राजचिन्ह

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JUDICIAL ACTIVISM

AND

BASIC STRUCTURE THEORY

BRIEF OVERVIEW

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FOREWORD

An attempt is being made by this brief overview to provide a glimpse of Judicial Activism and Basic Structure Theory. I hope this will help to understand the niceties of Fundamental Rights and Judicial Activism to the Students and Professors who have deep interest in the Constitutional Law. I am also very much indebted to Hon. Shri Ramraje Naik-Nimbalkar, Chairman, Maharashtra Legislative Council and Hon. Shri Haribhau Bagade, Speaker, Maharashtra Legislative Assembly for their continuous support and motivation in accomplishing this task.

This brief compilation will prove very useful to the Law students.

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The Concept of Fundamental Rights

Since the 17th Century, human thinking has been veering round the theory that human being has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the State, in order That -

i) human liberty may be preserved

ii) human personality developed

iii) and effective, social democratic life promoted to recognize these rights and freedoms.

This concept protects individuals against the excesses of States.

The concept of human rights represents an attempt to protect the individual from oppression and injustice - universal declaration of human rights on 10-12-1948 UNO - UDHR - 1948.

Rights are entrenched in such a way that they should not be violated, tampered with by an oppressive government. The rights, provided in written Constitution, only taken away by special procedure called amendment U/A 368.

- With this view, in written constitution, guaranteed these rights
- Beyond the reach of majority political interference.

- Concept of people's basic rights developed - Charter of human rights enacted by U.N.O.

- Modern Democratic thinking

USA (1787 Bill of Right in 1791 in the form of X (Ten) Amendments)

One's right to life, liberty, property, freedom of speech, freedom of Press, freedom of worship and assembly should not be submitted to vote. They are beyond the reach of the majority withdrawn and of political controversy in order to establish them as higher legal principles applied by the court.

(Justice Jackson in West Virginia - State Board of Education Vs Barnette - 319 US 624)

BRITAIN - growing demand to have bill of rights, HR Act, 1988

No constitutional guarantee but depends on public opinion, good sense of the people and strong common law tradition favouring individual liberty --

CANADA – Enacted in 1982

Constitution is amended and charter of rights has been incorporated in 1982. South Africa.

AUSTRALIA - No Fundamental Rights.

Congress demanding these rights against (British Rule)

- Democratic tradition were lacking

Indian society is fragmented to many religious, cultural and linguistic groups - necessary to give sense of security and confidence.

FUNDAMENTAL RIGHTS

History of the demands for Fundamental Rights -

- Nehru Report -1928
- To safeguard individual Liberty
- To ensure social economic and political justice
- Dignity of the individual
- Hitler - Jews – Nuremberg Trial
- Oppressive rule of British

Classification of fundamental rights -

(1) Right to Equality (A-14 to 18)

(2) Right to Freedom (A-19 to 22)

(3) Right against exploitation (A-23 -24)

(4) Right to Freedom of Religion (A-25 to 28)

(5) Cultural and Educational Right (A-29 to 30)

(6) Right to Constitutional remedies (A-32)

Some fundamental rights to citizens / some to Persons including citizens

Fundamental Rights guaranteed against State – not against individual action.

M. Nagraj vs. UOI - 2003 – SC ruled that --

1) It is fallacy to regard FR as a gift from the State to its citizens.
2) Individual possess basic H.R. independent of any Constitution by reason of the basic fact that they are members of human race.

3) Part III of Constitution does not confer Fundamental Rights. It confirms their existence and gives them protection.
4) It's purpose is to withdraw certain subject from the area of political controversy to place them beyond the reach of majority.
5) They are higher legal principles to be applied by the Courts.
6) FR limitations on the powers of the State.

In A.K. Gopalan Case - SC held - A. 21 provides no person shall be deprived life and personal liberty except according to procedure established by law.

SC by majority held that " procedure establish by law means any procedure established by law made by the Parliament or the Legislature State. The SC refused to infuse the procedure with principle of "Natural Justice".

It is concentrated solely upon the existence of enacted law.

After three decade, SC overturned completely and overruled Gopalan in landmark Maneka Gandhi Case, --- (AIR 1978 SC) "that procedure contemplated by A K must answer the test of reasonableness. The SC held that procedure should also be in conformity with principles of Natural Justice. The U.S. concept of "due process of Law" was incorporated.

(Fifth Amendment of US Constitution 1787)

"No person shall be deprived of life, liberty or property without due process of Law. (Fifth and Fourteen Amendment of US Constitution - 1791 and 1868)"

- Private individuals

- Ordinary - Legal remedies are available and not constitutional remedies

STATE – A.12.

Article 12. Definition - In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

The "State" has been the product of evolution and incessantly in the process of development. There have been enough theories to explain the phenomenon of a "State". With the advancement of time the concept of State has undergone radical changes. Originally a State was conceived as a law and order State. Those are Laissez Faire days. This was dominating philosophy. Thereafter the philosophy of welfare State changed the concept of a State. The State pervades every field of human life including Health, Education, Sanitation, Roads, Bridges, Urban and Rural, Planning etc.

The State occupies unique importance in the constitutional scheme of Part III and IV, the term "the State", in Article 12 of the Constitution of India, which states;

"In this part, unless the context otherwise requires, "the State" includes the Government and parliament of India and the

Government and the Legislatures of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

"The State" in Article 12 includes:-

1. the Government of India,
2. the Parliament of India,
3. The Government of each of the States which constitute the Union of India.
4. The Legislature of each of the States which constitute the Union of India.
5. All Local Authorities within the territory of India.
6. All Local Authorities under the control of Government of India.
7. all other Authorities within the territory of India, and
8. All other Authorities under the control of the Government of India.

The State acts through the organs of the Government, which are primarily classified as: executive, legislative and judicial. Any act by any of these organs constitutes a "state action". The doctrine of "state action" originated in the United States, nearly a century after the adoption of the Constitution, through various judicial pronouncements. Originally, the "state action" thesis was confined to the 14th and 15th amendments only in United States. Thereafter, it was extended to other acts of States. In India, however, the Supreme Court without any difficulty introduced the doctrine of "state action". The inclusive definition of the "the state"

in the Article 12 and enforceable nature of Part III of the Constitution against state has resulted into the judicial explosion of the "the state". Besides, the State in the Indian Constitution is vested with the powers from protection the national monuments, ancient works of art, education, culture of the people of the preservation of forest and wild life.

Under the constitutional scheme, the State, on the one hand guarantees the protection of fundamental rights contained in Part III and on the other hand has been a duty bound to further policies to achieve the socio-economic agenda of India enshrined in Part IV. Therefore explaining the significance and scope of Article 12, Dr. Babasaheb Ambedkar in the Constituent Assembly said;

> *The object of the Fundamental Rights is twofold. Firstly, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority – I shall presently explain what the word "authority" means-upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the Fundamental Rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the provincial government, they must not only be binding upon the governments established in the Indian states, they must also be*

binding upon district level boards, municipalities, even village panchayats and taluk boards, in fact; every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye laws." 2

Therefore, vary wide application of the State action has resulted into a long series of cases in which the Apex Court has extended the concept of State from time to time. In several judicial decisions public corporations have been declared as "the State" bringing them into the category of all other authorities within the territory of India or, all other authorities under the control of Government of India. In Rajasthan State Electricity Board Case 3, Sukhdev Singh Case 4, the nature and scope of Article 12 was further expanded. In Sukhdev Singh Case, Chief Justice Ray for himself and on behalf of Justice Y. V. Chandrachud held that, "the State under tax commercial function in combination with governmental function in welfare state." Justice P. N. Bhagwati further expanded the scope of "the state", in R.D. Shetty V. International Airport Authority case. (AIR 1979 SC 1628)

In this case the legal status of the International Airport Authority (IAA), a body setup by a statute passed by Parliament was involved. Holding it to be as an 'instrumentality or agency' of the Central Government and is also an 'authority' within Article 12. Justice Bhagwati stated;

"The Corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of Corporations should equally be subject to the same limitations."

In the decision Justice P. N. Bhagwati (as he then was) identified the following incidents as determinative of an agency or instrumentality of Government:-

1. State financial support and control over the management and policies.
2. A monopoly status conferred on the corporation or protected by the State.
3. The operation of the Corporation is an important public function.
4. If the entire share capital of the Corporation is held by the Government.
5. Existence of deep and pervasive State control.
6. If a department of government is transferred to a corporation, it

would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of government.

