a great promise in its constitutional career in preserving the liberty and freedom of the people. In India the court is an arbiter between the people and the executive. Each citizen of India has inherent right to challenge the constitutionality of any executive enactment passed by any executive authority if his interest is affected by it. By judicial interpretations the fundamental rights, distribution of executive powers and other constitutional restrictions and limitations were provided a new meaning. The fundamental object of judicial review is to infuse life in the dry and abstract postulates of the constitution enabling it to be a living organism so as to satisfy the needs of the time.

Articles 32 and 226 of the Indian Constitution makes provisions for the system of writs in the country. Under clause (2) of Article 32 the Supreme Court is empowered to issue appropriate direction, orders or writs, including
writs in the nature of habeas corpus, mandamus, prohibition quo-warranto and certiorari for the enforcement of any fundamental rights guaranted by Art III of the constitution.

By this article the Supreme Court has been constituted as a protector and guarantor of the fundamental rights and once a citizen has shown that there is infringement of his fundamental right the court cannot refuse to entertain petitions seeking enforcement of fundamental rights.¹ Article 226(1) empowers every High Court, notwithstanding anything in art.32, throughout the territories in relation to which it exercises jurisdiction to issue any person or authority, including appropriate cases any government, within those territories directions, orders or writs including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari for the enforcement of Fundamental Rights or for any other purpose.

Article 32 and Article 226 are expressed in broad language. The Supreme Court, nevertheless, ruled that in reviewing administrative actions, the courts would keep to broad and fundamental principles underlying the prerogative writs in the English law without however importing all its technicalities.² The result of this approach has been that

by and large the scope of judicial review in India under arts. 32 and 226 is similar to what it is in England under the prerogative writs. But there are a number of cases where the Supreme Court has deviated from the English approach.¹

Under articles 32 and 226, the courts enjoy a broad discretion in the matter of giving proper relief if warranted by the circumstances or the case before them. The courts may not only issue a writ but also make any order, or give any direction, as it may consider appropriate in the circumstances, to give proper relief to the petitioner.² It can grant declaration or injunction as well if that be the proper relief.³ It would not throw out the petitioner's petition simply on the ground that the proper writ or direction has not been prayed for.⁴ In practice it has become customary not to pray for any particular writ in the petition filed before the court, but merely to make a general request to the court to issue appropriate order, direction or writ. In making the final order, the court may not mention any specific writ but merely quash⁵ or pass

¹. For example, see Gujrat Steel Tubes V. Mazdoor Sabha, A.I.R. 1980 S.C. 1896.
³. The Kochunni as Ibid. Also see Sudarshan Kumar Kalra V. India, A.I.R. 1974 Del.119.
declaratory order\textsuperscript{1} or give any other appropriate order\textsuperscript{2}. There thus exists a good deal of flexibility in the matter of choice of remedy to suit the specific circumstances of each case.

\textbf{Scope of Article 32:}

Article 32 provides a guaranteed, quick and summary remedy for the enforcement of Fundamental Rights. Any person complaining of infraction of any of his Fundamental Rights by an administrative action can go straight to the Supreme Court for vindication of his right, without being required to undergo the dilatory proceedings from the lower to a higher court as one has to do in any ordinary litigation. The Supreme Court has thus been constituted as the protector and guarantor of Fundamental Rights.

Article 32 is itself of a Fundamental Rights and cannot therefore, be diluted or whittled down by legislation, and can be invoked over when a law declares a particular administrative action as final. The implications of this positions can be appreciated by reference to one or two cases. Section 14 of the Preventive Detention Act, 1950 prevented a detenue on pain of prosecution, from disclosing to any court the grounds of his detention communicated to him by the detaining authority.

\textsuperscript{1} B.B.L. and T.Merchants' Association v Bombay A.I.R.1962 S.C. 486.

Though the provisions did not formally deprive the detenu of the right to move the Supreme Court for a writ of habeas corpus under art.32 to challenge his detention, still it rendered the court's power somewhat nugatory and illusory, for, unless the court could look into and examine the grounds on which the detention order was based, it could not decide whether detenu's Fundamental Rights under articles 21 and 22 were infringed or not. Therefore, the court declared §.14 as unconstitutional. In Prem Chand v. Excise Commissioner, the Supreme Court struck down one of its own rules, requiring furnishing of a security to move a writ petition before the court under art.32, as unconstitutional on the ground that it retarded the assertion or vindication of the Fundamental Rights under art.32. But a rule requiring deposit of security for filing a petition of review of an order made earlier by the court dismissing a petition under art.32 has been upheld as valid as it does not restrict the right to move the court under art.32.

A notable aspect of art.32 is that it can be invoked only when there is an administrative action in conflict with a Fundamental Right of the petitioner. It cannot be invoked if no question of enforcing a Fundamental Right arises. While dealing with a petition under art.32, the court would confine

itself to the question of infringement of Fundamental Rights and would not go into any other question.\textsuperscript{1} Article 32 cannot be invoked even if an administrative action is illegal unless petitioner's Fundamental Right is infringed. Thus a petition merely against an illegal collection of income tax is not maintainable under art.32, for the protection against imposition and collection of taxes except by authority of law falls under art.265 which is not a Fundamental Right.\textsuperscript{2} But when an illegally levied tax infringes a Fundamental Right, then the remedy under art 32 would be available.\textsuperscript{3} In Tata Iron and Steel Co. v. S.R. Sarkar,\textsuperscript{4} the company paid tax under the Central Sales Tax Act to the State of Bihar. The State of West Bengal also sought to levy the tax under the same Act on the same turnover. In such a fact situation, a petition under art. 32 was entertained by the Supreme Court because the Act in question imposes only a single liability to pay tax on inter-state sales. The company having paid the tax to Bihar (on behalf of the Central Government), the threat by west Bengal to recover sales tax (again on behalf of the Central Government) in respect of the same sales primafacie infringed the Fundamental Right to carry on trade and commence guaranteed by art.19(1)(g).

\textsuperscript{1} Khyerban Tea Co. v. I.T.O., A.I.R. 1964 S.C.925.
\textsuperscript{2} Ramjilal v. I.T.O., A.IR.1951 S.C. 97
\textsuperscript{3} Bombay v. United Motors, A.I.R.1953 S.C.252.
The question whether a particular administrative action infringes a Fundamental Right or not and, therefore, whether a pettititon under art.32 to challenge it is maintainable or not, does at times raise complex issues. The classic case on the point is Ujjam Bai v. Uttar Pradesh.¹ A petition was filed in the Supreme Court under art.32 on the ground that a sales tax officer by misconstruing a provision in a taxing statute had imposed sales tax on the petitioner and thereby affected his Fundamental Right under art.19(1)(g). The Supreme Court held that since the order of assessment was made by the officer concerned within his jurisdiction, a mere misconstruction of a statutory provision by him would not justify a petition under art.32, even though a Fundamental Right may be involved. The court stated under art.32, it would quash an order of a quasi-judicial body affecting a Fundamental Right if it acts under an ultra vires law or without jurisdiction, or if it wrongly assumes jurisdiction by committing an error on a collateral fact, or if it fails to follow the principles of natural justice, or to observe the mandatory procedural provisions presented in the relevant statute. But a mere error of law committed by a quasi-judicial body cannot be cured under art. 32.² This ruling has come in for a good deal of criticism as

¹ A.I.R. 1962 S.C.1621-
it dilutes the efficacy of art.32, and is rather difficult to justify. Ordinarily, as will be seen later, a 'patent' error of law by a quasi-judicial body can be quashed by a writ of certiorari which the Supreme Court can issue under art.32. It is, therefore, difficult to comprehend as to why the court should refuse to give relief in a case of misconstruction of law when a Fundamental Right is involved. The ruling becomes all the more uncomprehensible when it is remembered that while the Supreme Court would issue a writ under art.32 if a quasi-judicial body does not follow principles of natural justice, it refuses to give relief in the case of misconstruction of law by it. Further, the court probably would have quashed the order if the authority had been administrative and not quasi-judicial. This indulgence towards quasi-judicial bodies can be explained on the basis of the judicial view that an order made by the courts does not infringe Fundamental Rights, but the analogy between a court and a quasi-judicial body is misleading for such a body, unlike the court, consists of administrators rather than judges.

Thus the main purpose of Article 32 is to protect the individual against the infringement of his fundamental rights. The threat to fundamental rights may arise from various sources.

Judicial opinion is clear that the authorities falling under the Government and Parliament of India, Government departmental undertakings and Agencies incorporated by statutes are amenable to the writ jurisdiction of the Supreme Court and are included within the definition of state in Article 12.¹

Agencies falling under the registered statutes e.g. public or private companies, government companies registered societies may be included within the term 'State' and, therefore, are amenable to the writ jurisdiction of the Supreme Court, if such authorities are instrumentalities or agencies of the Government.²

Courts of law are not mentioned as such in Article 12 but they may pose a threat to the Fundamental Rights of the people in exercise of their administrative powers. In Prem Chand Garg v. Excise Commissioner³, the Supreme Court struck down certain rules framed by it as violative of Fundamental Rights.

Some of the Fundamental Rights given under Articles 15(2), 17, 23(1) and 24 can be claimed against private individuals also. The judicial opinion is that these rights though

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² R.D.Shetty v.International Airports Authority(1979) 3SCC 489
belong to private individuals cannot be enforced by private individual. Therefore, as the law stands today, such private individuals and bodies are not amenable to the jurisdiction of the Supreme Court, no matter they violate Fundamental Rights.\footnote{Writ of Habeas corpus being the exception.} There seems to be no valid reason for this kind of a judicial exclusion.

The approach of the court in the area of Fundamental Rights must not be whether the authority is 'State' within the meaning of Article 12. The correct approach should be that every authority or person who poses a threat to a Fundamental Right should be amenable to the jurisdiction of the court. Therefore, not the type of agency but the threat to the Fundamental Rights must be the determining factor for the issue of writs under Article 32.

**Writ Jurisdiction of High Court under Article 226:**

The writ jurisdiction conferred on the High Courts by art.226 can be invoked to enforce not only a Fundamental Right but a Non-Fundamental Right as well. The jurisdiction conferred on the High Courts under art.226 is broader in range than that conferred on the Supreme Court under art.32, for while Supreme Court acts only when there is an infraction of a
Fundamental Right, a High Court may act when a Fundamental Right or any other legal right is violated. For example, when a tax levied without authority of law infringes a Fundamental Right, action against it can be taken both under art. 32 as well as under art. 226; but when it does not infringe a Fundamental Right, only art. 226 can be taken recourse to.\(^1\) Thus the High Courts have a wider power to issue writs against 'any person or authority' for the enforcement of Fundamental Rights and any other legal right. As regards the 'person and authority' against whom such writs can be issued, the law seems to be in a thicket of inconsistencies. There is no controversy about the writs of habeas corpus and quo warranto which can be issued against private individuals and public office respectively. Therefore, the discussion will mainly concentrate on writs of certiorari, prohibition and mandamus.

It is gratify to note that the area for the operation of the writs has been extended, and rightly so, to cover various administrative agencies exercising multifarious functions.

There is a no dispute that all constitutional and administrative authorities are amenable to the jurisdiction of the courts. Therefore a writ can be issued against public acts

of the President of India, Governors, Union and State Governments, ministers, government officers and departments, and other bodies given in the Constitution i.e. Union Public Service Commission, Election Tribunal, Finance Commission, Water Dispute Authority and Advocate General of India. In Election Commission of India v. Venkata Rao, the Madras High Court had issued a writ against Election Commission having it permanently located at New Delhi. The Court held that the Madras High Court had no power to issue a writ against Election Commission which is outside its jurisdiction. The mere fact that the effect of the order of a person or authority are produced within the territory of the High Court if the cause of action arises within its jurisdiction is not sufficient to insist the High Court with jurisdiction under Art.226 to issue a writ. The Punjab High Court can only issue a writ to central authorities which are located in Delhi. As a result of the Supreme Court decision relief against the Central Government could only be sought in Delhi.

The Law Commission expressed the view that these limitation had reduced the utility of Art.226 and, in fact, they had defeated the very purpose of this Article. Commission,

therefore, recommended the removal of these limitations on a person seeking relief under Art.226. Accordingly, the Constitution was amended by the Constitution(15th Amendment) Act, 1963. Article 226 now permits High Court within whose jurisdiction the cause of action in whole or in part arises to issue directions, orders or writs to any Government or authority notwithstanding that the authority or the Government is located in Delhi if the cause of action in whole or in part arises in its jurisdiction.

The law relating to the amenability of registered agencies i.e., companies registered under the Indian Companies Act and Societies registered under the Societies Registration Act, is still in a developing state and has not reached the state of maturity. The Government companies, no matter wholly controlled by the government, are not considered as public authorities amenable to the writ jurisdiction of the High Court. The law seems to rest on the ground that the remedies available under the Companies Act, labour laws and the ordinary law of the land are sufficient to meet the ends of justice.

However, some High Courts have taken the view that not only the government companies but private companies also are

amenable to writ jurisdiction because their bye-laws have the force of law. Standing orders made by the companies under the Industrial Employment (standing orders) Act, 1946 were considered as having the force of law.\(^1\) The Kerala High Court also issue a writ against the Cashew Corporation of India, a government company, on the ground that it was performing a statutory function, under the Imports and Exports Control Act, 1947 and Import Control Order, 1955 of controlling import and export of cashewnuts.\(^2\) Similarly, the various High Courts have issued writs against societies registered under the Societies Registration Act on the ground that their bye-laws have statutory force.\(^3\) However, the view of the Supreme Court in Co-operative Central Bank Ltd. v. Addl. Industrial Tribunal\(^4\) does not favour this approach.