In Ajay Hasia's case, Justice Bhagwati summarized the tests laid down in Ramanna's case. However, he observed that;

"the tests for determining as *to when* a *corporation can be said to be an instrumentality or agency of Government may now be called out from the judgment in the International Airport Authority's case (AIR 1979 SC 1628). These tests are not inclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide earning to be placed on the expression 'other authorities', it must be realized that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government with the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation."*

In Ajay Hasia's case, Justice P. N. Bhagwati provided the rational for expansive interpretation of the term 'the state' in Article 12. He observed;

"To use the corporate methodology is not to liberate the government from its basic obligation to respect the Fundamental Rights and not to override them. The mantle of a corporation may be adopted in order to free the Government from the inevitable

constraints of red-tapism and slow motion by doing so the Government cannot be allowed to play truant with the basic human rights. Otherwise it would be the easiest thing for the Government to assign to a plurality of corporations almost every state business, such as Post and Telegraph, T.V. and Radio, Rail, Road and Telephones – in short every economic activity and thereby cheat the people of India out of the Fundamental Rights guaranteed to them ...The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing with their sweep every authority which is an instrumentality or agency of the government or through the corporate personality of which the government is acting."

Ajay Hasia's decision was followed by another decision in the case, Som Prakash Rekhi V. Union of India. In this case Justice Krishna Iyer delivered the majority opinion for himself and Justice O. Chinnapa Reddy; Justice R. S. Pathak delivered a separate opinion. In the decision Justice Iyer said;

"Any authority under the control of the Government of India comes within the definition. While dealing with the corporate personality, it has to be remembered that while the formal ownership is cast in the corporate mould, the reality reached down to state control. The

core fact is that the central government chooses to make over, for better management, its own property to its own offspring. A government company is a mini-incarnation of government itself, made up of its blood and bones and given corporate shape and status for defined objectives and not beyond. The device is too obvious for deception. A government company though, is but the alter ego of the central government and tearing of the juristic veil worn would bring out the true character of the entity being 'the state' ... .it is immaterial whether the corporation is formed by a statue or under a statue, the test is functional. "

Brief information and case of laws on Article 12

Co-operative Societies

The statutory regulation or restriction in the functioning of the societies is not "an imprint of the State under article 12". Hence no writ will lie against a co-operative society governed by the- Kerala Co-operative Societies Act; P. Bhaskaran v. Additional Secretary, Agricultural (Co-operation) Department, Trivandrum, AIR 1988 Ker 75: (1987) 2 Ker LT 903: (1988) 2 Lab LJ 307: ILR (1988) 1 Ker 217: 1987 Ker LJ 1461: (1988) 19 Reports 636.

Examples of Statutory and Other Bodies held to be State

The State Bank of India as also the nationalized Banks are 'States' within the meaning of article12 of the Constitution of India. The services of the workman

are also governed by several standing orders and bipartite settlements which have the force of law. The Banks, therefore, cannot take recourse to 'hire and fire' for the purpose of terminating the services of the employees; Bank of India vs. O.P. Swaranakar, AIR 2003 SC 858: (2003) 2 SCC 721: (2003) 1 LLJ 819: (2003) 1 SLR 1.

The Children Aid Society should be treated as a State within the meaning of article 12, as it is undoubtedly an instrumentality of State; Sheela Barse vs. Secretary, Children Aid Society, AIR 1987 SC 656: (1987) 3 SCC 50: 1987 SCC (Cri) 458 (P.N. Bhagwati, C.J. and R.S. Pathak, J.).

There are tests formulated by several cases of the Supreme Court to find out whether an institution is a "State". There cannot indeed be a straight jacket formula; Tekraj v. Union of India, AIR 1988 SC 469: (1988) 1 SCC 236: 1988 SCC (L&S) 300: 1988 Lab IC 961.

Local Authorities: Writ

A local authority having a legal grievance may be able to take out a writ. Thus, a writ was issued on the petition of a local authority against a public utility concern, for the latter's failure to fulfill its statutory obligation to supply power to the local authority, a consumer; Corporation of City of Nagpur v. N.E.L. & Power Co., AIR 1958 Bom 498.

Other Authorities

What is, and what is not a "State" has been the subject-matter of rich case law under article 12. From the numerous decisions on the subject, a judgment of the Andhra Pradesh High Court has culled out certain propositions; B. Hassan Ali Khan v. Director of Higher Education, Andhra Pradesh, (1987) 4 Reports 198 (AP). The judgment says that the essential tests to determine whether a particular institution is "other authority" within the meaning of article 12 are substantial financial aid, control by the Government, performance of public functions and entrustment of governmental activities. All of these are not essential, and, in a particular case, one or a combination of more than one of them may suffice. In the leading case of Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487: (1981) 1 SCC 722: (1981) 2 SCR 79: (1981) 1 LLJ 103 (Registered Society), the Regional Engineering College was held to be a "State". P.N. Bhagwati, J. observed as under in that case:-

> The constitutional philosophy of a democratic socialist republic requires the Government to undertake a multitude of socio-economic operations and the Government, having regard to the practical advantages of functioning through the legal device of a corporation embarks on myriad commercial and economic activities by resorting to the instrumentality or agency of a corporation, but this contrivance of carrying on such activities through a corporation cannot exonerate the Government from its

basic obligation to respect the Fundamental Rights and not to override them. The mandate of a corporation may be adopted in order to free the Government from the inevitable constrains of red tapism and slow motion but by doing so, the Government cannot be allowed to play truant with the basic human rights. Otherwise, it would be the easiest thing for the Government to assign to a plurality of corporations almost every State business such as Post and Telegraph, TV and Radio, Rail, Road and Telephones-in short every economic activity-and thereby cheat the people of India out of the Fundamental Rights guaranteed to them.

In the above judgment of the Supreme Court, Mr. Justice Bhagwati enunciated the following test for determining whether an entity is an instrumentality or agency of the State:-

(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency or Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the 2orporation is a State agency or instrumentality.

(5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classified the corporation as a instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

The Delhi Transport Corporation is "State"; D.T.C. v. Mazdoor Congress, AIR 1991 se 101: (1991) Supp 1 SCC 600: 1991 SCC (L&S) 1213: (1991) 1 LLJ 395.

<u>Under mentioned decisions may be seen in this connection:</u>

(i) Som Prakash v. Union of India, AIR 1981 SC 212: (1981) 1 SCC 449: (1981) 1 LLJ 79: (1981) 1 LLN 322; Tajinder Singh v. Bharat Petroleum Corpn. Ltd., (1986) 4 SCC 237: 1986 JT 405: (1986) 2 Cur LR 319: (1986) 4 SCC 237: (1986) 2 Cur CC 862: 1986 (3) Supreme 414: 1986 SCC (Lab) 765: 1986 (3) SCJ 556: (1987) 1 UJ (SC) 1: (1987) 2 LLJ 225.

(ii) State of Punjab v. Raja Ram, (1981) 2 SCC 66: AIR 1981 SC 1694: (1981) 2 SCR 712, paragraphs 9-10.

(iii) Sukhdev v. Bhagatram, AIR 1975 SC 1331 (1342): (1975) 1 SCC 421: (1975) 1 LLJ 399.

(iv) K.S. Ramamurthy Reddiar v. Chief Commissioner, Pondicherry, AIR 1963 SC 1464: (1964) 1 SCR 656: (1964) 1 SCA 108.

(v) Umesh Chandra Sinha v. V.N. Singh, AIR 1968 Pat 3 (9): ILR 46 Pat 616: 1967 BLJR 798.

(vi) Parmatma Sharan v. Chief Justice Rajasthan High Court, AIR 1964 Raj 13: 1963 Raj LW 246: ILR (1963) 13 Raj 215: (1965) 1 Lab LJ 221.

(vii) Sabhajit v. Union of India, AIR 1975 SC 1329: (1975) 1 SCC 485: (1975) 1 LLJ 374; Mysore S.R.T.C. v. Devraj, AIR 1976 se 1027, paragraph 14; Premji Bhai v. Delhi Development Authority, AIR 1980 SC 738: (1980) 2 SCC 129, paragraphs 8, 9.

(viii) N. Masthan Sahib v. Chief Commissioner, Pondicherry, AIR 1962 SC 797: (1962) Supp 1 SCR 981: (1962) 2 SCA 401.

Private Body

A private body which is an agency of the State may be a "State"; Star Enterprises v. City and Industrial Development Corpn. of Maharashtra, (1990) 3 SCC 280: (1990) 2 Punj LR 264: (1990) 2 KLT 37.

State

The definition of "State" is not confined to a Government Department and the Legislature, but extends to any action-administrative (whether statutory or non-statutory), judicial or quasi-judicial, which can be brought within the fold of 'State action' being action which violates a fundamental right. See the under mentioned decisions:

(i) Ramana v. International Airport Authority of India, AIR 1979 SC 1628 (1638): (1979) 3 SCC 489, paragraphs 14-16; State of Punjab v. Raja Ram, AIR 1981 SC 1694: (1981) 2 SCC 66: (1981) 2 SCR 712, paragraph 5.