In a move recent decision of the Supreme Court in R.D. Shetty v. International Airports Authority\(^5\), the court has rightly extended its reach in matters of issuing writs by

5. (1979) 3 SCC 489.
liberalizing the test which brings an administrative authority within the gravitational orbit of the term 'state' in Article 12 of the Constitution. The core question in writ jurisdiction in India has always been whether an administrative authority is included in the category of 'other authorities' as contemplated by Article 12 within the definition of the term 'state'. The Supreme Court in Son Prakash Rekhi v. Union of India¹, held that the Bharat Petroleum Corporation a government company registered under the Indian Companies Act, 1956, is 'state' within the meaning of Article 12 of the Constitution. By the Burmah Shell (Acquisition of Undertaking in India) Act, 1976, the government had acquired the undertakings in India of the Burmah Shell Oil Storage and Distribution Company and handed them over to Bharat Petroleum Corporation Ltd., a government company formed for this purpose. A writ petition was filed by an employee of the Burmah Shell Company, who had retired and was entitled to get pension from the Bharat Petroleum Corporation for the restoration of cut in his pension. A preliminary objection was taken against the writ that no writ could be against Bharat Petroleum Ltd. since it being a company registered under the Indian Companies Act, was not 'state' within the meaning of Article 12 of the Constitution. Overruling the objection the Supreme Court held that the time test for classifying a body as 'State' within the meaning of Article

12 is not whether it is created by a statute or under a statute but whether besides discharging the functions or doing business as the proxy of the state, there must be an element of ability to affect legal relations by virtue of power vested in it by the law.

**Discretionary Remedy:**

The remedy provided for in Article 226 is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere.\(^1\) This remedy cannot be claimed as a matter of right. The High Court must exercise its discretion on judicial consideration and on well-established principles unless the High Court is satisfied that the normal statutory remedy is likely to be too dilatory or difficult to give reasonable, quick relief, it should be loath to act under Art. 226. The High Court should be careful to be extremely circumspect in granting these reliefs especially during the pendency of criminal investigations. The investigation of a criminal case is a very sensitive phase where the investigating authority has to collect evidence from all odd corners and anything that is likely to thwart its cause may inhibit the interests of

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justice. But the rule that it may refuse to grant any writ where alternative remedy is available is only a rule of direction and not a rule of law, and instances are numerous where a writ had been issued in spite of the fact that the aggrieved party had other adequate legal remedy.

The existence of an alternate adequate remedy is, however, no bar to the exercise of writ jurisdiction where the relief is involved in case of infringement of fundamental rights, or where there is complete lack of jurisdiction or where the order has been passed in violation of natural justice by the subordinate court. Existence of alternative remedy is also no ground to refuse to issue writ where the action is being taken under any invalid law or arbitrarily without sanction of a law.

In V. Vellaswamy v. I.G. of Police, Madras, the petitioner challenged the validity of his compulsory retirement

The High Court dismissed his writ-petition on the ground that an alternative remedy by way of review petition against the compulsory retirement order was available to him under R.15-A of Tamil Nadu Police Subordinate Service Discipline and Appeal Rules, 1980. On the facts the Supreme Court found that the review petition was not an alternative efficacious remedy and therefore held that the High Court was wrong in dismissing his petition on the ground that an alternative remedy was available.

The High Court will not go into the disputed question of fact in exercise of its writ jurisdiction.\(^1\) It has been held that the High Court should not dispose of in summary manner important question of law raised in a petition under Article 226. The Supreme Court directed the High Court to decide the case on merits.\(^2\)

Because of its broad ambit, Article 226 serves as a big reservoir of judicial power to control administrative action and hundreds of writ petitions are moved in the High Courts every year challenging this or that action of the administration. Being a constitutional provision, the ambit of art.226 cannot be curtailed or whittled down by legislation, and even

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if a statute were to declare an administrative action as final, art. 226 could still be invoked to challenge the same.¹ This is an aspect of some significance. For while in the modern administrative age, the legislature is rather easily persuaded to make the powers of the administration immune from being questioned in the courts, article 226 (and art. 32 as well) would still provide a means to restore to courts against any action of the administration. From this point of view, it may be worthwhile to point out the judicial review stands on a much firmer ground in India than Britain, for while in Indian the constitutional provisions guaranteeing judicial review are immune from any legislative action, in Britain it is not so and the jurisdiction of the courts to issue writs can always be regulated or entailed by legislation.

Under article 226, the jurisdiction of the High Court to issue writs etc., extends to the state over which it has jurisdiction, and also to territories outside that state, if the government, authority or person is within those territories and if the cause of action in relation to the government etc., wholly or in part, arises within the State. For exercising such outside jurisdiction, it is not necessary that the whole of the cause of action should arise within the

state, it is sufficient if only a part of the cause of action has arisen within the state. It depends upon the facts of each case whether part of the cause of action has arisen within the state or not.¹

**Alternative Remedy:**

The alternative remedy is that the Supreme Court and High Courts cannot refuse relief under Articles 32 and 226 on the ground of alternative remedy if the person complains of violation of his Fundamental Rights. But if the person invokes the jurisdiction of the High Court for any other purpose, in exercise of its discretion the High Court may refuse relief. The law was laid down with sufficient clarity by the Supreme Court in A.V. Venkateswaran V.R.S. Wadhwni.²

Where no Fundamental Right is involved, it has been ruled that, normally speaking, a High Court would not exercise its jurisdiction under art.226 when an alternate, adequate and efficacious legal remedy is available and the petitioner has not availed of the same before coming to the High Court.³

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Art. 226 is silent on this point; it does not say in so many words anything about this matter, but the courts have themselves evolved this rule as a kind of self-imposed restriction on their writ jurisdiction under article 226. The rule has been justified on the ground that persons should not be encouraged to circumvent the provisions made by a statute providing for a mechanism and procedure to challenge administrative action taken thereunder. The courts have also stressed the point that the remedy under art. 226 being discretionary, the High Court could refuse to grant a writ if it is satisfied that the petitioner could have an adequate or suitable relief elsewhere. For example in Prafulla Chandra v. Oil India Ltd., the High Court dismissed a writ petition filed for staying the implementation of an order dismissing some of the employees of Oil India on the ground that an alternative remedy existed under the Industrial Disputes Act. In Tilaghor Paper Mills Co. Ltd. v. Orissa, it was held that the petitioners were not permitted to approach the High Court, without exhaustion of the alternative remedy, to get redress for an alleged illegal order of the sales tax authority. Under the Act, there is a hierarchy of authorities before which the petitioners can get redress against the wrongful acts complained of.

But this not an absolute rule and some flexibility is practised by the courts in this matter depending upon the circumstances of the case in which the writ jurisdiction is invoked. The High Courts emphasize repeatedly that existence of an alternative legal remedy does not affect their writ jurisdiction as such, it is only a factor to be taken into consideration by them in the exercise of their discretion. The rule of exhaustion of remedy before invoking jurisdiction under article 226 has been characterised as a rule of policy, convenience and discretion rather than a rule of law. Existence of an alternative remedy is not regarded per se a bar to issuing a writ, and the court is not obligated, as a rigid norm, to always relegate the petitioner to the alternative remedy. This is more a matter of self-imposed restriction by the courts on themselves. The courts recognise that there could be circumstances justifying the issue of a writ without exhaustion of the alternative remedy. For example, if the petitioner has lost his remedy for no fault of his own, the High Court could take cognisance of the matter under article 226, but would not do so when he has lost his remedy through his own fault. If the alternative remedy is onerous and burdensome, then it could not be regarded as adequate and the High Court could take cognisance of the matter under article 226. For example, in tax

assessment proceedings, where an appeal from the assessing officer could be taken to a higher authority only after depositing the tax assessed, the assessee could approach the High Court under article 226 without exhausting the statutory remedy as it was onerous and not adequate\(^1\). Under the Sea Customs Act, 1878, an appeal from an order of the collector imposing penalty could be taken to the higher authority only after deposit of the amount of penalty imposed. This remedy is thus not adequate and, therefore, the High Court could exercise its writ jurisdiction\(^2\).

Normally when the petitioner has availed of the alternate legal remedy and the matter is pending before the authority, the court will not entertain a writ petition. But if a question arises in the course of those proceedings which the authority has no jurisdiction to decide, e.g. vires of the statute, the alternative remedy will not be a bar to the writ petition\(^3\). In such a case the alternative remedy is not an affective and efficacious remedy.

The High Court will not go into the disputed question of fact in exercise of its writ-jurisdiction\(^4\). The power

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1. Ibid
conferred on the High Court by Art.226 cannot be taken away or abridged by any law except by an amendment of the Constitution.1

The words writs, orders or directions in article 32 as well as 226 is in the process of evolution. The judicial opinion has been undergoing some shifts. The over-all picture is that the judiciary has expanded over time the range of persons or bodies to whom writs can be issued. The reason underlying this judicial approach is that centres of power should be restrained from arbitrary application of power against individuals. The eternal principle of modern democratic government is: "The governing power wherever located must be subject to the fundamental constitutional limitations".2

Writs are public law remedies and are generally designed to redress grievances against public officials or bodies. In the modern welfare state, the administration has assumed a sprawling and varied character. The state functions not only through the traditional government departments, officials, boards, administrative bodies and local governmental bodies but also through diversified various other agencies called public corporations, government companies, commissions, etc., which discharge various types of functions. The state at times utilises such structures as companies registered under the

Companies Act, or Co-operative Societies registered under the Co-operative Societies Act and some of these bodies may be sponsored by the government itself and some may even be set up by private persons. The modern administration has assumed such a multifarious character that the question against whom a writ may be issued? bristles with difficulties. This state of affairs is recognised by the Indian Constitution in article 12, which falls in Part III of the Constitution. This part contains Fundamental Rights of the people. Since writs can be issued for the enforcement of Fundamental Rights under articles 32 and 226, it follows that they can be issued for that purpose to all the bodies covered by article 12. As regards writs "for any other purpose" under article 226, they can certainly be issued to the various bodies covered by art.12, but it is a moot point whether this part of the jurisdiction of a High Court covers a broader area than that covered by article 12.

The writs of habeas corpus, mandamus, quo-warrants, Certiorari and Prohibition have been borrowed in India from England where they have had a long and chequered history of development and, consequently, have gathered a number of technicalities. The Supreme Court and the High Court have power to issue writs in the nature of habeas corpus, mandamus etc., under articles 32 and 226 respectively. The words "in the

nature of" in the Indian Constitutional provisions are significant as they indicate that the courts are not bound to follow all the technicalities of the English law surrounding these writs, or the changes of judicial opinion there from case to case and time to time. What the Indian courts have to do, therefore, is to keep to the broad and fundamental principles underlying these writs in the English law; the courts do not have to feel completely circumscribed by those principles. Although the Supreme Court has itself emphasised this front, in practice, however, the attitude of the Indian courts is by and large conditioned by the English approach and it is not often that the courts show a tendency to depart from the technicalities of the English law. The courts have generally been prone to follow the principles developed in English with some deviations here and there, except that in recent years some bold departures have been made from the English position. While the administration expands and perfects new techniques to interfere with individual freedom under the impulse of the concept of a socialist society, the tools of the disposal of courts to control the same remain somewhat antiquated. Quite a few aspects of administrative functioning fall outside judicial scrutiny. The result is the anomalous position that an individual aggrieved by administrative action may not always get relief through court action. This point will become clear after the discussion on the nature of the writs and the grounds on which they can be issued.
Writ of Habeas Corpus:

Habeas Corpus is a Latin term, which may be rendered into English in some such form as 'you must have the body'. This writ is used primarily to secure the release of a person who has been detained unlawfully or without any legal justification. The great value of the writ is that it enables immediate determination of the right of a person as to his freedom\(^1\). The writ is issued in form of an order calling upon a person by whom another person is detained to bring that person before the court and to let the court know by what authority he has detained that person. If the cause shown discloses that there is no legal justification for detention the court will order immediate release of the detained person. Thus the main object of the writ is to give quick and immediate remedy to a person who is unlawfully detained by the person whether in prison or private custody.

The writ of habeas corpus can be traced thirteenth century, the words 'habeas corpus' were a familiar formula in the language of civil procedure and it is likely that the phrase first appeared much earlier. The words simply represented a command, issued as a means or interlocutory process to have the defendant to an action brought physically before the court. The idea of producing the body with the cause of his

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detention was not present. In fact, there usually had been no detention at all\(^1\) and the purpose of the process was to order an officer to bring in the defendant, and not at all to subject the cause of a detention to the courts' scrutiny. It has, even, been said that the early use of habeas corpus was to put people in goal rather than to get them out, but this seems to have been a mistaken impression. Habeas corpus was used not to arrest and imprison, but to ensure the physical presence of a person in court on a certain day. There is some indication that 'habeas corpus' was also used to signify a command to the Sheriff to bring a person accused of crime before the court. Again, this seems to have been merely one way to have the party physically brought into face the charges against him where other methods had failed. The words 'habeas corpus' at this early stage were not connected with the idea of liberty, and the process involved an element of the concept of due process of law only in so far as it mirrored the refusal of the courts to decide a matter without having the defendant present.

Many of the purposes for which the writ has been utilized in the past are now matters of historical importance. Aliens who had been brought to England as slaves had attained freedom by means of habeas corpus\(^2\). In Hottentot Venus\(^3\), a

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3. (1810) 13 East.195
rule for a writ of habeas corpus was granted upon the allegation that an ignorant and helpless foreigner has been brought to this country and exhibited against her consent by those who held her in their custody. The writ was at one time also used as a means of securing freedom in cases of illegal imprisonment though within certain limits legal as a means of recruiting in the case of the navy and based on the royal prerogative, is no longer resorted to. During the first world war attempts were made to use the writ as a means of escaping from the compulsory military service under the provisions of the Military Service Acts¹.

In modern times the writ is most frequently invoked to test the validity of detention in public or private custody. A person who is in custody under a warrant or order of commitment may test the validity of the warrant or order under which he is detained by means of the writ of habeas corpus irrespective of the fact whether he is imprisoned under the sentence of a naval, military or ecclesiastical court or interned under the authority of some emergency state. The High Court is competent to issue a writ of habeas corpus for the production of a person illegally or improperly detained in public custody under executive orders².

In India, detention may be unlawful if, *inter alia*, it is not in accordance with law, or the procedure established by law\(^1\) has not been strictly followed in detaining a person, or there is no valid authority of law to detain a person, or the law is invalid because it infringes a Fundamental Right, or the legislature in enacting the law exceeds, its limits\(^2\). Under article 22, a person arrested is required to be produced before a magistrate within 24 hours of his arrest, and failure to do so would entitled the arrested person to be released.

However, recent developments of law indicate that in a writ of habeas corpus the production of the body of the person alleged to be unlawfully detained is not essential. In Kanu Sanjal v. District Magistrate. Darjeeling\(^3\), the Supreme Court however, held that while dealing with the application of writ of habeas corpus production of the body of the person alleged to be unlawfully detained was not essential. In that case the top-ranking Naxalite leader Kanu Sanyal was arrested in 1971 and was detained without trial in the Visakhapatnam Jail. He moved the Supreme Court for a writ under Art.32 of the Constitution challenging the legality of his detention and praying

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for the Courts' order for his production before the court. The
court issued the rule *misi* but not the production of the
detenu. Counsel appearing for the detenu, contended the
production of the body of person alleged to be illegally
detained was an essential feature of writ of habeas corpus
under Art.32 of the Constitution and that the court can dispose
of the petition only after the petitioner was produced in
person before it. Bhagwati, J., held that in writ of habeas
corpus under Art.32 the production of body of the person
detained before the court was not necessary for hearing and
disposing of the writ-petition by the court. The production of
body of a person illegally detained is not an essential feature
of the writ of habeas corpus. "Why should we hold ourselves in
fetters by a practice which originated in England about 300
years ago on account of certain historical circumstances which
have ceased to be valid even in that country and which have
certainly no relevance in ours", his Lordship said.

Though the traditional function of the writ of habeas
corpus has been to get the release of a person unlawfully
detained or arrested, the Supreme Court has widened its scope
by giving relief through the writ against inhuman cruel treat-
ment meted out to prisoners in jail\(^1\). In Sunil Batra II the

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court stated that;

the dynamic role of judicial remedies ... imparts to the habeas corpus writ a versatile vitality and operational utility that makes the heating presence of the law line up to its reputation as bastion of liberty even within the secrecy of the hidden cell.1

The court has thus permitted the use of the writ for protecting the various personal liberties to which the arrested persons or prisoners are entitled to under the law and the Constitution. The general rule is that an application can be made by a person who is illegally detained. But in certain cases, an application for habeas corpus can be made by any person on behalf of the prisoner, i.e. a friend or a relation. In an application for a writ of habeas corpus the Supreme Court will not follow strict rules of pleading nor place undue emphasis as to question as to on whom the burden of proof lies.

Even a postcard written by a detenue from jail would be sufficient to activise the court into examining the legality of detention. The Supreme Court has shown great anxiety for personal liberty and refused to throw out a petition merely on the ground that it does not disclose a prima facie case. This practice marks a departure from that obtaining in England where

observance of the strict rules of pleading is insisted upon in a writ of habeas corpus. But, in view of peculiar socio-economic conditions prevailing in this country the court has adopted liberal approach where large masses of people are poor, illiterate and ignorant and the access to the courts is not easy on account of lack of financial resources it would be most unreasonable to insist that the petitioner should set out clearly and specifically the grounds on which he challenges the order of detention. The burden of proof to justify detention has always been placed on the detaining authority.

Three views have been expressed as to date with reference to which the legality of detention of a person may be examined on a habeas corpus petition. In Gopalan v. Government of India, the Supreme Court ruled that the earliest date with reference to which the legality of detention may be examined is the date on which the application for the same is made to the court. In a few earlier cases, the view was taken that the legality was to be determined at the time of the return and not with reference to the institution of the proceedings. In another case, the Supreme Court has stated that the legality of detention is to be considered as on the date of

In Kanu Sanyal v. Distt. Magistrare\textsuperscript{2}(II), the Supreme Court has taken note of these three views and pointed out that the second view is more in accordance with the law and practice in England and largely accepted in India. The third view also has some relevance for if the detention at the hearing is legal, the court cannot order release of the person detained by issuing habeas corpus. In Kanu Sanyal, the court did not express any definitive view as to which of the three views is correct. In any case, the court has ruled that the earliest date with reference to which the legality of detention could be examined is the date of filing of the petition for habeas corpus and the court is not concerned with a date prior to that. In the instant case, the court refused to go into the validity of detention before the date of petition.

Writ of habeas corpus provides security against administrative and private lawlessness but not against judicial 'foolishness'. Therefore if a person has been imprisoned under the order of conviction passed by a court, writ would not lie. The normal procedure in such case is appeal. In exercise of its discretion, the court may refuse the petition if there is special alternative remedy available. But it is not a rule of the limitation of jurisdiction. The court may still grant relief in appropriate cases.\textsuperscript{3}

\textsuperscript{2} A.I.R. 1974 S.C. 510.
\textsuperscript{3} Gopalji v. Shree Chand, A.I.R.1955 All 28.
The writ of habeas corpus will lie if the power of detention vested in an authority was exercised *mala fide* and is made in collateral or ulterior purposes. In habeas corpus writ proceeding not only the fact of detention but the constitutionality of the law can also be challenged. In A.K. Gopalan v. State of Madras\(^1\), the court examined the constitutionality of the Preventive Detention Act. The legislature which deprives a person of his personal liberty by law must be competent to make that law. If the law is unlawful the detention will be unlawful. An appeal lies against an order of the High Court granting or rejecting the application for issue of the habeas corpus under Arts.132, 134 or 136.

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The Writ of Mandamus:

The word "mandamus" means "the order". The writ of mandamus is thus an order by a superior court commanding a person or a public authority (including the Government and public corporation) to do or forbear to do something in the nature of public duty or in certain cases of a statutory duty.

For instance a licensing officer is under a duty to issue a licence to an applicant who fulfils all the conditions laid down for the issue of such licence. But despite the fulfilment of such conditions if the officer or the authority concerned refuses or fails to issue the licence the aggrieved person has a right to seek the remedy through a writ of mandamus. Mandamus is thus a command issued by a court to an authority directing it to perform a public duty imposed it by law. The writ can be issued when the government denies to itself a jurisdiction which it undoubtedly has under the law, or where an authority vested with a power improperly refuses to exercise it. The function of mandamus is to keep the


public authorities within the limits of their jurisdiction while exercising public functions. Mandamus can be issued to any kind of authority in respect of any type of function—administrative, legislative, quasi-judicial, judicial. Thus, when the telephone of the applicant was wrongfully disconnected in spite of his paying his dues regularly, the High Court directed the telephone authorities to restore the connection within a week.

In India, mandamus can be issued to undo what has already been done in contravention of a statute, or to enforce a duty to abstain from acting unlawfully. For example, Mandamus can be issued to restrain the government from superseding a reference made by it earlier of an industrial dispute for adjudication to a labour tribunal because under the law the government has no authority to do so.

It is considered as a residuary remedy of the public law. It is a general remedy whenever justice has been denied to any person. English writers trace the development of the writ from the Norman conquest, however it was only in the early part of the eighteenth century that the writ came to be frequently used in the public law to compel the performance of the public duties.

**Conditions for the grant of Mandamus:**

(i) **There must be public or private duty:**

Until recently the law was that mandamus would be only to enforce a duty which is public in nature. Therefore a duty private in nature and arising out of a contract was not enforceable through this writ. It was on this basis that in I.T. Commr v. State of Madras\(^1\), the court refused to issue mandamus where the petitioners wanted the government to fulfil its obligation arising out of a contract. However, recently in Gujrat State Financial Corporation v. Lotus Hotel\(^2\), the Supreme Court issued writ of mandamus for the specific performance of a contract to advance money. In this case the Gujrat Financial Corporation a government instrumentality, had sanctioned a loan of Rs.30 lakhs to Lotus Hotel for the construction but later on refuse to pay the amount.

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1. A.I.R. 1954 Mad.54.
A public duty is one which is created either by a statute, the constitution or by some rule of common law. The public duty enforceable through mandamus must also be an absolute duty. Absolute is one which is mandatory and not discretionary. Therefore in Manjula Manjari v. Director of Public Instruction\(^1\), the court refused to issue mandamus against the Director of Public Instruction compelling him to include the petitioner's textbook in the list of approved books because it was a matter in the complete direction of the authority. Mandamus would not lie where the duty is ministerial in nature. A ministerial duty is one where the authority has to act on the instructions of his superior\(^2\). In the same manner mandamus can not be issued to enforce administrative directions which do not have the force of law, hence it is discretionary with the authority to accept it or to reject it\(^3\). But where the administrative instructions are binding, mandamus would lie to enforce it\(^4\). Mandamus would also lie to compel the authority to refund the amount of fee it has collected under law which has been declared ultra vires by the competent court.\(^5\)

\(^1\) A.I.R. 1952 Ori 344.
(ii) **There must be a specific demand and refusal:**

Before mandamus can be granted there must be a specific demand for the fulfilment of duty and there must be specific refusal by the authority. Therefore in Naubat Rai v. Union of India, the court refused mandamus because the petitioner who was illegally dismissed from the military form never applied to the authority for reinstatement.

To maintain a petition for mandamus, the petitioner must show that he has a right to compel the government to act in a particular manner. In the absence of any such right, mandamus cannot be granted. The existence of such a right is the sine qua non for the issuance of the writ. When the governing body of a college appointed a new principal after interviewing the candidates and considering their applications, mandamus would not be issued on the petition of a unsuccessful candidate as he has no legal right to be appointed.

Formerly, the rule was that only a person having a specific legal right to the performance of the duty by the concerned public authority had a right to seek mandamus. This meant a very strict legal standing rule and laid emphasis on individual right rather than public interest. The standing rule has now been very much relaxed and emphasis has come to be

1. A.I.R. 1953 Puni 137.
shifted from vindication of "individual right" to "public interest". The principal has come to be that public authorities should be made "to perform their duties, as a matter of public interest, at the instance of any person genuinely interested; subject always to the discretion of the count.

For the issue of mandamus against an administrative authority the affected individual must demand justice and only on refusal he has a right to approach the court.\(^1\)

Thus, a party seeking mandamus must show that he demand justice from the authority concerned by performing his duty and the demand was refused. In S.I. syndicate, the court refused to grant mandamus as there was no such demand or refusal where a civil servant approached the court for mandamus against wrongful denial of promotion, he was denied the relief because of his failure to make representation to the government against injustice.\(^2\) The demand for justice is not a matter of form but a matter of substance, and it is necessary that a "proper and sufficient demand has to be made.\(^3\) The demand must be made to the proper authority and not to an authority which is not in a position to perform its duty in the manner demanded. It is suggested that the court should not fossilize this rule into

something rigid and inflexible but keep it as flexible. Demand may also not be necessary "where it is obvious that the respondent would not comply with it and therefore it would be but idle formality."\textsuperscript{1}

However, express demand and refusal is not necessary. Demand and refusal can be inferred from the circumstances also. Therefore, in Venugopalan v. Commr. Vijayawada Municipality\textsuperscript{2}, the court inferred demand and refusal from the situation in which the petitioner filed a suit for injunction restraining the municipality from holding elections and the suit was contested by the municipality.

(iii) \textbf{There must be a clear right to enforce the duty:}

Mandamus will not be issued unless there is, in the applicant, a right to compel the performance of some duty cast on the authority. Therefore, in S.P. Manocha v. State of M.P.\textsuperscript{3} the court refused to issue mandamus to the college to about the petitioner because the petitioner could not establish a clear right to admission in the college. The right to enforce a duty must subsist till the date of the petition. If the right has been lawfully terminated before filing the petition, mandamus cannot be issued\textsuperscript{4}.

\textsuperscript{1} Narayan Singh v. Rajasthan, A.I.R.1984 Raj.69.
\textsuperscript{2} A.I.R. 1957 A.P. 833.
\textsuperscript{3} A.I.R. 1973 M.P. 84.
Mandamus is employed to enforce a duty the performance of which is imperative and not optional or discretionary with the authority concerned\(^1\). Mandamus is used to enforce the performance of public duties by public authorities. Mandamus is not issued when government is under no duty under the law\(^2\).

A state government made a rule taking power to grant dearness allowance to its employees. The rule neither conferred any right on the government employees to get the dearness allowance nor imposed any duty on the government to grant the same. The government had merely taken power to grant the allowance in its discretion. Accordingly, mandamus could not be issued directing the government to grant the allowance to its employees\(^3\).

Mandamus cannot be issued directing the state government to appoint a commission to inquire into changes in climatic cycle, floods in the state etc. The reason being that under the commission of Inquiry Act, the power of the government to appoint a commission is discretionary except when the legislative passes a resolution to appoint an enquiry commission\(^4\).

Mandamus can be issued on all those courts on which certiorari and prohibition can be issued. Therefore, mandamus

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can be issued for lack of jurisdiction, excess of jurisdiction, abuse of jurisdiction, for violation of the principles of natural justice and error of law apparent on the face of record. Mandamus may be issued not only to compel the authority to do something but also to restrain it from doing something. It provides a general remedy in administrative law.

Like any other extraordinary remedy, the grant of mandamus is discretionary. The court may refuse it if there is unreasonable delay in filing the petition, or if there is adequate alternative remedy, or if it is premature, or if its issuance would be infructuous and futile. Mandamus would also not be against the President or Governor of any state for the exercise and performance of powers and duties of his office.¹ In hearing the petition for mandamus, the court does not sit as a court of appeal. The court will not examine the correctness or otherwise of the decision on merits.² It cannot substitute its own wisdom for the discretion vested in the authority unless the exercise of discretion is illegal.³ This is true for other writs also.

There being no Fundamental Rights in England, there cannot be any question of the writ of mandamus being used for the enforcement of Fundamental Rights. It is used for the enforcement of the ordinary legal rights relating to public

¹. Article 361.
³. Ibid.
matters. In India, the writ is available under Article 226 not only for the purposes for which it is available in England but also for the enforcement of Fundamental Rights. It is obvious, therefore, that in the matter of enforcement of Fundamental Rights, Indian Courts may have to evolve principles which are different from those which govern the issue of the writ in England. For instance, the remedy by means of the writ being guaranted by the Constitution for the enforcement of the Fundamental Rights, it becomes the duty of the court to issue the writ of mandamus where a Fundamental Right has been infringed, in case where the writ might not be available in England.
The Writ of Quo Warranto

The term quo warranto means what is your authority. The writ quo warranto is used to judicially control executive actions in the matter of making appointments to public offices under relevant statutory provisions. The writ is also used to protect a citizen from the holder of a public office to which he has no right. The writ calls upon the holder of a public office to show to the court under what authority he is holding the office in question. If he is not entitled to the office, the court may restrain him from acting in the office and may also declare the office to be vacant. The writ lies in respect of a public office of a substantive character and not a private office such as membership of a school managing committee. An appointment to the office of a public prosecutor can be quashed through quo warranto if in contravention of relevant statutory rules as it is a substantive public office involving duties of public nature of vital interest to public. The Andhra Pradesh High Court quashed the appointment of a government pleader as the procedure prescribed in

the relevant rules for this purpose had not been followed. Nomination by the Governor of members to the state legislative council, appointment of a Chief Minister in a state, nominations or elections to municipal bodies, *inter alia* have been challenged by way of petitions for *quo warranto*. *Quo warranto* will not be issued if there is an alternative legal remedy provided by the statute. Thus it will not be a proper remedy to challenge the election of a Chief Minister to the House, as the statutes provides for the remedy of an election petition. The office of the Principal of a private college has been held to be not a public office.