(ii) Gulam v. State of Uttar Pradesh, AIR 1981 se 2198: (1982) 1 SCC 71: (1981) 1 SCR 107, paragraph 23.

(iii) Som Prakash v. Union of India, AIR 1981 SC 212: (1981) 1 SCC 449: (1981) 1 LLJ 79, paragraphs 34, 37.

Even a private body may be "State"; Mahabir Auto Stores v. Indian Oil Corporation, (1990) 3 SCC 752: AIR 1990 SC 1031: (1990) 2 SLR 69.

State Action

The historical context in which the doctrine of "State action" evolved in the U'.S. is irrelevant for India. But the principle behind the doctrine (State aid, control and regulation so impregnating a private activity as to give it the colour of "State action") is of interest to us to the limited extent to which it can be

Indianised and harmoniously blended with our constitutional jurisprudence; M.C. Mehta v. Union of India, AIR 1987 SC 1086: (1987) 1 SCC 395: 1987 SCC (L&S) 37.

A-13. Definition of Law

13. Laws inconsistent with or in derogation of the fundamental rights in detail — (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) [1]Nothing in this article shall apply to any amendment of this Constitution made under article 368.

Brief information on Article 13

The main object of article 13 is to secure the paramountacy of the Constitution in regard to fundamental rights. The first clause relates to the laws already existing in force and declares that pre-Constitution laws are void to the extent to which they are inconsistent with the fundamental rights. The second clause relates to post-Constitution laws and prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. The expression "the State" is to be construed in conformity with article 12 as judicially interpreted. The ambit of the expression "law" is defined in article 13(3)(a) itself, so as to ensure that the paramountacy of the Constitution extends also to:-

(a) temporary laws, such as Ordinances, Acts as well as permanent laws

(b) statutory instruments in the nature of subordinate legislation, specifically described as "order, bye-law, rule, regulation, notification" having in the territory of India the force of law.

(c) Non-legislative sources of law, that is to say, custom or usage having in the territory of India the force of law.

[1] Ins. by the Constitution (24th Amendment) Act, 1971, sec. 2 (w.e.f. 5-11-1971)

The object of the definition in article 13 is to ensure that instruments emanating from any source of law - permanent or temporary, legislative or judgment or any other source-will pay homage to the constitutional provision relating to fundamental rights. At the same time, clause (4) seeks to ensure that a constitutional amendment does not fall within the definition of law in article 13, and its validity cannot be challenged on the ground that it violates a fundamental right. But it should be noted that fundamental rights as such, while not immune from constitutional amendment, may, in some cases, form part of the theory of basic features, enunciated in certain decisions by the Supreme Court. The chronology of important Supreme Court decisions on the subject is as under:-

(i) L.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643: (1967) 2 SCR 762: 1967 All LJ 813: 1967 (2) SCJ 486: 1967 BLJR 818: (1967) 2 SCA 642: 1967 MPWR 553: (1967) 2 SCWR 1006.

(ii) Keshavananda Bharati Sripadgalvaru v. State of Kerala, AIR 1973 SC 1461: (1973) 4 SCC 225: 1973 Supp SCR 1, which, while upholding the validity of the Constitution (24th Amendment) by which article 13(4) was inserted, laid down (by majority) the theory that there were certain basic features which could not be amended under the amending power.

(iii) Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789: (1980) 3 SCC 625: 1980 Ker LT 573: 1980 UJ (SC) 727, which declared that even

though the 42nd Amendment sought to amend article 368 (relating to the amending power) there shall be no limitation whatsoever on the Constituent power of Parliament to amend, by way of addition, variation or repeal, the provisions of the Constitution under article 368, a Constitutional amendment which relates to a basic feature (e.g., total exclusion of judicial review) would be void.

(iv) Waman Rao v. Union of India, AIR 1981 SC 271: (1981) 2 SCC 362: 1980 Ker LT 573: 1980 UJ (SC) 742: (1981) 2 SCR 1, paragraph 15, re-affirming the above limitation on the constituent power.

(v) Bhim Singhji v. Union of India, AIR 1981 SC 234: (1981) 1 SCC 166: 1981 Raj LR 39: (1981) 19 DLT 185: 1981 All CJ 38.

(vi) S.P. Gupta v. Union of India, AIR 1982 SC 149: 1982 Raj LR 389: 1981 Supp SCC 87 and S.P. Sampath Kumar v. Union of India, AIR 1987 SC 386: (1987) 1 SCC 124: (1987) 1 LLJ 128: (1987) 1 SLR 182, both being decisions which, while upholding the validity of a particular amendment, impliedly proceed on the proposition that a constitutional amendment cannot override a basic feature.

Constitution Amendment Acts Declared as Unconstitutional

Amendment Act	Relevant Ruling
(1) Seventeenth Amendment (in part)	L.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643: (1967) 2 SCR 762: 1967 All LJ 813: 1967 (2) SCJ 486: 1967 BLJR 818: (1967) 2 SCA 642: 1967 MPWR 553: (1967) 2 SCWR 1006.
(2) Twenty-fifth Amendment (article 31C)	Keshavananda Bharati Sripadgalvaru v. State of Kerala, AIR 1973, SC 1461: (1973) 4 SCC 225: 1973 Supp SCR 1.
(3) Thirty-second Amendment	Sambamurthy v. Union of India, AIR 1987 SC 66: (1987) 1 SCC 362: (1987) 2 ATC 502: (1987) 1 LLJ 221 (Rule of law).
(4) Thirty-sixth Amendment (article 329)	Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299: 1975 Supp SCC 1, para 251.
[The relevant article 329A was repealed by the Forty-fourth Amendment]	
(5) Article 368 (Amendment power)	Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789: (1980) 3 SCC 625: 1980 Ker LT 573: 1980 UJ (SC) 727.
(6) Fifty-second Amendment (10th)	Kihota Hollohan v. Zachillhu, (1992) Supp 2 SCC 651: AIR 1993 SC 412: 1992 AIR SCW 3497: JT 1992 (1) SC 600: (1992) 1 SCR 686: (1992) Supp 2 SCC 651.
(7) 99th Constitution Amendment Act, 2015	National Judicial Commission

Laws inconsistent with or in derogation of the Fundamental Rights are void.

Teeth to the fundamental Rights –

I. Pre-constitution Laws -

i) Laws in force before the commencement of Constitution (before 26th January 1950) to the extent of inconsistency - void.

Example - 1) Doctrine of Eclipse 2) Doctrine of Severability

II. Post-constitution Laws - The State shall not make Laws which takes away or abridges Fundamental Rights – Laws made to the extent of contravention be void.

Ordinance of University - Action of Ministers - Resolution of Government.

Laws means ordinance, order, bye-laws notification etc. having force of Law.

Any administrative action – Medical entrance rule, notification issued by B.M.C / Z.P. even action of Principal can be challenged as violative of Fundamental Rights. Service Rules, Recruitment Rules, Admission Rules, Examination Rules.

III. Laws - includes Order, Ordinance, Regulation, Bye-Law, Rules, Notification - having the force of law.

IV. Laws in force - Laws made before the commencement of Constitution – I.P.C. - Indian Evidence Act.

Art. 13(4) "Nothing in this Article shall apply to any amendment of this Constitution made U/A 368:

This was inserted by the Constitution 24th Amendment Act 1971 w.e.f. 5-11-71 to override the view taken by Justice Subbarao C.J. for the majority in Golaknath Vs State of Punjab – AIR 1967 SC 1643.

Validity of this amendment is upheld Keshavananda's case - AIR 1973 SC 1461.

VIEW: The Constitution Amendment Act passed according to A. 368 is a "Law" within the meaning A.13 and would accordingly be void it if contravenes the Fundamental Rights.

A.13 - Gives teeth to the Fundamental Rights. A-13(1) is prospective and not retrospective.

Prospective nature of A. 13(1) gives rise to unconstitutionality and Doctrine of Eclipse.

Pre-Constitution Law: A Pre-Constitution law (before 26 January 1950) inconsistent with a Fundamental Right becomes void after the commencement of the Constitution - Liability is not nullified.

Relevant Case - Bhikaji Vs MP AIR 1955 SC 781

A legal provision enacted in 1948 authorizing State Government to exclude all private motor transport business, it becomes inconsistent when Constitution came into force in 1950 with A-19 (1) (g). In 1951, A.19 (1) (g) was amended so as to permit State Government to monopolize any business. Was the effect?

Doctrine of Eclipse:

i) Pre-constitution Law not wiped out automatically

ii) Eclipsed for the time being

iii) dormant or moribound condition

iv) not dead

Fundamental Right amended “to remove the shadow and make the act valid” and enforceable. Apply only to pre-constitutional Law -- not post-constitutional Law.

Fundamental Right:

i) prospective

ii) not void ab initio

iii) Rights and liabilities not affected

Leading case - Keshavan Menon Vs State of Bengal AIR 1951 SC 128.