It is a method of judicial control in the sense that the proceedings practically review the actions of the administrative authority which appointed the person. It tunes the administration by removing inefficient and unqualified perso-

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nnel and impostors from public offices. Thus the writ of quo warranto gives judiciary the weapon to control the executive, the legislative, statutory and non-statutory bodies in matters of appointment in the public offices. A.N. Ray, J. (who was fourth in order of seniority) was appointed as Chief Justice of India superseding his three senior colleagues who immediately resigned from the Supreme Court. A petition for the writ of quo warranto was moved in the Delhi High Court challenging the appointment of Ray, J., as the Chief Justice but the court dismissed the petition\(^1\). In the first place, the court stated that quo warranto was a writ of technical nature and it is discretionary for the court to grant it or refuse it according to the facts and circumstances of the case\(^2\). Secondly, the court argued that the writ would not be issued if it is futile to do so, or where a mere irregularity in the appointment can be cured. Thus, even if it were assumed that the appointment of the Chief Justice should be on the basis of the rule of seniority, Ray J., could immediately be reappointed, if quo-warranto were issued, for he was by then the senior-most judge of the court. It follows from this that if a holder of a public office is not qualified to hold the office initially but subsequently acquires the necessary qualifications during the pendency of the writ petition, the writ quo warranto will not be

2. In Jogendra Nath v. Assam A.I.R.1982 Gau.25, the court rejected a quo warranto petition challenging the appointment of the Chief Minister saying that this question was best left to the Assembly as to who should have been appointed to this office by the Governor.
Thirdly, the court ruled that malafides of the appointing authority is not relevant to the question of issuing quo-warranto as the writ is issued against the usurper of the office and not against the appointing authority. quo warranto would not be issued even if the appointment was made for a collateral purpose if the appointment did not violate any mandatory rule.

An appointment to a public office cannot be challenged in a collateral proceeding. However, in Haryana v. Haryana Co-op. Transport, the Supreme Court held that a person can challenge an award of a labour court under article 226 by challenging the appointment of the presiding officer thereof on the ground that he was not qualified under the law to hold the office. The court rules that the appointment was not being challenged collaterally in proceedings taken to challenge the award, but directly in substantive proceedings. This is artificial logic. The petitioner had not asked specifically in so many words that quo warranto be issued, but the court ignored the defect by saying that there was no magic in the use of a formula. In this case the court not only quashed the appointment of the presiding officer but also set aside the award.

Originally, quo warranto was a high prerogative writ. The essence of the procedure was calling a subject to account

for an invasion or unsurpation of the royal prerogative or the right of franchise or liberty of the Crown. At that period of time it was the king's weapon, and the subjects were not allowed to use it. The statute of 710 extended this remedy to the public.

Conditions for the issue of Quo warranto:

A writ of Quo warranto will issue in respect of an office only if the office is public. It will not lie in respect of office of a private charitable institution or of a private association. Thus, the managing Committee of a private school even though a small section of the public, viz. the students and guardians are interested in the school, is not an office of a public nature for the purpose of Quo-Warranto. The test of a public office is whether the duties of the office are public in nature, in which the public are interested whether it is or is not remunerated. But payment of remuneration out of public funds will be a specific test. In Anand Behari v. Ram Sahai, the court held that a public office is one which is created by the constitution or a statute and the duties of which must be such in which public is interested. In this case it was held that the office of speaker of Legislative Assembly is a public office.

A substantive office is one which is permanent in character and is not terminable at will. In R.V. Speyer¹, the word 'substantive' was interpreted to mean an 'office independent of title'. Therefore, quo warranto would be granted even when the office is held at the pleasure of the state provided it is permanent in character. In other words, the official must be an independent official and not merely one discharging the functions of a deputy or servent at the pleasure of another officer.

Mere declaration that a person is elected to an office or mere appointment to a particular office is not sufficient for the issue of quo warranto unless such person actually accepts such office². There must be a clear violation of law in the appointment of a person to the public office. If there is a mere irregularity, quo warranto will not lie. In State of Assam v. Ranga Muhammad³, the court found the transfer and posting of two district judges contrary to law, but did not issue quo warranto as it was a case of mere irregularity that did not make the occupation of office wrongful.

In short, Quo warrant will not issue unless there is a clear infringement of provisions having the force of law⁴ as

1. (1916) IKB 595.
distinguished from mere administrative instructions or some provision of the constitution itself\(^1\). The question to be determined before issuing quo-warranto is whether the impugned appointment has contravened the binding rule of law and not whether it has involved a 'manifest error' which is relevant in a proceeding for certiorari.

**When Quo-Warranto may be refused:**

Quo-warranto is a discretionary remedy which the court may grant or refuse according to the facts and circumstances of each case.\(^2\) The proposition that a writ can be issued on the petition of a person whose rights are adversely affected has no application to the writ of quo warranto. A petition for the writ is maintainable at the instance of any person, although he is not personally aggrieved or interested in the matter\(^3\). However, he must not be a man of straw set up by anyone. For example, in order to challenge a municipal office, the person must at least be the resident of the area where municipality governs.

Like any other extraordinary remedy, quo-warranto is also a discretionary remedy. It can be refused on the ground of unreasonable delay. Therefore, when a person has held

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office for a long time without challenge the writ may be refused. However, in K. Bheema Raju v. Govt. of Andhra Pradesh\textsuperscript{1}, the court remarked that in a matter which involves a Fundamental Right to public office and violation of legal procedure to be adopted in the matter of public appointment to public office the delay should not deter the court in granting the relief and rendering justice.

Normally, acquiescence is no ground for refusing the remedy in cases of public office appointments but it may be a relevant factor in cases of election\textsuperscript{2}. The writ may also be refused if there is an adequate alternative remedy. Therefore in V.D. Deshpande v. State of Hyderabad\textsuperscript{3}, the court refused the writ against members of legislatures who had become disqualified since they held offices of profit as Article 192 of the Constitution provided an adequate remedy.

\textsuperscript{1} A.I.R. 1981 A.P. 24, 29.
\textsuperscript{3} A.I.R. 1975 Hyd. 36.
The Writ of Certiorari:

Certiorari may be defined as a judicial order operating in personam and made in the original legal proceedings, directed by the Supreme Court or High Court to any constitutional statutory or non-statutory body or person, requiring the records of any action to be certified by the court and dealt with according to law. It is a remedy operating in personam, therefore writ can be issued even where the authority has become functus officio, to the keeper of the records.

Our Supreme Court has the power to issue certiorari only for the purpose of enforcement of Fundamental Rights, under Art.32, while our High Courts have this power under Art. 226, not only for this purpose but also for other purposes where, according to the general principles governing certiorari, it would lie. It is to be noted, however, that though we have an additional ground in India, namely, the enforcement of Fundamental Rights, the use of the writ has so far been confused to the purpose of quashing a decision and not to remove a case from an inferior tribunal to be tried by the Supreme Court or a High Court itself, for which there are statutory provisions.

'Certiorari' comes from 'certify' (to inform). It was the writ by which" the king commanded the judges of any inferior court of record to certify the record of any matter
in that court with all things touching the same and to send it to the kings court to be examined\(^1\).

The object of the writ was thus to remove the record of the inferior tribunal to the superior court so that the latter may "inform itself upon every subject essential to decide upon the propriety of the proceedings below"\(^2\).

"The ancient writ of certiorari in England is an original writ which may issue out of a superior court requiring that the record of the proceedings in some cause or matter pending before an inferior court should be transmitted into the superior court to be there dealt with. The writ is so named because in its original Latin form it required that the king should be certified of the proceedings to be investigated and the object is to secure by the exercise of the authority of a superior court, that the jurisdiction of the inferior tribunal to be properly exercised".\(^3\)

The Supreme Court while speaking of the scope of the writ of certiorari in the Province of Bombay v. Khushaldas\(^4\) case held that whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, acts in excess of their legal authority, a writ of certiorari lies.

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1. R.V.Northumberland Tribunal(1952) 1 All E.R.122(128) C.A.
3. R.V.Northumberland Tribunal(1952) 1 All E.R.122(128) C.A.
It does not lie to remove merely ministerial acts or to remove or cancel executive administrative acts. For this purpose the term "judicial" does not necessarily mean act of a judge or a legal tribunal sitting for determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances imposing liability affecting the right of others.

**Conditions precedent to the issue of Certiorari:**

The writ of certiorari is issued to a judicial or quasi-judicial body where there is want or excess of jurisdiction and where there is violation of procedure or disregards of principles of natural justice. The writ can also be issued where there is error of law apparent on the face of the record but not error of a fact.

It is a basic principle of administrative law that no body can act beyond its powers. This lies at the basis of judicial review on the ground of lack of jurisdiction. No authority can exceed the power given to it, and any action taken by it in excess of its power is invalid. Thus, when an authority is empowered to grant a stage carriage permit for a maximum period of three years, it cannot grant the same for the five years. The writ of certiorari is issued to a body

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performing judicial or quasi-judicial functions for correcting errors of jurisdiction as when an inferior court or tribunal acts without jurisdiction or in excess of it or fails to exercise it. The want of jurisdiction may arise from the nature of subject-matter, so that the inferior court had no authority to enter on the enquiry or upon some part of it. Want of jurisdiction may also arise from the absence of some preliminary proceeding or upon the existence of some particular facts which are necessary to the exercise of court's power and the court wrongly assumes that, that particular condition exists.

A writ of 'critiorari also lies against a court or tribunal when it acts in violation of the principles of natural justice are generally accepted are the court or tribunal should be free from bias and interest and audi alteram Partem, i.e.; the parties must be heard before the decision is given. The principle that the adjudicator should not have an interest or bias in the case is that no man shall be a judge in his own cause, justice should not be done but manifestly and undoubtedly seen to be done. The reason for this rule is to enable the tribunal to act independently and impartially without any bias towards one side or the other.

The writ is also issued for correcting an error of law apparent on the face of record. It cannot be issued to correct an error of fact. What is an error of law apparent on the face record is to be decided by the Courts on the each case. In Hari Vishnu v. Ahmad Ishaque the Supreme Court held that no error could be said to be error on the face of the record if it was not self-evident and if it required an examination, argument to establish it. An error of law which is apparent on the face of the record can be corrected by a writ of certiorari but not an error of fact, howsoever grave it may appear to be. The reason for the rule is that the court issuing a writ of certiorari acts in a supervisory jurisdiction and not appellate jurisdiction. Accordingly, it cannot substitute its own decision on the merits of the case or give direction to be complied with by the inferior court or tribunal.

The writ of certiorari cannot be issued against a private body. Co-operative Electricity Supply Society Limited incorporated under the Co-operative Societies Act, is a private body and not a public body discharging public function and the writ petition is, therefore, not maintainable against such a private society.

The Writ of Prohibition:

A writ of Prohibition is issued primarily to prevent an inferior court or tribunal from exceeding its jurisdiction or acting contrary to the rules of natural justice. It is issued by a superior court to inferior courts for the purpose of preventing inferior courts from usurping a jurisdiction with which it was not legally vested or in other words to compel inferior courts to keep within the limits of their jurisdiction\(^1\). It is a writ of right and court cannot refuse it in cases of excess of jurisdiction or where jurisdiction is being exercised in violation of the law of the land\(^2\).

The writ of Prohibition is designed to prevent the excess of power by public authorities. Formerly, the writ is issued only to judicial and quasi-judicial bodies. For example, in Brij Khandelwal v. India\(^3\), the Delhi High Court refused to issue prohibition to the Central Government to prevent it from entering into an agreement with Sri Lanka regarding a boundary dispute. The decision was based on the principle that prohibition does not lie against government discharging executive functions and that prohibition is intended to control quasi-judicial and not executive, functions. But this view is no longer tenable with the

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expansion of the concept of natural justice, and the emergence of the concept of fairness even in administrative functions, the rigidity about prohibition has also been relaxed. The writ can now be issued to anybody, irrespective of the nature of the function discharged by it, if any of the grounds on which the writ is issued is present. Prohibition is now regarded as general remedies for the judicial control of both quasi-judicial and administrative decisions affecting rights. Thus, in England the writ has been issued to a local council preventing it from licensing indecent films\(^1\) or preventing it from discharging its administrative functions unfairly\(^2\).

Both Certiorari and Prohibition are issued on similar grounds; only the stage at which each writ is issued differs. The function of Certiorari is to quash a decision already made and so it is issued when the body in question has disposed of the matter and rendered a decision. Prohibition is issued when the matter has not been disposed of but is being considered by the body concerned. The function of prohibition is to prohibit the body concerned from proceeding with the matter further. A court-martial constituted under the Army Act has been held subject to prohibition\(^3\).

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Grounds for the issue of Prohibition:

Prohibition can be issued on the grounds on which certiorari can be issued except in case of error of law apparent on the face of record.

In India, Prohibition is issued to protect the individual from arbitrary administrative actions. In Mannusamappa & Sons v. Custodian Evacuee Property\(^1\), the custodian, after accepting the petitioners as tenants of the evacuee property and after accepting rent for five months, purported to proceed against them as if they were in permissive possession. Prohibition was issued to forbid him from proceeding further.

Generally it is an efficacious and speedy remedy where a person does not desire any other relief except to stop the administrative agency. After nature remedy does not bar the issue of this writ\(^2\). The fact that something must be left to be done is necessary for the issue of the writ is not a rule of disability. It can be issued even when the agency has reached a decision to stop the authority from enforcing its decision. It can be issued even in cases where the authority has not kept any record.

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Generally speaking, the conditions for the issue of prohibition are the same as those for the issue of certiorari, except as to the stage when the relief is available. It follows that the grounds on which prohibition will issue are the same on which certiorari will issue (if the Petitioner comes to court after the tribunal has already pronounced its decision). Thus, prohibition will issue to prevent the tribunal from proceeding further, when the inferior court or tribunal proceeds to act without or in excess of jurisdiction and also when the inferior court or tribunal proceeds to act in violation of the rules of natural justice. In India we also find that the writ will issue to prevent the tribunal from proceeding further, when the inferior court or tribunal proceeds to act under a law which is itself ultra vires or unconstitutional.

Thus, we saw that judicial review of administrative actions through writ is vital to safeguard the civil liberties of the people. The progress of a nation, its unity and integrity, rule of law and social equality depend on the judiciary to a great extent, and the Supreme Court and High Courts performance has to be judged on the basis of the degree of their success in fulfilling these tasks. In India, these goals have not been fully achieved, but it is undeemable the Courts have done its job judiciously, despite its limitations.
CHAPTER

SHADES OF JUDICIAL REVIEW UNDER PRESIDENT'S RULE

* Proclamation of President's Rule and Judicial Review
* Facts of Individual Cases
* Judicial Review of Article 356
PROCLAMATION OF PRESIDENT'S RULE and JUDICIAL REVIEW

Article 356 envisages proclamation of Presidential Rule in case of a break-down of constitutional machinery in the states. During the debate on the present article 356, in the constituent assembly it was realised that the provision is a necessary evil and is indispensable for a nascent democracy. But the subsequent events proved that proclamation of Presidential Rule has become more a rule than an exception. It was invoked for about 101 times during 47 years.

The constitution 38th Amendment (1975) had placed proclamations issued under Articles 356 beyond the scope of judicial review "in any court on any ground", but the constitution 44th Amendment (1978) removed this impediment. It is clear that judicial review of a proclamation under Article 356 would be on any grounds upon which an executive determination which is found on subjective satisfaction can be questioned.

The legal experts say that after deletion of clause (5) by 44th Amendment leaves no doubt that judicial review is not totally excluded with regard to the question
relating to President's satisfaction. It is said that if the proclamation has been made upon a consideration which is wholly extraneous or irrelevant to the purpose for which the power under Article 356, had been confessed, namely, a breakdown of constitutional machinery in the state, or in other words, where there is no "reasonable nexus" between the reasons disclosed and the satisfaction of the President in such a case it can be said that there has been no satisfaction of the President, which is a condition precedent to exercise of the power under Article 356. It can also be questioned on the ground of malafide because a statutory order which lacks bonafides has no existence in law.

The Union Government is of the view that it cannot be compelled to disclose all the facts and materials leading to the satisfaction of the President. Article 74 would be a bar and the court would be precluded from going into the same. If the government does not give reasons, than the only scrutiny which the court can carry out is to examine whether the reasons given are wholly extraneous to the formation of the satisfaction.

It is impossible for the court to substitute its judgement for that of the Government. The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is not a 'decision
which can be judicially discoverable by manageable standards. It can be based on, inter-alia, public reaction, motivation and response of different classes of people and then anticipated future behaviour, and a host of other consideration. This argument of the Union Government can be accepted at the time when Article 356 contained clause (5), which was inserted by the 38th Amendment, by which the satisfaction of the President mentioned in clause (1) of Article 356 was made final and conclusive and that satisfaction was not open to be questioned in any court. But that cannot hold good after the 44th Amendment. Legal experts say it can be argued that the 44th constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the questions relating to the President's satisfaction.

In quasi-federal constitution like ours, Article 356 sticks out like a sore thumb—it is antifederal in character and spirit, and it has been one of the most frequently misused provisions of the constitution. The framers of our constitution expected that this extraordinary provision would be invoked rarely, in extreme cases—and as a last resort when all alternative correctives had failed. But the Sarkar's Commission (on centre-State Relations) truefully noted (in its Report in 1988) that "despite the hopes and expectations so emphatically expressed by the
framers. In the last 37 years, Article 356 has been brought into action no less than 75 times."

The power to declare President's rule has been challenged on many occasion for example before Kerala High Court in 1965, before Punjab High Court in 1968, before Andhra Pradesh and Orissa High Court in 1974 and before Supreme Court in 1977, 1989 and 1993. In these cases question of justiciability and validity of proclamation were involved and answered by the respective courts. This does not mean that the court are obliged to upset the declaration of every Presidential proclamation. It merely means that the courts are interested to consider the constitutionality of a proclamation. Courts were keen to consider many issues arose due to president rule e.g. to elucidate what a breakdown of the constitutional machinery in the state means, determination of governmental directive and threatened or imminent action, validity of proclamation and jurisdiction to consider disputes between governments of the states and the union relating to political question doctrine, interpretation of Article 356 in presence of 42nd Amendment Act 1976 and a part of these pivoce issues more important issue of jurisdiction etc. Conclusion of these issues might not settled legal war but provided an academic satisfaction.

The first case in the arena of Indian High Courts
appeared in 1965 before Kerala High Court. On September 10, 1964, the president assumed the governance of the state, consequent upon the resignation of the ministry. A general election held in March 1965, again resulted in a fragmented House, with no prospect of a state government. After consulting the party leaders, the Governor reported to the president that it was not possible to form the council of Ministers. The state legislature was dissolved again and President's rule imposed. A writ petition challenging the central action on the ground that the state legislature could not have been dissolved without its meeting at all, was rejected by Kerala High Court. The court also rejected the contention that the action of President was mala fide.\(^1\) This judgement makes it clear that the learned judge did not want to interfere in political matters. In evitabily, the judgement does not really elucidate what a breakdown of constitutional machinery in the state means. It was merely decided that there was a breakdown of the constitutional machinery in the state in this case.

The next case in which a High Court examined the propriety of a presidential proclamation arose in \_\_Rao Birinder Singh vs. Union of India\_\_\_\_ in Haryana. Here the president accepted the Governor's recommendation that President's rule should be imposed. The politics of the

\_\_I.K.K.Aboo vs. Union of India A.J.R 1965 Ker. 229._\_\_\_.
Haryana assembly were torn apart by defections. The petitioner had a majority and naturally contended that the President's rule could not be imposed as long as he commanded a majority. He argued that the action was malafide.

Chief Justice Mehar Singh (for Justice Narula and himself) founded a rather novel and neat way out of the situation presented before him. He argued that the president's constitutional powers were not amenable to the jurisdictional control of High Court because the President did not act on behalf of the "executive" of the Union but in a constitutional capacity.

The approach of the High Courts have been interesting. The Kerala and Punjab High Courts managed to follow what we have called the "total ouster" approach while at the same time appearing to approve of the propriety of the action of President and Governor. The Orissa High Court in Bijiayanand's case accepted the total "ouster" approach but expressed the opinion that the Governor may have acted in violation of the settled constitutional conventions. This was an interesting attempt to have it both ways. In re A. Sueeramula, Justice Chinnappa Ready had to consider the validity of a proclamation declaring President's rule in Andhra Pradesh. Justice Ready in this remarkable judgement, followed the "total ouster" approach and at the same time explained the court's helplessness by taking stock of the

1. Bijiayanand Vs. President of India. A.I.R 1974 Ori. 52
2. A.I.R 1974 A.P. 106
realities of the power structure with in which the courts existed. But he also left upon another approach which is quite like what we have called the "Substantive review" approach. He took judicial notice of contemporary political events and satisfied himself that a presidential proclamation was necessary and proper. While it is true that this argument was a secondary and alternative argument, it contains within it possibilities of an extremely wide power of review.

None of these cases came before Supreme Court. After emergency an important case came before the Supreme Court when the newly elected Janta Party wanted to impose President's rule on nine states which had Congress ministers. Not unnaturally, the Supreme Court become the focus of attention. Not only had these provisions finally arrived at the Supreme Court, but they had arrived with a bang and not a whimper. This was the widest and most political use of the President's rule that independent India had ever seen.

**Mass Dissolution Case**¹:

This case had a lot of political overtones because it arose as a result of series of political events. The general election which was held in March 1977, resulted in a landslide, victory for the newly formed Janta Party in Northern

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¹ State of Rajasthan Vs. Union of India, A.I.R 1977 SC 1361.
India even though the Congress Party held firm in Southern India. Soon after the Janta Government came into power, Charan Singh, the Home Minister, wrote letter on April 18, 1977 to the Chief Ministers of the nine northern states which had congress Governments. He advised the congress Chief Ministers of these governents due to Janta victory in their states they should seek a fresh mandate from the people of those states. Mr. Shai Bhushan, Minister of Law in a radio interview widely reported in the newspapers suggested that if the states did not comply with this advice President's rule would be imposed on there statesand these congress goverment would be forced to seek a fresh mandate from the people who inhabited their states.¹ This interview was given on April 22, 1977. The various states responded to this in next two days filing petitions before Supreme Court under Article 131 of the constitution which gives the Supreme court the power, interalia, to decide disputes "between the Goverment and one or more States....if and so for dispute involves any question (whether of Law of fact) on which the existance of a legal rights depends...."The petitions were further supported by three members of legislative assemblies which were threatened with dissolution. These members of the

¹. Ibid quoted judgement of Beg C.J, at pr. 22, p-1373
legislative assemblies argued that they had a right to property in the salaries they received as members of their legislative assembly. The threatened dissolution, they argued, interfered with their right to property which was guaranteed under Article 19(1)(f) of the constitution.

All this had to making of drama. Nine states had filed applications along with three members of the legislative assembly and several interveners. The presence of multiple appeals and interveners, invariably widen the issues in a case before Supreme Court.

There was only one embarrassing factor in all this. The threatened Presidential proclamation had not yet been declared. The Supreme Court was thus being asked to consider a hypothetical question. The relief the petitioners wanted could be paraphrased as follows:

If the President were to pass a proclamation for the reasons suggested by Mr. Charan Singh in his letter and the law minister in his interview, such an action would be unconstitutional and an injunction even a permanent injunction, should be granted to restrain the President from considering such an action of the Council of Ministers to give him advice to follow such a course of action.

In the Dissolution case, there was only a threat that
some action might be taken. The Supreme Court had judicially found that the Charan Singh's letter was not a formal governmental directive. That being the case the court was not really considering an actual action of the government but a threatened or even imminent action.

The Supreme Court's willingness to hear a case in which the impugned governmental action had yet to be taken can be interpreted in various ways. The first and least generous interpretation is that the Supreme Court was used by states for symbolic litigation. Thus all the parties in the case were trying to get political mileage out of court. The second interpretation was that the Supreme Court was being used as a testing ground in order to show to people that the new Janta government was willing to deal with constitutional problems in a legal way. Not surprisingly, the proclamation was declared on April 30, 1977 – one day after the Supreme Court had agreed to dismiss the case. Thirdly, it would be argued that the Supreme Court had not really heard the case, but merely discussed some preliminary issues and found them to be not justiciable before the court. Fourthly, it would have been quixotic for the Supreme Court is that there was no issue before the court. Clearly, the common man would be baffled by such esoteric legal jugglery. This was certainly the view taken by justice Chandrachud who, writing his judgement after the proclamation had been issued, said:
But the proclamation having since been issued, it would be hypertechnical to discuss the writ petitions on the ground that there was no invasion of the petitioner's rights on the date when the petitions filed were in this court.1

It does, however, seem strange that the court was prepared to adjudicate on the validity of a proclamation which petitioner's available for discussion when the court heard and dismissed the case.

A common sense view of the Supreme Court's stand would be that it was not willing to be seen to stay away from a problem presented to it simply because the problem had a political face to it. And so the Supreme Court assumed jurisdiction in this case. But it is clear as to what was the basis on which they assumed jurisdiction.

Quite apart from the hypothetical case argument, there was another jurisdictional question that the court did not wholly resolved. It was argued that the Supreme Court did not have jurisdiction to consider disputes between two governments of the states and the union but only disputes were between states and the union. Accordingly this case, it was alleged, was a dispute between the governments. The Janata government at the centre and various congress government in the states. It was not a dispute between the states and Union. This argument

1. Ibid at pr. 94 pp- 1393 - 4.
was accepted by three judges and rejected by another three judges. Chief Justice Beg assumed that the jurisdiction of Article 131 was very wide. It was a question as to whether Chief Justice Beg admitted jurisdiction in this case or not. If he did not, much of what was written in this case was clearly obiter dictum.

In many ways one of the crucial questions which the court had to answer related to the 'Political question' doctrine. The real question was when can the court interfere in and adjudicate upon a political question? This question had never been discussed fully by the Supreme Court. Chief Justice Subha Rao in some extrajudicial remarks had taken the view that the real clue to the problem was that the court was concerned with constitutional matters and could deal with political questions only on the basis that they raised constitutional issues...

Supreme Court's credibility would be very seriously affected if it declared what the Justice Bhagwati called a 'Judicial hands of' whenever a political question came up before the court. Though courts cannot enter what was called a political 'Prohibited area' or Political thicket they

2. Ibid. At para.142 p.1413.
3. Ibid. At para.144 ,p.1414.
must adjudicate on all constitutional questions even though they may have a political complexation to them.

The real question in 'Dissolution Case' was how the Supreme Court would approach the interpretation of the Article 356. This was all the more important because the 42nd Amendment to the constitution added a clause to Article 356 which read:

'Notwithstanding anything in this constitution the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground.'

The judges chose to ignore this clause. But in many ways the clause merely re-stated what has already been said in a lot of Privy Council decisions and by House of Lords. The import of these decisions was that the executive, and not the courts, would determine whether or not a particular emergency was justified or not. The court accepted the import of these rulings.

But this does not mean that the judges totally abandoned the idea that the exercise of these powers could be
subject to judicial review. The judges suggested that the review could take place on the following basis:

(a) Where the order was *malafide*.
(b) Where the authority passing the order took into account extraneous or irrelevant considerations.
(c) Where the authority passing the order failed to take into account relevant considerations.

To these Chief Justice Beg added a fourth restriction:
(d) The order should not be used for any purpose which was inconsistent with the provisions of the constitution.