The appellant was accused of having violated certain provisions of Indian Press (Emergency Power) Act 1931. The proceedings commenced before commencement of Constitution & pending. The petitions contend:

i) Certain provisions of the Act were inconsistent with A. 19(1) (g). So, Law was void and proceedings may be dropped.

Doctrine of Severability.

A-13(2) The State shall not make any law which takes away or abridges fundamental right and any law made in contravention to fundamental right shall to the extent of contravention is void. Not void as a whole, only a part of it may be void and if that part is severable from the rest then the rest may continue to stand and remain operative (RMDC V/s Union of India AIR 1957 SC 628).

Prize Competition Act, which was broad enough to include:

i) competition of gambling nature

ii) as well as those involving skill U/A 19 (1)(g)

Parliament could restrict Prize competition only and gambling nature and not those involving skill. Thus invalid provision severable. These propositions have been reiterated recently in “Motor General Traders Vs Andhra Pradesh AIR 1984 SC 121.

A-13 (1) Pre-constitutional Laws - Doctrine of Eclipse

(Bhikaji Narain Dhakras Vs M.P - 1955 2 SCR 589 (CP & Berar Motor Vehicles Act 1939 amended in 1947).

The CP & Berar Motor Vehicles (Amendment) Act 1947 had amended Sec. 43 of the same Motor Vehicles Act 1939 introducing provisions which authorizes

the provincial Govt. to take up the entire Motor transport business in the province and run it in competition with and even to the exclusion of Motor transport operator. These provision though valid, when enacted became void on the coming into force of the Constitution (26 Jan. 1950) as they violated A.19 (1) (g). i.e. to practice any profession or to carry out trade / business. However, on 18th June, 1951 the Constitution was amended so as to authorize the State to carry on business, whether to the exclusion, complete or partial of citizens or otherwise. Original provision, which was ecliped by constitutional provision, was again revived by constitutional amendment.

The question whether a fundamental right can be waived has been finally decided by Constitution bench of the SC in Olga Telis Vs Bombay Corporation AIR 1986 SC 180.

The Court has unanimously held that –

"The person cannot waive any of the fundamental rights conferred upon him by any act of his".

AMENDABILITY OF FUNDAMENTAL RIGHTS AND BASIC STRUCTURE THEORY

Judicial Activism –

i) **Art. 13(4)** - Nothing in this article shall apply to any amendment of this Constitution made under Article 368. (Inserted by the constitution (24th) Amendment Act 1971).

Article 368 - [2]Power of Parliament to amend the Constitution and procedure therefor;

(1) [3]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.

(2) [4]An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting, [5]it shall be presented to the President who shall give his assent to the Bill and

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[2] Subs. by the Constitution (24th Amendment) Act, 1971, sec. 3(a), for "**Procedure for amendment of the Constitution**" (w.e.f. 5-11-1971)
[3] Ins. by the Constitution (24th Amendment) Act, 1971, sec. 3(b) (w.e.f. 5-11-1971)
[4] Article 368 renumbered as clause (2) thereof by the Constitution (24th Amendment) Act, 1971, sec 3 (w.e.f. 5-11-1971). Earlier article 368 was amended by the Constitution (7th Amendment) Act, 1956, sec. 29 and Sch. (w.e.f. 1-11-1956)
[5] Subs. by the Constitution (24th Amendment) Act, 1971, sec. 3(c), for certain words (w.e.f. 5-11-1971)

thereupon, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in -

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) [6]Nothing in Article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution

[6] Ins. by the Constitution (24th Amendment) Act, 1971, sec. 3(d), (w.e.f. 5-11-1971)

(Forty second Amendment) Act, 1976) shall be called in question in any court on any ground.

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

[*Inserted by 42nd Amendment Act, 1976 – declared invalid unconstitutional by Supreme Court in Minerva Mills Ltd. vs. Union of India [(1980) 2 SCC 591*]

ORIGINAL ARTICLE IN CONSTITUTION 1950

Article 13. Laws inconsistent with or in derogation of the fundamental rights in detail — (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) **"law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;**

(b) **"laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.**

ORIGINAL ARTICLE

(BEFORE 24TH CONSTITUTIONAL AMENDMENT ACT 1971)

PART XX

PROCEDURE FOR AMENDMENT OF THE CONSTITUTION

Article 368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in -

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

I. Legal battle between Parliamentary sovereignty and judicial supremacy.

History – Conflict of Philosophical thinking

Parliament attaches great importance to socio-economic changes of the common man. Indian Constitution first and foremost a social document. The Goal of Constitution is to impart social-economic justice to the people of India.

- social revolution
- welfare of the common man
- socialistic pattern of society
- No concentration of Wealth

Art.38 - **State to secure a social order for the promotion of welfare of the people.**

1. State shall strive to promote welfare of the people by securing and protecting social order in which justice, social, economic & political shall inform all the institution of national life.
2. State shall strive to minimize the inequalities in income & endeavor to eliminate inequalities in status, facilities, opportunities, not only amongst individuals but also amongst group of people residing in different areas or engaged in different vacation and in condition of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Art.39 – The State shall direct its policy towards securing -

a) men and women equally have the right to have an adequate mean of livelihood.
b) ownership and control of material resources of the community and so distributed as best to sub serve the common good.
c) operation of economic system does not result in concentration of wealth and means of production of the common detriment.
d) there is equal pay for equal work for both men and women.
e) health and strength of workers men and women and the tender age of children are not abused and the citizens are not forced by economic necessity to enter avocation unsuited to their age or strength.
f) children are given opportunities and facilities to develop in a health manner

Art. 39 A - Equal justice and free legal aid

Art. 40 - Organisation of Village Panchayat

Art. 41 - Right to work, education and public assistance in case of unemployment, old age, sickness, disablement

Art. 42 - Just and human conditions of work and maternity relief

Art. 43 - Living wage for worker - agricultural, industrial

Art. 44 - Uniform Civil Code

Art. 45 - Early childhood care and education to children below the age of 6 years

Art. 46 - Promotion of educational interest and economic interest of SC/ST and Other Weaker Section.

Art. 47 - Raise level of nutrition, standard of living public health

Art. 48 - Protection and improvement of environment and safeguard in forest and wildlife.

Pandit Nehru philosophy, thinking, concept dominated the Indian polity. He is true democrat and influenced by socialism based on Russian thinking (Russian Revolution 1917) Nehru ---

Marxism - Haves / Have not

Class conflict - ultimate goal - egalitarian society

(Pandit Jawaharlal Nehru's speech in Lok Sabha)

Parliament - **Constitution is creature of Parliament so Parliament is supreme. (Nehruvian Philosophy)**

Parliament is creature of Constitution – so Constitution supreme. (Judicial View)

Amending process cannot be so rigid that if fails to adopt changing need of the people of free India – Nehru.

Judicial Thinking

- Fundamental rights are essential, basic, inviolable, inherent and sacrosanct right.
- Beyond reach of Parliament
- Cannot be tampered with
- essential for all round development of human beings
- Attach great importance to these basic rights
- elite society
- influence by capitalistic thinking – particularly right to "property"

i) U.S. Constitution / Australia – special method of Amm. is prescribed – the power must be there.

Pandit Nehru's speech on draft Art. 24 asserts the sovereignty of Parliament – Judiciary is not a third or revising Chamber – SC could not constitute itself into third chamber.

Draft Constitution – Art. 304 which is in pari materia with Art. 368 show that the amending power cannot be residuary power.

LANDMARK JUDGEMENTS

I. Shankari Prasad vs. Union of India – AIR 1951 SC 458.

(The first Constitutional Amendment Act was challenged in this case.)

i) Unanimous decision

ii) Judges – Kania C.J., Shastri, Mukherji, Das and Ayyer.

The first Constitutional Amendment Act curtailing Right to Property was challenged.

Arguments:-

1) Art. 13 prohibited enactment of law infringing or abrogating Fundamental Rights.

2) The word "Law" in Art. 13 would include any law, even a Law amending Constitution. (Art. 368)

Art. 31, Art. 31B --- IXth Schedule inserted.

(Kameshwar vs. State of Bihar) – 1950 (1962 AIR 1166, 1962 SCR Supl. (3) 369)

The Bihar Land Reform Act 1950 was held by S.C. to be violative of Art. 14 and Art. 16(1)(g). To override the judgement of S.C. the 1st Constitutional Amendment Act 1951 was passed. (Election 1952 – Parliament Constituted)

Art. 31 A – Notwithstanding anything contained in Art. 13 no Law providing for acquisition of any estate, taking over management of property shall be void on the ground that it is inconsistent or takes away any rights conferred by Art. 14 and 19.

Art. 31 B – If acts included in IXth Schedule takes away for abridges fundamental right shall not be void.