But there was still one question which the Supreme Court did not tackle. The question was: what did the words "....the Government of a state cannot be carried on in accordance with the provisions of the constitution" in Article 356 of the constitution mean? Could they cover anything and everything? Could President's rule be declared in the situation where it would appear that the President's rule was being imposed in the states simply because the party in power in these states had suffered a severe set-back in general elections to the Lok Sabha? Most of the judges in the Supreme Court clearly did not answer this question fully. These matters were left to the satisfaction of the executive. At the same time it is clear that some of the judges appeared to approve of the constitutionality of the moves made.¹

¹. Ibid at pr. 170, p-1420, 1441, 1416-7.
Now let us turn to the petition of the Legislators that their fundamental rights were being taken away. This was not fully discussed by the judges. Chief Justice Beg and Justice Utwalia took the view that the petitioners had not made out a case without explaining why. Justice Chandrachud, Bhagwati, Gupta and Goswami did not even decide whether the legislators had a Fundamental Right to property in their salaries. They argued that the 'dissolution' had too remote an effect on their right such as it was.

The judgements of Supreme Court in the 'Dissolution case' are bound to give rise to some dismay. The court examined a hypothetical question. In that action complained was imminent and had not been taken. The court did not come to a clear ruling on whether it had jurisdiction to hear the case under Article 131. The court did not spell out the implications of the ouster clause in Article 356 (5) which had been introduced by the 42nd Amendment. But at the same time, the 'Dissolution case' did make a significant contribution. It made clear the courts have a role to play even when they are confronted with political questions. At the same time, it spelled out that the courts would interfere if the provisions of Article 356 were being used for improper purposes.

S.R. Bommai Vs Union of India\(^1\).

After the Dissolution case the next case was decided by the constitution bench of nine judges headed by Justice

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1. 1994 (2) Scale pp - 37 - 228
Ratnavel Pandian on March 11, 1994 which upheld the validity of the proclamation of the President's rule in the states of Madhya Pradesh, Himachal Pradesh and Rajasthan in the wake of Ayodhya incidents of Dec. 6, 1992.

However, the bench which also comprised Justices A.M. Ahmadi, Kuldip Singh, J.S. Verma, P.B. Sawant, K. Ramaswamy, S.C. Agarwal, Yogeshwar Dayal and Jeevan Raidy held that similar impositions of President's rule in Nagaland (1988), Karnataka (1989) and Meghalaya (1991) were unconstitutional.
FACTS OF THE INDIVIDUAL CASES

(i) KARNATAKA:- Taking first the challenge to the proclamation issued by the President on 21.4.1989 dismissing Government of Karataka. The facts were that the Janta Party being the majority party in the state legislative had formed government under the leadership of Mr. S.R Bommai on 30.8.1988 following the resignation on 1.8. 1988 of the earlier Cheif Minister, Mr. Ram Krishna Hegde. In September 1988 the Janta Party and Lok Dal (B) merged into a new party called Janta Dal. On 17.4.1989 one Mr. K.R. Molakery, a legislator of Janta Dal defected from the party and presented letter to the Governor withdrawing his support to the ministry. On the next day he presented to the Governor 19 letters allegedly signed by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to BJP who was supporting the ministry, withdrawing their support to this ministry. On 19.4. 1989 the Governor sent a report to the President stating therein that there were dissensions and defections in newly formed Janta Dal. In Support of his case, he referred to the 19 letters received by him. He further stated that in view of the withdrawal of the support by the said legislators, the Cheif Minister Mr. S.R. Bommai did not command a majority in the
Assembly. He also added no other party was in a position to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356 (1). On 24.4.1989 seven out of nineteen Legislators who had allegedly written the said letter to the Governor sent letters to him complaining that their signatures were obtained on earlier letters by misrepresentation and affirmed their support to the ministry. The state cabinet met on the same day and decided to convene the session of the Assembly within a week i.e. on 27.4.1989. The Governor however, sent yet another report to the President on the same day i.e. 20.4.1989, in particular, referring to the letters of seven members pledging their support to the ministry and withdrawing their earlier letters. He, however, opined in the report that the letters from the seven legislatures were obtained by Chief Minister by pressuring them and added that the horse-trading was going on and atmosphere was getting vitiated. In the end, he reiterated his opinion that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under Article 356 (1). On that very day, the President issued the Proclamation in question. The Proclamation was, thereafter approved by the Parliament as required by Article 356 (3). Mr. Bommai and some other members of the council and Ministers challenged the validity of Proclamation before Karnataka High
Court. A three-Judge Bench of High Court dismissed the petition holding, among other things, that the facts stated in Governor's report could not be held to be irrelevant and that the Governor's satisfaction was based upon reasonable assessment of all the relevant facts. The court also held that recourse to floor-test was neither compulsory nor obligatory and not was a prerequisite to sending the report to the President. It was also held that Governor's report could not be challenged on the ground of legal malafides since the Proclamation had to be issued on the satisfaction of the council of Ministers. Court further relied upon the test laid down in *State of Rajasthan V. Union of India*¹ and held that on the basis of material disclosed, the satisfaction arrived at by the President could not be faulted.²

(ii) **MEGHALAYA:** The facts are that the writ petitioner G.S. Masser belonged to a Front known as Meghalaya United Parliamentary Party (MUPP) which had a majority in the Legislative Assembly and had formed in March 1990, a Government under the leadership of Mr. B.B. Lyndoh. On 27.7.1991, one Mr. Kyndish Arthree who was at the relevant

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¹ A.I.R 1977 S.C. 1361.
² 1994 (2) Scale at pp - 87 - 88.
time, the speaker of the House, was elected as leader of the opposition group known as United Meghalaya Parliamentary Forum (UMPF). The majority in this group belonged is the Congress Party. On his election Mr. Arthree claimed support of majority of the members in the Assembly and requested to the Governor to invite him to form the Government. Thereupon Governor asked the then Chief Minister Mr. Lyndoh to prove his majority on the floor of House. Assembly was convened on 7.8.1991 and a Motion of confidence was moved. Thirty legislators supported the Motion and 27 voted against it. Instead of announcing the result, the speaker declared that he had received a complaint against five independent MLAs of the ruling coalition from alleging that they were disqualified as legislators under the anti-Defection Law and since they had become disentitled to vote, he was suspending their right to vote. On 11.8. 1991, the speaker issued show cause notices to the alleged defectors, the five independent MLAs. The five MLAs replied to the notice denying that they had continued to be independent. On receipt of the replies, the speaker passed on order on 17.8. 1991 disqualifying he five MLAs on the ground that the four of them were ministers in the then ministry and one of them was the Deputy Goverment Chief whip. Assembly was summoned second time for of confidence but speaker did not send notices to
five MLAs and made arrangements to prohibit their entry in the Assembly. On 6.9.1991, the five MLAs, approached Supreme Court. The Court issued interim order staying the operation of the Speaker's orders. The Governor prorogued the Assembly indefinitely by his order dated 8.9.1991. Independent MLAs moved a contempt petition against Speaker in Supreme Court. On 8.10.1991 Court passed another order directing that all authorities of the state should ensure the compliance of the Court's interim order of 6.9.1991. After this order five independent MLAs received invitation to attend the session of the Assembly convened on 8.10.1991. After the Motion of Confidence the ministry was put to vote, the Speaker declared that 26 voted for the Motion and 26 against it and excluded the votes of four independent MLAs. Thereafter, declaring that there was a tie in voting, he cast his vote against the Motion and declared that the Motion had failed and adjourned the House sine die. The thirty MLAs sent a letter to the Governor stating that they had voted against the favour of the ministry and had also passed a Motion of No-confidence against the Speaker. However, on 9.10.1991, the Governor wrote a letter to the Chief Minister asking to resign in view of what had transpired in the session on 8.10.1991. The Chief Minister moved the Supreme Court against the letter of the Governor. Court on 9.8.1991, among other things asked the Governor to take into
consideration of the orders of the court and votes cast by the four independent MLAs before taking any decision on the question whether the Government had lost the Motion of confidence. In spite of this, the President on 11.10.1991 issued Proclamation under Article 356 (1). The Proclamation stated that the President was satisfied on the basis of the report from the Governor and other information received by him that the situation had arisen in which the Government of state could not be carried on in accordance with the provisions of the constitution. The Government was dismissed and Assembly was dissolved. Both Houses of Parliament met and approved the Proclamation issued by the President.

(iii) NAGALAND: The President Proclamation dated 7.8.1988 was issued under Article 356 (1) imposing President's rule in the state of Nagaland. At the relevant time, in the Nagaland Assembly consisting of 60 members, 34 belonged to Congress (I), 18 to Naga National Democratic Party, one belonged to Naga Peoples Party and seven were independent. Mr. Set’a the leader of ruling party was the Chief Minister. On 28th July, 1988, 13 of the 34 MLAs of the ruling Congress (I) party informed the speaker of the Assembly that they had formed a party separate from Congress (I) ruling party and requested him for allotment of separate seats for them in the House.

1. 1994 (2) Scale at pp - 91-92
The session was to commence on 28.8. 1988. By his decision of 30.7. 1988, the Speaker held that there was a split in the party within the meaning of the Tenth Schedule of the constitution. On 31.7. 1988 Mr. Vamuzo, one of the 13 defecting MLAs who had formed separate party informed the Governor that he commanded the support of 35 out the then 59 members in assembly and was in a position to form the Government. Allegation was made against the Vamuzo for confinement of the MLAs. Mr. Vamuzo denied the said allegation and asked the Chief Secretary to verify the truth from the members themselves. On varification the members told the Chief Secretary that none of them was confined. On 6.8.1988, the Governor sent a report to the President of India about the formation of a new party by 13 MLAs. He also stated that the said MLAs were allured by money. He further stated that the said MLAs were kept in forcible confinement of Mr. Vamuzo and one other person, and that the story of the split in the ruling party was not true. He added that the Speaker was hasty in according recognition to the new group of the 13 members and commented that horse-trading was going in the state. He expressed the apprehension that if the affair were allowed to continue as they were, it would affect the stability of the state. In the mean time Chief Minister submitted his resignation to the Governor and recommended the imposition of President's rule. The
President thereafter issued the impugned Proclamation and dismissed the Government and dissolved the Assembly. Mr. Vamuzo, the leader of the new group challenged the validity of the Proclamation in the Gauhati High Court. The Petition was heard by a Division Bench which differed on the effect and operation of Article 74 (2) and hence the matter was referred to third judge. But before the third judge could hear the matter, the Union of India moved the Supreme Court for grant of special leave which was granted and the proceedings in the High Court Stayed.1

Now let us mention the facts of the Madhya Pradesh, Rajasthan and Himachal Pradesh. The elections were held to the legislative Assemblies in the states along with legislative Assembly of Utter Pradesh, in February, 1990. The BJP secured majority in the Assemblies of all the four states and formed Governments there.

Following appeals of some organisation including the BJP, thousands of KarSevaks from Utter Pradesh as well as from other states including M.P., Rajasthan and Himachal Pradesh gathered near the Babri Masjid on 6th December, 1992 and eventually some of them demolished the disputed structure. Following the demolition, on the same day the U.P. Government

1. 1994 (2) Scale. ntp - 92 -93
resigned. Thereafter on the same day the President issued Proclamation under Article 356 (1) and dissolved the legislative Assembly of the state. The said Proclamation is not challenged.

Demolition in turn created further reaction in the country resulting violence and destruction of the property. The Union Government tried to cope up with the situation by taking several steps including a ban on several organisations including RSS, VHP and Bajrang Dal which had along with BJP given a call for Kar Sevaks to march towards Ayodhya. The ban order was issued on December 10, 1992 under the lawful Activities (prevention) Act, 1967. The dismissals of the state Governments in M.P., Rajasthan and Himachal Pradesh were admittedly a consequence of these developments and were effected by the issuance of Proclamation under Article 356 (1), all on the 15th December.

(iv) MADHYA PRadesh:- The Proclamation was a consequence of three reports sent by Governor to the President on December 8, 10 and 13, 1992. Reports referred to the fast deteriorating law and order situation in the wake of widespread acts of violence, arson and looting expressed his "lack of faith" in the ability of the state Government to stem the tide primarily because of the political
leadership' "overt and covert support to the associate communal organisations" which seemed to point out that there was a break-down of the administrative machinery of the state. The Governor also referred to the statement of the Chief Minister of M.P. Mr. Sunder Lal Patwa describing the ban of RSS and VHP as unfortunate. The Governor expressed his doubt about the credibility of the state Government to implement sincerely the Centre's direction to ban the said organisations. He recommended that considering the said facts & the fact that the RSS was contemplating a fresh strategy to chalk out its future plan, and also the possibility of the leaders of the banned organisations going under ground, particularly with the convenience of the State Administration, the situation demanded immediate issuance of the Proclamation. Hence President on December 15, 1992 issued the proclamation.¹ The proclamation was challenged before M.P. High Court. The court in a historic judgement by 2-1 majority held that the Presidential order imposing President's rule in the state was invalid and unconstitutional as being beyond the scope of Article 356 of the constitution. The government at the Centre filed appeal against judgement in the Supreme Court².

1. Ibid at pp - 94-95
(v) HIMACHAL PRADESH:- The proclamation issued by the President succeeded the report of Governor which was sent to him on 15.12. 1992. In his report Governor has stated, among other things that the Chief Minister and his Cabinet had instigated Kar Sevaks from Himachal Pradesh. The report of Governor was almost similar to the report of Governor of M.P. It was on the basis of this report that the Proclamation in question was issued.

(VI) RAJASTHAN:- The Presidential Proclamation was pursuant to the report of Governor sent to President that Government of Rajasthan had played "an obvious role" in the episode at Ayodhya. One of the Ministers had resigned and along with him, 22 MLAs and 15500 BJP workers has participated in Kar Seva at Ayodhya. They were given royal send-off and welcome. Report of Governor was identical as mentioned above in case of Himachal Pradesh.

The validity of the three Proclamations was challenged by writ petitions in their respective state High Courts. Proclamations in respect of the Governments and the legislative Assemblies of Rajasthan and Himachal Pradesh which were pending in the respective High Courts transferred to the Supreme Court¹.

¹. 1994 (2) Scale at p - 96
In this case six judgements were delivered by Mr. Justice S.R. Pandian, Mr. Justice Ahmadi, Mr. Justice J.S. Verma on his behalf and on behalf of Mr. Justice Yogeshwar Dayal, Mr. Justice P.B. Sawant for himself and Mr. Justice Kuldip Singh, Mr. Justice K. Ramaswamy and Mr. Justice S.C. Agarwal.

The separate judgements were delivered on various grounds for example the judicial review of Article 356, Secularism, scope of reinduction of dismissed Governments etc. Let us discuss Separate judgements on these grounds.
The following main question arises in this case:-

(i) Is Presidential Proclamation issued under Article 356 of the constitution subject to Judicial Review?

(ii) If so what are the parameters and scope of Judicial Review.

Justice Pandian held that since many learned brother have elaborately dealt with the constitutional provisions relating to the issue of the Proclamation and as I am in agreement with the reasoning given by B.P. Jeevan Reddy, J. it is not necessary for me to make further discussion on this matter except saying that I am of the firm opinion that the power under Article 356 should be used very Sparingly and only when President is fully satisfied that situation has arisen where the Government of the state cannot be carried on in accordance with the provisions of the Constitution.

Justice Ahmadi in his judgement held that a political party with an ideology different from the ideology of the political party in power in any state comes to power in the centre, the Central Government would not be justified in exercising power under Article 356 (1) unless it is shown
that the ideology of the political party in power in the state is inconsistent with the constitutional Philosophy and therefore, it is not possible for the party to run the affairs of the state in accordance with the provisions of the constitution. But where a State Government is functioning in accordance with the provisions of the constitution and its ideology is consistent with the constitutional Philosophy, the Central Government would not be justified in resorting to Article 356 (1) to get rid of the state Government 'solely' on the ground that a different political party has come to power at the centre with a landslide victory. Such exercise of power would be clearly malafide. The decision of this court in state of Rajasthan v. Union of India¹ to the extent it is in consistent with the above discussion does not, my humble view, lay down the law correctly.

The decision to issue a proclamation is based on the subjective satisfaction of the President i.e. Council of Ministers, but the court would hardly be in a position to X-ray such a subjective satisfaction for want of expertise in regard to fiscal matters.

Justice Ahmadi further stated that the marginal note of Article 356 indicates that the power conferred by the

¹ A.I.R 1977 S.C. 1361.
provision is exercisable 'in case of failure of constitutional machinery in the state. While the text of the said article does not use the same phraseology, it empowers the President, on his being satisfied than, 'a situation has arisen in which the Government of the states 'cannot' be carried on in accordance with the provisions of the constitution. This action he must take on receipt of a report from the Governor of the concerned state or 'otherwise' if he is satisfied therefrom about the failure of the constitutional machinery. The expression 'otherwise' is a very wide term and cannot be restricted to material capable of being tested on principles relevant to admissibility of evidence in courts of law. It would be difficult to predicate the nature of material which may be placed before the President. Since the President is not expected to record his reasons for his subjective satisfaction, it would be equally difficult for the court to enter the Political thicket to ascertain what weighed with the President for the exercise of power under the said provision. Therefore in my view the court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be malafide. In other words it can be challenged on the limited ground that the action is malafide or ultra vires Article 356 itself.
Justice Verna in his judgement and on behalf of Justice Yogeshwar Dayal said that there is no dispute that the proclamation issued under Article 356 is subject to judicial Review. The question now is of the test applicable to determine the situation in which the power of judicial review is capable of exercise or, in other words, the controversy is justiciable. The deeming provision in Article 356 is an indication that cases falling within its ambit are capable of judicial Scrutiny by application of objective standards.\(^1\)

Justice Sawant on behalf of Justice Kuldip Singh and himself held that the validity of the proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the proclamation was issued in the mala fide exercise of the power. When a prima facie case is made out in the challenge to the proclamation, the burden is on the union Government to prove that the relevant material did in fact exist and such material may either the report of Governor or other than the report.

Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction. The acts of state Government which are

\(^1\) Ibid at pp-53-54
calculated to subvert or sabotage secula\textit{r}ism as enshrined in our constitution, can lawfully be deemed to give rise to a situation in which the Government of the state cannot be carried on in accordance with the provisions of the constitution.

The proclamation dated 21.4.1989 and 11.10.1991 and action taken by the President in removing the respective Ministries and Legislative Assemblies of the state of Karnataka and Meghalaya are unconstitutional. The proclamation dated 7.8.1988 in respect of state of Nagaland is also held unconstitutional.

The proclamation dated 15th December 1992 and actions taken by the President removing the Ministries and dissolving the legislative Assemblies in the state of M.P., Rajesthan and Himachal Pradesh pursuant the said proclamations are not unconstitutional\textsuperscript{1}. Justice K. Ramaswamy in his separate judgement held that Article 74(2) is not a barrier for judicial review. It only places limitations to examine whether any advice and if so what advice was tendered by council of Ministers to the President. Article 74(2) receive only this limited protective canopy from disclosure, but the material on the basis of which the advice was tendered by the council of ministers is subject to judicial scrutiny

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\textsuperscript{1} Ibid at pp - 107-108.
Judicial review is a basic feature of the constitution. This court/High Courts have constitutional duty and responsibility to exercise judicial review as centinel quevive. Judicial review is not concerned with the merits of the decision but with the manner in which the decision was taken. This court as final arbiter in interpreting the constitution, declares what the law is. Higher judiciary has been assigned the delicate task to determine what powers the constitution has conferred on each brance of the Goverment and whether the actions of that branch transgress such limitations, it is the duty and responsibility of this court/High Courts to lay down the law. The judicial review, therefore extends to examine the constitutionality of the proclamation issued by the President under Article 356. It is a delicate task, though loaded with political overtones, to be exercise with circumspection and great care. In deciding finally the validity of the proclamation there cannot be any hard and fast rules or fixed set of rules or principles as to when the President's satisfaction is justiciable and valid. The decision can be tested on the ground of legal malafides or high irrationality in the exercise of the discretion to issue Presidential proclamation.

1. Ibid at pp-153-156.
Justice B.P. Jeevan Reddy on behalf of Justice S.C. Agarwal and himself said on the point of judicial review of Article 356 that the power conferred by Article 356 upon the President is a conditioned power. It is not absolute power. The existence of material which may compose of or include the report of the Governor is a precondition. The satisfaction may be formed on relevant facts. Article 74(2) merely bars an enquiry into the question whether any and if so, what advice was tendered by the ministers to the President. It does not bar the court from calling upon the union council of ministers (Union of India) to disclose to the court the material upon which the President had formed the requisite satisfaction. The proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the proclamation if it is found to be malafide or based on wholly irrelevant or extraneous grounds. The deletion of clause(5) (which was introduced by 38th) Amendment Act, by the 44th (Amendment) Act, removes the cloud on the revivality of the action. When called upon the union of India as to produce the material on the basis of which action is taken. It cannot refuse to do so, if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material irrelevant, the court
cannot interfere so long as there is some material which is relevant to the action.\footnote{Ibid at pp. 227-8}

There was no difference of opinion among the judges that the Presidential proclamation under Article 356 was subject to judicial review.

\textbf{ROLE OF THE GOVERNOR:-}

The apex court held that the key actor in the centre-state relations is the Governor, a bridge between the union and the state. The founding fathers deliberately avoided election to the office of the Governor. The President has been empowered to appoint him as executive head of the state under Article 155. The executive power of the state is vested in him by Article 154 and exercised by him with the aid and advice of the council of ministers, the Chief Minister as its head. Under Article 159 the Governor shall discharge his functions in accordance with the Oath "to protect and defend the constitution and the Law." The office of the Governor therefore, is intended to ensure protection and sustenance of the constitutional process of the working of the constitution by the elected executive and given him an imperial's role. When a Gandhian economist member of the constituent Assembly wrote letter to Gandhiji of his
plea for abolition of the office of the Governor, Gandhiji wrote to him for its retention, thus: "The Governor had been given a very useful and necessary place in the scheme of the team. He would be an arbiter when there was a constitutional dead lock in the state and he would be able to play an impartial role. There would be administrative mechanism through which the constitutional crises would be resolved in the state".

The Governor thus should play an important role. In his dual undivided capacity as an head of the state should impartially assist the President. As a constitutional head of the state Government in times of constitutional crisis he should bring about sobereiety. The link is apparent when we find that Article 356 would be put into operation normally passed on Governor's report. He should truthfully and with high degree of constitutional responsibility, in terms of path, inform the President that a situation has arisen in which the constitutional machinery in the state has failed and the state cannot be carried on in accordance with the provisions of the constitution, with necessary detailed factual foundation. The report normally is the foundation to reach the satisfaction by the President. So it must furnish material with clarity for later fruitful discussion by the Parliament. When challenged in a court it gives in sight into the satisfaction reached by the President. The governor
therefore, owes, constitutional duty and responsibility in sending the report with necessary factual details and it does require approval of the council of Ministers nor equally with their aid and advice.

SECULARISM:-

It is contended in this case that the imposition of President's rule in the states of M.P., Rajasthan and Himachal Pradesh was malafide, based on no satisfaction and was purely a political act. Mere fact that communal disturbances and or instances of arson and looting, took place is no ground of imposing President's rule. Indeed, such incidents took place in several Congress(I) ruled states as well as in the particular, in the state of Maharashtra on a much larger scale and yet no action was taken to displace those governments whereas action was taken only against BJP governments.

Justice Sawant on behalf of Justice Kuldip Singh and himself held that in view of the content of secularism adopted by our constitution, the question that poses itself for our consideration in these matter is whether the three governments could be trusted to carry on the governance of the

1. Ibid at p-117.
State in accordance with the provisions of the constitution and the President's satisfaction based on the said acts could be challenged in law. To recapitulate, the acts were (i) the BJP manifesto on the basis of which election were contested and pursuant to which elections of the three ministries came to power stated as "......hence party is committed to Shri Ram Mandir at Janmasthan be relocating superimposed Babri structure with due respect". (ii) Leaders of the BJP had consistently made speeches thereafter to the same effect, (iii) Some of the Chief Ministers and Ministers belonged to RSS which was banned organization at the relevant time (iv) The Ministers in the Ministries concerned exhorted people to join Kar Seva in Ayodhya on 6th December, 1992. One MLA belonging to ruling BJP in Himachal Pradesh made a public statement that he had actually participated in the destruction of the mosque, (v) Ministers had given public send off to Kar Sevaks and also welcomed them on their return after the destruction of mosque, (vi) At least in two states, Viz, Madhya Pradesh and Rajasthan there were atrocities against the Muslim and loss of lives and destruction of property.

Religious tolerance and equal treatment of all religious groups and protection of their life and property and of places of their worship are an essential part of secularism enshrined in our constitution. Any profession
and action which go counter to the aforesaid creed are _prima-facie_ proof of the conduct in defiance of the provisions of our constitution. We are therefore of the view that the President had enough material in the form of the aforesaid professions and acts of the responsible section in the political set up of the three states including the Ministries to form his satisfaction that the governments of the three states could not be carried on in accordance with the provisions of the constitution. Hence the proclamations issued could not said to be invalid. In short, secularism is part of the 'basic structure of the constitution'. Th acts of the state government which are calculated to subvert or sabotage secularism as enshrined in our constitution, can lawfully be deemed to give rise a situation in which the government of the state cannot be carried on in accordance with the provisions of the constitution.¹

Justice K. Ramaswamy observed that the satisfaction reached by the President in issuing presidential proclamation and dissolving the legislative assemblies of M.P., Rajasthan and Himachal Pradesh cannot be faulted as it was based on the fact of violation of the secular features of the constitution which itself a ground to hold that a situation has arisen in which the government of the concerned states cannot be carried on in accordance with the provisions of the constitution.

¹. Ibid at pp-105-107
Therefore, the satisfaction cannot be said to be unwarranted\(^1\). He said that religion has no place in politics. No political party can simultaneously be a religious party. Any state government which pursues unsecular policies or unsecular course of action, acts contrary to the constitutional mandate and renders itself amenable to action under Article 356.\(^2\)

Justice Ahmadi said that I am in agreement with the views expressed by my learned colleagues Sawant, Ramaswamy and Reddy, JJ, that secularism is a basic feature of our constitution. They have elaborately dealt with this aspect of the matter and I can do not better than express my concurrence but I have said these few words merely to complement their views by pointing out how this concept was understood immediately before the constitution and till the 42nd Amendment. By the 42nd Amendment what was implicit was made explicit.\(^3\)

ROLE OF PARLIAMENT:

The Bench without difference of opinion held that it is necessary to interpret clause(1) and(3) of Article 356

\(^1\) Ibid at p. 157
\(^2\) Ibid at pp-175-179,228.
\(^3\) Ibid at p.48
harmoniously since the provisions of clause (3) are obviously meant to check by Parliament (which also consist of members from the concerned states) on the powers of the President under clause (1). The check would become meaningless and renders ineffective if the President takes irreversible actions while exercising his powers under sub-clause (a), (b) and (c) of clause (1) of the said Article. The dissolution of the Assembly by exercising the powers of the Governor under Article 174 (2) will be one such irreversible action. Hence it will have to held that in no case, the President shall exercise the Governor's power of dissolving the Legislative Assembly till at least both the Houses of Parliament have approved the Proclamation issued by him under clause (1) of the said Article. The dissolution of Assembly prior to the approval of Parliament under clause (3) of the said Article will be invalid. The President however may have the power of suspending the legislature under sub-clause (c) of clause (1) of the said Article.

Conclusion of the court, firstly, is that the President has no power to dissolve the Legislative Assembly of the state by using his power under sub-clause (1) of Article 356 till the Proclamation is approved by both Houses of Parliament under clause (3) of the said Article. He may have power only to suspend the Legislative Assembly under
sub-clause (c) of clause (1) of the said Article. Secondly, the Court may invalidate the Proclamation whether it is approved by parliament or not. The necessary consequence of the invalidation of the proclamation would be to restore the status quo ante therefore to restore the council of ministers and the Legislature Assembly as they stood on the date of issuance of the Proclamation.¹

SCOPE OF RE-INDUCTION OF DISMISSED GOVERNMENTS:

The question arises is whether the council of ministers and Legislative Assembly can be restored by the court when it declares the proclamation invalid? Justice Sawant replied in affirmative and held that there is no reason why the council of ministers and the Legislative Assembly should not stand restored as a consequence of the invalidation of the proclamation, the same being the normal legal effect of the invalid action. In the context of the constitutional provisions and in view of the power of the judicial review rested in the court such a consequence is also necessary constitutional fall-out. Unless such result is read, the power of judicial review rested in the judiciary is rendered nugatory and meaningless. To hold otherwise is

¹. Ibid at p - 86.
also tentamount to holding that the proclamation issued under Article 356 (1) is beyond the scope of judicial review. For when the validity of the proclamation is challenged, the court will be powerless to give relief and would always be met with the fait accompli. Article 356 would then have to read as an exception to judicial review. Such an interpretation, is neither possible nor permissible. Hence to necessary of the invalidation of the proclamation would be restoration of the ministry as well as Legislative Assembly, in the state. In this connection, we may refer to the decision of Supreme Court of Pakistan in Mian Mohammad Nawaz Sharief Vs. President of Pakistan and others.1 The court held that the impugned order of dissolution of National Assembly and dismissal of the Federal Cabinet were without lawful authority and, therefore, of no legal effect. As a consequence of the said decleration, the court declared that the National Assembly, Prime Minister and the Cabinet stood restored and entitled to function as immediately before the impugned order was passed. The court further declared that all steps taken pursuant to the impugned order including the appointment of care-taker cabinet and care-taker Prime Minister were also of no legal effect.