Unanimous decisions of the Court:-

1) S.C. rejected contention and limited scope of Article 13.
2) Terms of Art. 368 were perfectly general and empowered Parliament to amend the Constitution without any exception including fundamental right.
3) Theory of ordinary Legislative Power and Constituent Powers was invented by S.C. (Judicial Innovation). "Doctrine of --- ordinary legislative power –and constituent power invented by the S.C."
4) Fundamental Rights could not be curtailed by organs of the State i.e. Executive, Legislature in exercise of Legislative powers i.e. by means of Law, Rules, Regulation etc.
5) Fundamental rights could certainly be curtailed, abridged or even nullified in exercise of constituent powers by Parliament.
6) Art. 368 cannot be controlled by Art. 13(4).
7) Law in Art. 13 means Law, Rules, Regulations in exercise of Ordinary Legislative Power under Art. 245 – List III.

8) Constitutional amendment under Art. 368 are Constituent Power of Parliament ("Doctrine of --- ordinary Legislative power --- constituent powers invented by S.C.")

II. Sajjan Singh vs. State of Rajasthan --- AIR 1965 SC 845

Facts of the Case:-

1) Validity of 17th Constitutional Amendment Act, 1964 was called in question.
2) Numbers of statues affecting property rights were placed in the IXth Schedule. Art. 31B and thus immunized from courts.
3) Review (Maharashtra Land Ceiling Act, 1961).
4) Defined the term "Estate" widely – Art. 31A.

17th Amendment Act 1964

1) Definition of Estate is amended
2) Entries 21-64 Land Reforms Act, added in IXth Schedule

Arguments

1) Amendment in question reduced the area of judicial review.
2) By inclusion in IXth Schedule many statutes had been immunised from the attack before Court.
3) It affected Art. 226.
4) Concurrence of the half of the State under Art. 368 ought to have been taken –

Majority – 3:2

- Justice – C.J. Gajendragadkar
- Wanchoo
- Raghubir Dayal

1) Justice Hidayatullah - dissenting
2) Justice Mudholkar – dissenting

Decision

1) The SC rejected the argument by majority of 3:2.
2) Majority ruled that the substance of the amendment was only to amend the fundamental right to so as to help the State Legislatures in effectuating the policy of agrarian reforms.
3) Art. 226, if it affected is an insignificant manner – that was only incidental
4) The conclusion of the Shankari Prasad case is reiterated in this case.

The majority refused to accept the argument that fundamental rights were eternal, inviolable and beyond the reach of Art. 368 and confirmed the right of Parliament to amend any provision of the Constitution including fundamental rights.

Minority Judgement – dissenting

Justice Hidayatullah and Justice Mudholkar

1) They raised doubt whether Art. 13 would not control Art. 368

"PLAY THING" Theory

2) **Justice** "**Hidayatullah**", I would require stronger reasons than those given in Shankari Prasad's case, to make me accept the view that fundamental rights were not really fundamental but were intended to be within the powers of amendment in common with the other parts of Constitution and without concurrence of the States, because the constitution gives so many assurances in Part III and that it would be difficult to think that "they were play thing of special majority".

I. Golaknath was based on Justice Hidayatullah's argument i.e. theory of non-amendability of fundamental rights.

II. Keshvananda was based on Justice Mudholkar's view i.e. basic structure theory.

Mudholkar – Justice felt reluctant to express definite opinion but he broadly said "every constitution has certain fundamental features which could not be changed".

III. Golaknath Vs State of Punjab – AIR 1967 SC 1643 (Judgement 6:5)

Judges – Majority 6 – (i) C. J. Subba Rao (ii) Sikri (iii) Shah (iv) Shelat (v) Vaidilingam (vi) Hidayatullah

Minority 5 - DISSENTING – **(i) Wanchoo (ii) Bachavat (iii) Ramaswami (iv) J.M. Bhargava (v) Vishishtha & Mitter**

1) Landmark decision in the Constitutional History of India.
2) Based on Justice Hidayatullah view in Sajjan Singh's case
3) Keshvananda was based on Justice Mudholkar's view of limited amending power of Parliament.

Facts:-

1) encouraged by there marks of Justice Hidayatullah and Mudholkar, Constitution Amendment Act – 17th Amendment 1964 – Validity Challenged.
2) Special Bench of 11 Judges first time in the Constitutional History of India was constituted.
3) Decision 6:5
4) challenged on the ground that "Parliament has no powers to amend the fundamental rights".

SC wanted to assert judicial supremacy over Parliamentary sovereignty

Culminated judicial activism

SC acts as a protector and guarantor of fundamental rights.

(Parliament has no power to amend fundamental right under Art. 368)

Decisions

i) held that fundamental rights were not amendable under Art. 368

ii) They are inviolable rights beyond the reach of Parliament.

iii) Subba Rao C.J. delivering the majority judgement observed that – fundamental rights could not be amended under Art. 368.

  i) Art. 368 merely contained the procedure for amendment and did not confer substantive power to amend fundamental right.

  ii) The power to amend constitution being not expressly contained in any article, its location could be only in the residuary power of Parliament contained in List I – Union List – 97.

  iii) Therefore, Parliament by an exercise of the Legislative Power could not amend Part III of the Constitution.

  iv) These rights by their very nature could not by subject to the process of amm. and if any of such rights is to be amended, a new Constituent Assembly must be convened for making new constitution.

  v) Accordingly amendment to the Constitution was a "Law" within the meaning of Art. 13 of the Constitution

  vi) Art. 13 gave a definition of Law including "Constitutional Law" – no distinction between ordinary Legislative Power and Constituent Powers.

vii) The amending power in Art. 368 were merely legislative and not constituent in nature. This was the crux of the whole argument

viii) The majority found countenance for its argument from one anomalous feature of Art. 368 – procedure laid down their in is similar to ordinary legislative process. The provision for Presidential assent was similar to that of ordinary legislative process.

Philosophy behind this Judgement

1) The majority was worried about numerous amendments to Constitution 1950-1964 within a span of 14 years – Constitution was amended 17 times.
2) If restrictions not put on powers of Parliament, time might come when these rights are completely eroded and
3) India would gradually pass under totalitarian regime
4) Danger to democracy
5) Constitution incorporates "implied limitation" on Parliament
6) The Constitution places fundamental right on such a high pedestal that they are beyond the reach of Parliament.
7) They are sacrosanct

Minority Judgement

1) The minority judges delivered three separate opinion (influenced by Nehruvian Philosophy)

2) Bone of contention was that "Constitution would become static if no such power is conceded to Parliament". They have relied on the liberal Philosophy of the framers of the Constitution which has been so nicely express by Pandit Nehru.
3) Art. 368 is not controlled by Art. 13.
4) Parliament has every power to amend the Constitution.
5) If the constitution makers had wanted to make the Fundamental Right unamendable they could have easily make express provisions in the Constitution.

Doctrine of Prospective overruling (CANADA)

1) Five Judges took recourse to the doctrine of prospective over rulings
2) Till 1967 – 17 amendments had been upheld by SC as valid
3) Large body of legislation had been enacted bringing about agrarian revolution in India.
4) If given retrospective effect – introduce chaos and unsettled condition in country.
5) So they took view that Golaknath decision would not affect previous constitutional amendment and not invalidated them.

IV. Keshvanand Bharati Vs State of Kerala – AIR 1973 SC 1461

(Fundamental Rights Case)

1) To neutralise the effect of Golaknath, Barrister Nath Pai, M.P. introduced a Private Members Bill in Lok Sabha on 7th April 1967 to assert supremacy of Parliament.
2) Bill did not make such headway – affront to the dignity of SC
3) Political situation in country was fluid
4) Syndicate / Indicate --- 1969 Split in Congress Party – In 1971 Congress Party returned to power under stewardship of Mrs. Indira Gandhi with huge majority. (V. V. Giri – President 1969 – Neelam Sanjeeva Reddy – Indira Gandhi (Gai, Vasru, Naka Visru)
5) **To supersede the judgement of Golaknath Case.**

The Parliament had passed the Constitution 24th Amendment Act 1971 Art. 13(4) inserted – marginal heading. amended - Power of Parliament to amend the Constitution and procedure therefore. (Instead of procedure for amendment of Constitution).

24th Amendment Act, 1971

Art. 13(4) – Nothing in this article shall apply to any amendment made under article 368 – Art.368 (3). Nothing in Article 13 shall apply to amendment made under this Article.

6) Parliament passed 25th Amendment Act 1971 --- 20-4-1972

(i) In place of "compensation" the "amount" is submitted in Article 31.

(ii) Art. 31(c) is inserted i.e. Directive Principles have been given paramount over fundamental right.