Justice Sawant concludes in following words "if proclamation issued is held invalid, then notwithstanding

1. 1993 PLD Sc 473.
the fact that it is approved by both Houses of Parliament, it will be open to the Court to restore the status quo ante to the issuance of the proclamation and hence restore the Legislative Assembly and Ministry.

Justice K. Ramaswamy observed that there is no express provision in the constitution to revive the Assembly dissolved under the Presidential Proclamation or to reinduct the removed government of the state. In interpreting the constitution of the working of the democratic institutions set up under the constitution, it is impermissible to fill the gaps or to give direction to revive the dissolved Assembly and to reinduct the dismissed government of the state into office.¹

Justice B.P. Jeevan Reddy held that if the court strikes down the proclamation, it has the power to restore the dismissed government to office and revive and reactivate the Legislative Assembly whenever it may have been dissolved or kept under suspension.²

The key operative part of the Supreme Court's landmark judgement on the use of Article 356 lies in the majority agreement reached on the following specific points:

1. Ibid at p - 157
2. Ibid at p - 228.
(a) The validity of the proclamation issued by the President under Article 356 (1) is "judicially reviewable to the extent of, examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the proclamation was issued in the malafide exercise of power" when a primafacie case is made out in the challenge to the proclamation, "the burden is on the union government to prove that the relevant material did in fact exist." The material may be either the report of the Governor or something other than the report, but it must meet the new test.

(b) Article 74 (2), which bars judicial review so far as the advice given by the ministers to the President is concerned, is "not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction."

(c) The constitution places a check on executive power exercised in the name of the President by requiring parliamentary approval of a Presidential proclamation issued under Article 356. Therefore, "it will not be permissible for the president to exercise powers under sub-clauses (a), (b) and (c) of Article 356 (1) and to "take irreversible actions untill at least both the Houses of parliament have approved of the proclamation." In other words, the Legislative Assembly of a state cannot be dissolved untill" at least"
both the Houses of parliament approve the executive action. (d) If the Presidential Proclamation is held invalid, "then not withstanding the fact that it is approved by both Houses of Parliament it will be open to the court to restore the Status quo ante" and bring back to life the Legislative Assembly and the Ministry. (e) While the Court "will not interdict the issuance of a Presidential Proclamation or the exercise of any other power under the proclamation, in appropriate cases it will have the power by an interim injunction to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the proclamation. This it can do to avoid a fait accompli and to prevent "the remedy of judicial review (from) being rendered fruitless."

The most far-reaching aspect of the Supreme Court's judgement lies in its splendidly uncompromising championing of secularism as a basic and inalienable feature of the constitution a feature nobody has any right to work against. The majority agreement on the secular imperative is contained in conclusion in the judgement delivered by Justice Sawant (on behalf of himself and Justice Kuldip Singh):" Secularism is a part of the basic structure of the constitution. The acts of a state government which are calculated to subvert or
sabotage secularism as enshrined in our constitution can lawfully be deemed to rise to a situation in which the government of the state cannot be carried on in accordance with the provisions of the constitution."

An excellent exposition of secularism is offered in Justice B.P. Jeevan Reddy's judgement (for himself and justice S.C. Agarwal): "While freedom of religion is guaranteed to all persons in India, from the point of the view of the state, the religion, faith or belief of a person is immaterial to the state, all are equal and are entitled to be treated equally. In matters of state, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed."

In this powerful exposition of secularism as something permanently embedded in the constitution, Justices Reddy and Agarwal demolish every one of the building blocks of Hindutva (and every other type of communal) ideology:

It is "absolutely erroneous to say the secularism is a 'vacuous word' or a 'phantom concept'." The Indian constitution has several provisions which strongly express its commitment to secularism. This means equality, non discrimination and justice for all its citizens and no one can be permitted to be less or more equal liberty of
conscience. It is impermissible to treat minorities as "Second-Class citizens."

Secularism does not mean a hands-off state policy towards religion, but it certainly means the state has no religion and it is unconstitutional for it to tilt in favour of any religion. "In short, in the affairs of the state (in its widest connotation) religion is irrelevant; it is strictly a personal affair."

The founding father read the concept of equality fairness-and justice-based secularism into the constitution" not because it was fashionable but because it was an imperative in the Indian context".

Above all, it is constitutionally illegitimate for either that state, or any political party, to mix up religion and politics; to use communalism as a political mobilisation strategy; and to fight elections "on the basis of a plank which has the proximate effect of eroding the secular philosophy of the constitution."

A party or Organisation which "acts or behaves by word of mouth print or in any other manner" to bring about the effect of mixing up religion and politics will certainly be "guilty of an act of unconstitutionality". It will "have no right to function as a political party".
CHAPTER

CONCLUSION & SUGGESTIONS
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Judicial review is an integral part of the Constitution of India. The scheme of the present constitution of India is based on the structure of judicial review. If one part of it is extricated the other part cannot be sustained. In India, the majority which governs the country quickly changes and the public opinion is also not very progressive and efficacious. In such circumstances it is not always possible for the majority in power to correctly fathom the needs and urgency of law which is enacted and the executive enactments in the state of tension, haste and variety of power do not represent the free will of the sovereign people. In such circumstances, judicial review has a great necessity. The legislature and executive cannot only act through a majority. "The majority goes on changing from time to time on the swing of the Pendulum of public opinion. The changing majority cannot be easily expected to render a consistent interpretation of the Constitution." This is why the people of India are in favour of strengthening the doctrine of judicial review in the Indian Democracy to protect the right liberty and freedom of the individual to have socio-economic development in the right way and to avoid executive tyranny.

2. Shriram Sharma, How India is Governed ?, Central Book Depot, Allahabad, p.146.
The courts in India and specially the Supreme Court has assumed a unique position by discharging the function of judicial review and giving constitutional decisions of wider importance to the nation. The court in India has to shape the destiny of the nation by its constitutional decisions which have great impact on the individual and the social life. "The tendency to view the court as unique and relatively isolated body is largely the result of its power of judicial review".¹ The court in order to give relief to the aggrieved party through judicial review has to visualise the will of the sovereign people in relation to the liberty and freedom of the individual. The court alone is competent to determine the nature and extent of the good or evil effect, on the fundamental rights of administrative action. The function of the court is to make the Executive realise its Limitations. In this connection S.A. de Smith also remarks- "To the extent that court do justice to the individual citizen while giving due weight to the requirements of the public interest they act as a major instrument of social equilibrium and with their sphere of jurisdiction fulfil function that cannot adequately be performed by any other organ of Government".²

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The court in India has larger problems to solve through judicial review. It should work as a social service instrument. An awakened court is a desiderata. One of the difficult problem is regarding fundamental rights. Rights guaranteed to the citizens of India by the constitution cannot be violated by the executives and when the executive actions are violative of fundamental rights, the court has to strike a just balance between social justice and rights of citizens. In India, the majority which governs the country quickly changes and the public opinion is also not very progressive and efficacious. In such circumstances it is not always possible for the majority in power to correctly fathom the needs and urgency of law which is enacted and the legislative enactments in the state of tension, haste and vanity of power do not represent the free will of the sovereign people. In such circumstances, judicial review has a great necessity. The people of India are in favour of strengthening the doctrine of judicial review in the Indian Democracy to protect the right, liberty and freedom of the individual, to have socio-economic development in the right way and to avoid executive tyranny. The age through which India is passing is the age of fluidity of life which is surrounded with extreme complexities and multitudinous diversities. India has evolved an indigenous system of constitutional polity, which has adopted judicial review of administrative actions as a
weapon of effective censor over constitutional lapses by the executive.

Article 356 of our constitution which was expected by our founding fathers to remain a dead letter has been indiscriminately utilised by the President of India to extinguish the lives of 101 state assemblies and every party at centre has yielded to this temptation. Power conferred by Article 356 can be exercised only when a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution. What is that situation? The Supreme Court has ruled that President's rule cannot be imposed in situation which can be remedied or do not create an impasse, or do not disable or interfere with the governance of the state according to the constitution. The Supreme Court further held that, except in urgent situations which cannot brook delay, a warning should be issued to the errant state and the President should use all other measures to restore the constitutional machinery in the state before having recourse to his drastic power. The majority consisting of Justices Pandian, Sawant, Kuldip Singh, Jeevan Reddy and Agarwal, enlarged the scope of judicial review. It held that the validity of the Presidential proclamation is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material
was relevant or whether the proclamation was issued *mala fide* or was based on wholly irrelevant and extraneous grounds. The role played by the governor of Karnataka in recommending dissolution of the Karnataka assembly in 1989 on the basis of unverified information about defections from the ruling Janta Dal and his refusal of the Chief Minister, Mr. Bommai's request for proving his majority within a week on the floor of the House has been severely criticised. The court held that all canons of propriety were breached by the governor and his undue haste in inviting President's rule "clearly smacked of *mala fide* ... . A duly constituted ministry was dismissed on the basis of material which was neither tested or allowed to be tested and was no more than the *ipse dixit* of the governor". The court laid down that a ministry's strength should be tested on the floor of the House which "alone is the constitutionally ordained forum" and not by private opinion of any individual be the governor or the President". Applying this principle the presidential proclamations dissolving Karnataka and Nagaland assemblies were declared unconstitutional by the majority. However, since fresh elections had taken place in both the states and new legislative assemblies and governments had come into existence no further relief was granted and which was not prayed for before the Supreme Court.
The courts have invalidated what appeared to them to be genuinely arbitrary conferrals of discretionary power, although it must be said that in a very large number of situations vast conferral of discretionary powers have also been sustained\(^1\). But in these situations courts have attempted to maintain strict invigilation over the exercise of discretionary power. A malafide exercise of discretionary power is not to be countenanced. The stringent standards of proof and the refusal to invoke the doctrine of judicial notice has led to many difficulties in proving malafides; naturally, there are very few cases in this category and those which have upheld charges of malafide throw much light on how far power can be abused\(^2\). Exercise of discretionary power can be struck down if it is based on 'irrelevant considerations'\(^3\). There is an emerging requirement that administrative action must be reasonable. The Indian courts have held, after some initial hesitation, that a law may be valid as reasonable against the test of fundamental rights and yet a discretionary exercise of power under the law may not be valid being reasonable. Persons invested with discretionary powers may not transfer these to some other persons; they may not act under dictation or mechanically and without due care or without proper application of mind.

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In the area of discretionary, judicial energies appear to be more dedicated to control over actual exercise of discretionary powers rather than on the validity of conferral of vast discretionary powers without adequate guidelines or standards.

It is an accepted axiom that the real Kernel of democracy lies in the courts enjoying the ultimate authority to restrain the exercise of absolute and arbitrary power. Without some kind of judicial power to control administrative authorities, there is a danger that they commit excesses and degenerate into arbitrary bodies, and such a development would be inimical to a democratic constitution. Articles 32 and 226 of the Indian Constitution make provisions for the system of writs in the country. The writs are in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari. Articles 32 and 226 are expressed in broad language. The Supreme Court, nevertheless, ruled that in reviewing administrative action, the courts would keep to broad and fundamental principles underlying the prerogative writs in the English law without however importing all its technicalities. Under these articles the courts enjoy a broad discretion in the matter of giving proper relief if warranted by the circumstances of the case.

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before them. The courts may not only issue a writ but also make any order, or give any direction as it may consider appropriate in the circumstances, to give proper relief to the petitioner.  

Article 32 provides a guaranteed quick and summary remedy for the enforcement of Fundamental Rights. Any person complaining of infraction of any of his Fundamental Rights by an administrative actions can go straight to the Supreme Court for vindication of his right without being required to undergo the dilatory proceedings from the lower to a higher court as one has to do in any ordinary litigation. The writ jurisdiction conferred on the High Court by article 226 can be invoked to enforce not only a Fundamental Right but a non-fundamental right as well. Under this article the jurisdiction of the High Court to issue writs extends to the state over which it has jurisdiction and also to territories outside that state, if the government, authority or person is within those territories, and if the cause of action in relation to the government etc., wholly or in part, arises within the state.

The High Court recently has widen its jurisdiction by bringing the Indian Army Act under the subject to judicial review. The High Court brought the Indian Army's

termination policy under judicial review by holding that Army personnel cannot be dismissed without an inquiry or trial in cases where malafide was obvious. A full Bench of Justice Sunanda Bhandare, Justice Arun B. Saharya and Justice C.M. Nayar held that Section 18 of the Indian Army Act, hitherto treated as a holy cow by the judiciary is subject to judicial review.

Section 18 of the Army Act, "the judges said, provides that every person subject to the Act shall hold office during the pleasure of the President Undoubtedly, the section does not provide for procedures to be followed while passing an order under the said section. However, it does not permit the passing of an order which is arbitrary. malafide and illegal". Legal experts term the Judgement "historic". They say that till now Section 18 of the Army Act was not put to judicial review by any court in the country.

The doctrine of judicial review, as it is obvious from the above discussion, helps the courts to perform creative functions, a legal order where human beings matter. It also enables the courts to ring out old values and ring in new values. However, in the name of judicial review, the court should not block progressive legislations. Law and life should go hand in glove. Law should not be allowed to stand independent
of social changes. As has been aptly observed, "law is not a brooding omnipotence in the sky but a flexible instrument of social order dependent upon the political values of the society it purports to regulate."
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