- to supersede the judgement delivered by the SC in Bank nationalization case (R.C. Cooper & Others Vs Union of India --- AIR 1970 SC 564)

Bank Nationalization Case

Under banking companies (Acquisition and transfer of undertakings) Ordinance 1969 the Government of India nationalized 14 major Indian Banks. Ordinance was replaced by the Act 2 of 1969.

The Act was challenged in SC on the ground that it violated Fundamental Right guaranteed under Art. 14, 19 and 31 of the Constitution and so Act was invalid and unconstitutional.

On 10th February 1970 the SC gave its judgement and held that –

i) Sec 15(2) of the said Act was unconstitutional as banks were prohibited from carrying on not only banking but non-banking business.

ii) The compensation under Art. 31 should be just compensation

iii) The Act was strike down as contravening Art. 31(2) of the Constitution.

7) Parliament enacted the Constitution (26th Amendment) Act 1971 – (28-11-71) – Privy Purses and special privileges of rulers of farmer Indian states were abolished.

8) In 1971 Congress Party was returned in power with huge majority – with "Garibi Hatao" slogan.

V. His Holiness Keshavananda Bharati Sripadagalvaru and others vs State of Kerala (29th amendment Kerala Land Reforms Act 1969 and 1971 was included in IXth Schedule – infringed Right to Property)

i) The validity of 24th, 25th and 29th Amendments to the Constitution was challenged in SC.

ii) Landmark case in Indian Constitutional History.

iii) The matter was referred to Full Bench of SC consisting 13 Judges.

iv) Hearing lasting for 69 days – longest in the History of SC.

v) The judgments were delivered on 24th April 1973

vi) In all 11 judgments representing the views of 13 judges were delivered.

(**Justice Ray, Palekar, Mathew, Beg, Dwivedi, Chandrachud, ("Repudiated the doctrine of Basic feature") 6 judges.**

Judgements

(1) Majority of the Full bench upheld the validity of the 24th amendment and overruled the case of Golaknath- means.

i) Justice A.N. Ray, ii) D.C. Palekar, iii) K.K. Mathew, iv) M.H. Beg, v) S.N. Dwivedi, vi) Y.V. Chandrachud, vii) H.R. Khanna- upheld the parliament's power to amend the F.R.) u/a. 368

2) The question has been settled in favor of view that the constitution amendment Act is ; not "law within the meaning of Art.13.

i) S.M. Sikri, C.J., ii) J.M. Shelat, iii) K.S. Hegde, iv) A.N. Grover, v) P. Jagmohan Reddy, vi) A.K. Mukherjee, vii) H.R. Khanna – "Parliament power to amend the Constitution cannot be so exercised as to destroy the basic structure or basic features of the Constitution)".

3) The majority upheld the validity of clause 4 of Art.13 24th Amendment Act 1971 (13(4) 368(3).

Parliament power to amend the Constitution cannot be so exercised as to destroy the basic structure or basic features of the Constitution (Basic Structure Theory)	**Parliament's power to amend the Fundamental Rights**
i) S.M. Sikri, C.J., ii) J.M. Shelat, iii) K.S. Hegde, iv) A.N. Grover, v) P. Jagmohan Reddy, vi) A.K. Mukherjee, vii) H.R. Khanna	i) Justice A.N. Ray, ii) D.C. Palekar, iii) K.K. Mathew, iv) M.H. Beg, v) S.N. Dwivedi, vi) Y.V. Chandrachud, vii) H.R. Khanna

It was strange co-incidence that Justice Khanna was responsible for laying down the two propositions.

4) Held that F.R. in India can be amended by an Act passed under Art.368 and the validity of Constitutional Amendment Act cannot be questioned on the ground that Act invades or encroaches upon any fundamental right.

5) Concept of Basic structure or frame work – evolved in this Case.

6) Seven of the 13 judges observed that "though Parliament possessed the power to amend the Constitution there are certain basic features of the Constitution of India which cannot be amended, altered in exercise of the power to amend Art. 368.

7) Theory of "Implied Limitation" affirmed in this Case (Judicial Innovation)

8) If Constitution Amendment Act seeks to alter the basic structure or framework of the Constitution, the court would be entitled to annual it- on the ground of ultra virus because the word "amend" in Art.368.

"Parliament's power to amend the constitution could but be so exercised so as destroy the basic structure or basic feature of the constitution." (Basic Structure Theory)

It was strange co-incidence that Khanna J. was responsible for laying down the two prepositions –

1) Parliament has power to amend any part of the Constitution but it cannot so amend the Constitution as to destroy the basic features of the Constitution (Justice Khanna's Judiciary pendulum kept on swinging in both directions)
2) The union government moved the Supreme Court for review of the basic structure theory enunciated in this case. The full Bench of 13 judges sat to

hear the arguments. But in sudden move "without assigning any reasons, the bench was dissolved by Chief Justice A. N. Ray on Nov. 12, 1976.

3) **Famous and renowned jurist Nani Palkhiwala argued the case and advanced argument that fundamental rights in Aert.14, 19 and Sec 1 were core fundamental rights.**

"The Parliament is only a creature of the Constitution parliament has the power to destroy the basic structure it would cease to be creature of the constitution and become its master".

This is rationale of SC Judgement in this case.

4) **In exercising its amending power, Parliament cannot arrogate to itself the role of the Official Liquidator of the Constitution.**

5) **In this case Palkhiwala vehemently argued that there were inherent and implied limitation on Parliament's amending power. (Palkhiwala described Keshvananda as "One of the milestone in the history of "Constitution Jurisprudence – Page 147) In his book "Constitution defaced and defied**" -

Palkhiwala had put this argument "Parliament's powers to amend the Constitution do not comprise the power to alter or destroy any of the essential features, basic element or fundamental principles of the Constitution.

Decision has a great impact or influence by this argument.

VI. POST KESHVANAND'S CASE-CONSTITUTIONAL DEVELOPMENT

Indira Nehru Gandhi Vs Rajnarain (AIR 1975 SC 2299)

(Election Case)

(Jaya Prakash movement "Sanmpurna Kranti" – 26th June, 75 - Emergency)

(Election Case)

Facts-

1) On 12th June 1975, the Allahabad High Court decided in favour of Mr. Raj Narain who had preferred an election petition against Mrs. Indira Gandhi. Smt. Gandhi defeated him in 1971 election from Raibareli by a margin of about 1,12,000 votes.
2) Mr. Justice "Jagmohan Lal Sinha" (this name had been written with golden letter in the judicial history of India) of the Allahabad H.C. had set aside Mrs. Gandhi's election on the ground that she was guilty of corrupt practices. (Yashpal Kapur a Government servant assisted her - Govt. machinery of UP misused.)
3) Against this decision of Allahabad H.C., Mrs. Gandhi preferred an appeal in the SC and as the matter came up before a Bench of five Judges -
    i) C.J. A.N. Ray
    ii) H.R. Khanna
    iii) K.K. Mathew
    iv) Beg

v) Chandrachud

4) One interesting Development- all the five judges were also associated with the famous Keshvanand's Case.

Except Justice Khanna – who is responsible for basic structure theory and both preposition, others have confirmed unfettered powers of Parliament to amend the Constitution in Keshvanand's case.

A.N. Ray was elevated to Chief Justices of India superseding Shelat, Hegde and Grover Thex resigned in protest.

Allegation made against Congress Govt. regarding "committed judiciary".

i) During pendency of Smt. Gandhi's appeal - R.P. Act 1951 was amended with retrospective effect - reg. government servant assistance etc.

ii) During pendency of Mrs. Gandhi's appeal, the Constitution 39th amendment Act 1975 was also enacted - Prime Minister's election cannot be challenged in court (Date of commencement 10-8-1975 Art. 329A repealed by Constitution 44th amendment Act 1978 w.e.f. 20-6-1979 by Janata Party Govt.

New Art. 329 A was introduced to oust the jurisdiction of the courts so far as election of Prime Minister Speaker is concerned.

Aim of amendment - the amendment sought to decide the election petition in favour of Mrs. Gandhi, then Prime Minister of India.

Judgement

1) SC unanimously upheld Mrs. Gandhi's election Lok Sabha in 1971 nullifying the judgment passed by Allahabad H.C." on merits".
2) Not guilty of corrupt practices
3) Government's help / arrangements construction of rostrums could not be considered as having been done in furtherance of her election prospects.

As per C.J. Ray Clause 4 of A. 329:

i) it has wiped put judgement of Allahabad H.C. and election petition also

ii) Before S.C. – no judgement - no dispute - everything nullified.

iii) Through constituent powers- validated the election of Smt. Gandhi - Clause 4 declared void by SC.

Clause 4 of Art.329 was held unconstitutional by the SC as it was considered to be violative of the basic structure of the Constitution viz. Principle of free and fair election which is an essential postulate of democracy and which in turn part of the basic structure.

iv. The constituent powers had discharge judicial functions in deciding election dispute against Smt. Gandhi, P.M. and in doing this it had followed no procedure and applied no Law.

v. Mathew Judge – it destroyed essential democratic feature of the constitution i.e. free and fair election.

vi. Chandrachud Justice- equality of status and opportunity being essential feature = violated

vii. Judicial function of declaring election void or valid – is exercised by legislature – void- separation of powers is basic structure

viii. Judicial review basic structure

6. **Minerva Mills Ltd. Vs Union of India - AIR 1980 SC 1789 (Validity of 42nd amendment was challenged)**

(Objects and reasons of 42nd Amendment - to be read out i) Preamble ii) Art.31,31C, 32A, 39, 39A, 43A, 48A, 51A, 55, 74, 77, 81, 82, 100, 102, 103, 105, 118, 131A, 139A, 144A, 145, 150, 166, 170, 172, 189, 191,192, 194, 208, 217, 225, 226, 226A, 227, 228A, 257A, 31, 312, 323A, New Part XIV A (14A) 323B, 352, 353, 356, 357,358, 359, 366, 368,371F, Amendment of VII Schedule – Art. 60)

1) The Government did not relish the SC pronouncement in the Indira Gandhi election case declaring clause 4 of A329 i.e. 39th Constitutional amendment invalid and decided to ensure that never in future the courts should have the power to pronounce the constitutional amendment invalid.

2) Art. 368 was again amended by 42nd amendment Act 1976 with a view to assert supremacy of Parliament in the area constitutional amendment and CA should be taken out of judicial purview.

3) 42nd amendment 1976 (Art.31(c) w.e.f. 3-1-77)

Amendment of Art.31C - "the principle specified in clause (b) or (c) of Art.39 " for this" all or any of the principles laid down the Part IV (D.P).

Amendment of Art. 368

Art. 368(4) - No amendment of this Constitution (including the provisions Part III) made or purporting to have been made under this article (whether before or after commencement of Sec.55 of Constitution 42nd amendment Act 1976) shall be called in question in any court on any ground.

Art. 368(5) – For the removal of doubt, it is hereby declared that there shall be no limitations whatever on the Constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

In justification of new amendment in Art. 368 the (H.R. Gokhale) Law Minister had claimed that:

1) **There were no basic features which needed to be protected from amendment.**
2) **Supremacy of the parliament ought to be established in the area of constitutional amendment.**

I. Parliament cannot so amend the Constitution as to damage the basic or essential features of Constitution.

II. Amendment to Art. 368 held to be beyond the amending power of Parliament and void since it sought to remove all limitations on the power of Parliament to amend the Constitution.

III. Depriving the court of the power of judicial review will mean making fundamental right "a mere adornment" (Alankar / Bhushan) as they will be rights without remedy. (Amendment to Art.31C was declared invalid – given total primacy to D.P. over fundamental rights and taken away power of judicial review).

In Keshvananda's case, Justice Chandrachud repudiated the Doctrine of basic structure but in Minerva Mills he supported that doctrine and advocated limited power of Parliament.

IV. A controlled Constitution will become uncontrolled and abrogate democracy.

Justice Chandrachud advocated, as under:-

i) Judicial review was basic structure and any amendment which took away this, was unconstitutional.

ii) The Constitution confers limited powers of amendment to Parliament and Parliament could not by exercise of that limited power enlarge that very power to unlimited one.

iii) "The donee of limited power cannot by exercise of that power convert the limited powers into an unlimited one".

iv) Article 368(4) and 368(5) were held unconstitutional and they violated basic features of Constitution.

In Keshavananda, Justice Chandrachud has advocated unlimited power of Parliament to amend fundamental rights and repudiated theory of basic structure but in Minerva Mills's case as a Chief Justice; he has changed his stance and advocated limited power of Parliament and basic structure there.

1. Rajaram Pal Vs Speaker Lok Sabha
AIR 2007 SC (supp.) 1448
Writ Petition No. (c) 1 of 2006
(C J Sabharwal)

Supreme Court upholds expulsion of 12 MPs

Says It is The Final Arbiter On legality Of House Actions

The Supreme Court on Wednesday endorsed parliament's decision to expel 12 MP's stung by the cash for query and MPLAD scams but claimed for itself the role to play final arbiter by sitting in judgment on the legality of decisions taken by the legislature.

The 4:1 landmark ruling with Justice R.V Raveendran dissenting emphasises that the concept of judicial review extends to scrutiny of how legislature exercise their powers. This is sure to rankle the votaries of parliamentary supremacy.

The majority 357 page judgement on the petition of expelled MPs challenging parliament's powers to expel its members has two parts. The first Validates the decision of parliament to terminate the membership of those who were caught on camera accepting money for asking questions inside Parliament. The court was unambiguous that Article 105(3) confers on parliament the right to punish, which includes expulsion of an errant member.

Summary of the Principles relating to Parameter of Judicial Review in relation to exercise of Parliamentary Provisions

We may summarize the principles that can be called out from the above discussion. They are:-

a. Parliament is a co-ordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny;

b. Constitutional system of government abhors absolutism and it being the cardinal principle of our Constitution that no one, howsoever lofty, can claim to be the sole judge of the power given under the Constitution, mere co-ordinate constitutional status, or even the status of an exalted Constitutional functionaries, does not disentitle this Court from exercising its jurisdiction of judicial review of action which part-take the character of judicial or quasi-judicial decision;

c. The expediency and necessity of exercise of power or privilege by the legislature are for the determination of the legislative authority and not for determination by the courts;

d. The judicial review of the manner of exercise of power of contempt or privilege does not mean the said jurisdiction is being usurped by the judicature;

e. Having regard to the importance of the functions discharged by the legislature under the Constitution and the majesty and grandeur of its task, there would always be an initial presumption that the powers,

privileges etc have been regularly and reasonably exercised, not violating the law or the Constitutional provisions, this presumption being a rebuttable one;

f. The fact that Parliament is an august body of co-ordinate constitutional position does not mean that there can be no judicially manageable standards to review exercise of its power;

g. While the area of powers, privileges and immunities of the legislature being exceptional and extraordinary its acts, particularly relating to exercise thereof, ought not to be tested on the traditional parameters of judicial review in the same manner as an ordinary administrative action would be tested, and the Court would confine itself to the acknowledged parameters of judicial review and within the judicially discoverable and manageable standards, there is no foundation to the plea that a legislative body cannot be attributed jurisdictional error;

h. The Judicature is not prevented from scrutinizing the validity of the action of the legislature trespassing on the fundamental rights conferred on the citizens;

i. The broad contention that the exercise of privileges by legislatures cannot be decided against the touchstone of fundamental rights or the constitutional provisions is not correct;

j. If a citizen, whether a non-member or a member of the Legislature, complains that his fundamental rights under Article 20 or 21 had been

contravened, it is the duty of this Court to examine the merits of the said contention, especially when the impugned action entails civil consequences;

k. There is no basis to claim of bar of exclusive cognizance or absolute immunity to the Parliamentary proceedings in Article 105(3) of the Constitution;

l. The manner of enforcement of privilege by the legislature can result in judicial scrutiny, though subject to the restrictions contained in the other Constitutional provisions, for example Article 122 or 212;

m. Articles 122 (1) and Article 212 (1) displace the broad doctrine of exclusive cognizance of the legislature in England of exclusive cognizance of internal proceedings of the House rendering irrelevant the case law that emanated from courts in that jurisdiction; inasmuch as the same has no application to the system of governance provided by Constitution of India.

n. Article 122 (1) and Article 212 (1) prohibit the validity of any proceedings in legislature from being called in question in a court merely on the ground of irregularity of procedure;

o. The truth or correctness of the material will not be questioned by the court nor will it go into the adequacy of the material or substitute its opinion for that of the legislature;

p. Ordinarily, the legislature, as a body, cannot be accused of having acted for an extraneous purpose or being actuated by caprice or mala fide intention, and the court will not lightly presume abuse or misuse, giving allowance for the fact that the legislature is the best judge of such matters, but if in a given case, the allegations to such effect are made, the Court my examine the validity of the said contention, the onus on the person alleging being extremely heavy.

q. The rules which the legislature has to make for regulating its procedure and the conduct of its business have to be subject to the provisions of the Constitution;

r. Mere availability of the Rules of Procedure and Conduct of Business, as made by the legislature in exercise of enabling powers under the Constitution, is never a guarantee that they have been duly followed;

s. The proceedings which may be tainted on account of substantive or gross illegality or unconstitutionality are not protected from judicial scrutiny;

t. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action;

u. An ouster clause attaching finality to a determination does ordinarily oust the power of the Court to review the decision but not on grounds of lack of jurisdiction or it being a nullity for some reason such as gross

illegality, irrationality, violation of constitutional mandate, malafides, non-compliance with rules of natural justice and perversity.

The article, which confers a whole set of privileges on parliament is silent on whether they include the right to expel members.

Chief Justice Y K Sabharwal, along with CJI designate K G Bal Krishnan and Justice C. K. Thakkar and D.K. Jain, settled the matter decisively in parliament's favour attracting full throated cheers form the political class, led by speaker Somnath Chatterjee.

Judiciary can examine legislature's actions:

The Supreme Court, while giving it's ruling in the cash for query and MPLAD scam, emphasized that the concept of judicial review extends to scrutiny of how legislatures exercise their powers. The constitutional system of governance abhors absolutism and it being the cardinal principle of our constitution that no one, howsoever lofty can claim to be the sole judge of the power given under the constitution mere coordinate constitutional status, or even the status of exalted constitutional functionaries does not disentitle this court from exercising it's jurisdiction of judicial review of action which partakes the character of a judicial or quasi-judicial decision, the court said a construction which essentially debunks the argument that judicial review ends where the privileges of parliament start.

2. I.R. Coelho Vs State of Tamil Nadu SC 2007

(2007) 2 SCC 1: AIR 2007 SC 861

This judgement opened up a Pandora's Box with Tamil Nadu Chief Minister Karunanidhi asking for the Constitution to be re written since the state government order for 69% reservations as opposed to 50% limit laid down by the Apex Court would now be open to judicial scrutiny.

Y. K. Sabharwal, C.J.

In these matters we are confronted with a important yet not very easy task of determining the nature and character of protection provided by Article 31-B of the Constitution of India, 1950 (for short, the 'Constitution') to the laws added to the Ninth Schedule by amendments made after 24th April 1973. The relevance of this date is for the reason that on this date judgment in His Holiness Keshavananda Bharati, Sripadagalvaru v. State of Kerala and Anr. was pronounced propounding the doctrine of Basic Structure of the Constitution to test the validity of constitutional amendments.

The fundamental question is whether on and after 24th April 1973 when basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so, what is its effect on the power of judicial review of the Court?

In conclusion, we hold that:

1. A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the court. The validity or invalidity would be tested on the principles laid down in this judgment.

2. The majority judgment in Keshavananda Bharati's case read with Indira Gandhi's case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into 'account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

3. All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the

fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

4. Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute. sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right' test taking the synoptic view of the Articles in Part III as held in Indira Gandhi's case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule. This is our answer to the question referred to us vide Order dated 14th September, 1999 in I R Coelho v State of Tamil Nadu MANU/SC/0562/1999.

5. If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated

in Article 21 read with Article 14, Article 19 and the principles underlying there under.

6. Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge. We answer the reference in the above terms and direct that the petitions/appeals be now placed for hearing before a Three Judge Bench for decision in accordance with the principles laid down herein.

Supreme Court lays down the law: No law is beyond judicial review

CLEARLY reinforcing the pre-eminence of the Constitutional and a citizen's fundamental rights. The Supreme Court in a milestone verdict today said that laws in the Ninth Schedule of the Constitutional do not enjoy absolute immunity form judicial review as envisaged by the legislature.

The unanimous 108 page verdict from the nine judge Constitution Bench headed by Chief Justice Y K Sabarwal made it clear that even though an Act is put in the Ninth Schedule by a Constitutional amendment, it's provisions would by open to challenge on the ground that it destroys or damages the basic structure (of the Constitution by) eroding fundamental rights that pertain to the basic structure.

A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an

insertion in the Ninth Schedule such law will have to be invalidated in exercise of judicial review power of the Court the bench held.

The bench including justices Ashok Bhan, Arijit Pasayat, B P Singh, S H Kapadia, C K Thakker, P K Balasubramanyan, Altamash Kabir and D K Jain said All amendments to the Constitutional made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitutional as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them.

The cut-off date refers to the landmark Keshavanand Bharati vs State of Kerala case in 1973 where a full bench of 13 judges of the Supreme Court said that the Parliament had the power to amend any or all provisions of the Constitution. Seven judges including then Chief Justice Sikri, ruled that Parliament could not use it's powers to alter the basic structure of the Constitution. Each judge gave his view on what he thought was the basic structure but there was no unanimity. The other six judges (the minority view) said fundamental rights be longed to the basic structure and could not be amended by Parliament.

The Ninth Schedule: Removing the immunity shield

WHAT: Ninth Schedule, brought via First and Fourth amendments in 1951 and 1952 is where the govt. places laws to keep them out of judicial review.

WHY: Earlier, used sparingly in land reform case. Now more than 280 laws haven been slipped into this.

THE 1973 RULING: Ruling in the Keshavananda Bharati vs. State of Kerala in 1973, a full bench (of 13 judges) of the Supreme Court upheld the validity of the 24th Amendment saying that Parliament had the power to amend any or all provisions of the Constitution. Seven judges, including Chief Justice Sikri, ruled that Parliament could not use its powers under Article 368 to alter the basic structure of the Constitution.

NOW: The present case has to do with reservation and violation of the right to equality. Despite SC capping reservations at 50% in the Mandal case, Tamil Nadu where quota was already 69% passed a law to get the judgement.

3. Supreme Court Advocates on record Ass. vs. Union of India, 2015

(National Judicial Appointments Commission Case)

(National Judicial Commission and 99th Constitutional Amendment Act, 2014 held unconstitutional)

The Government suffered major set back when the Supreme Court struck down a new law that replace the opaque collegium system with a panel in which the executive was to have a say in judicial appointments, saying it eroded judicial independence.

A five judge bench headed by Justice J.S. Kehar declared the 99th Constitutional Amendment under National Judicial Appointments Commission (NJAC) Act unconstitutional and revived the 22 years old collegium system, putting the judiciary on a collision course with Parliament and the Government.

What the SC says -

- National Judicial Appointments Commission Act, 2014 and related 99th Constitutional Amendment Act 2014, declared unconstitutional and void on grounds that it undermined judiciary's independence.
- **Collegium system of Judges** appointing judges restored.
- **Criticising Collegium system** for lacking "transparency, accountability and objectivity", court fixes to consider measures for improving it.

Collegium System	NJAC System
• Panel of top five SC judges that appoints SC and HC Judges in complete secrecy. Government can return its recommendations but if sent again is bound to accept it.	• Proposed body comprised six members – CJI, 2 Senior SC Judges, Law Minister, Two 'eminent persons' chosen by CJI, PM, Leader of Opposition / Leader of largest Opposition Party in Lok Sabha.
• **Original Provision** – Under Article 124(2) and 217(1) of the Constitution, SC / HC Judges have to be appointed by the President after "consultation" with the CJI.	• **Constitutional Amendment** – NJAC was established by the Constitution (99th Amendment) Act, 2014, giving some say to executive in Judges appointment.
• **Judicial Takeover** – In 1993, SC introduced the Collegium System taking over primacy appointments of SC and HC Judges.	• NJAC Act – Parliament also passed the National Judicial Appointment Commission Act 2014 to regulate procedure to be followed by NJAC that replaced Collegium System.

• **CJI's primacy** – In 1998, a nine judge constitution bench ruled that "consultation" must be effective and the CJI's opinion shall have primacy.	• **Implementation** – The 99th Constitutional Amendment Act and NJAC came into force from April 13, 2015. But it could not take of as the CJI refused to join until petitions against the new system were decided.
• **Composition** – Under the Collegium System, a panel of top five judges appointed judges in secrecy.	• **Composition** – CJI, Two Senior most SC Judges, Union Law Minister and two eminent persons.
• **Veto power** – Government could return collegium recommendation. But if a recommendation was sent again, Government was bound by it.	• **Veto power** – NJAC not to recommend person if any two members did not agree.

ARTICLE 124 as on 26th January 2014 (Before 99th Constitutional Amendment) 2014 – National Judicial Appointments Commission.

124. Establishment and constitution of Supreme Court -

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven _88other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Appointment of Judges and Collegium System Brief information

Appointment of Judge

A nine Judges Bench of the Supreme Court *In re Presidential Reference,* AIR 1999 SC 1:1998 AIR SCW 3400: JT 1998 (7) SCC 739: 1998 (4) SCJ 200: 1998 (4) SCT 696: (1998) 5 SCALE 629: 1998 (8) Supreme 140, has held that recommendations made by the Chief Justice of India without complying with the "norms and requirements of the consultation 'process' were not binding on the Central Government.

In July 1998, the President has sought the Court's opinion on nine issues relating to the appointment of Apex Court judge and transfer of High Court

Judges. The 11th Presidential Reference sought clarification on certain doubts over the consultation process to be adopted by the Chief Justice of India as stipulated in the 1993 case relating to judges appointment and transfer opinion.

The following propositions were laid down –

(a) As to the appointment of the Supreme Court Judges, the Chief Justice of India should consult a collegium of four senior most Judges of the Apex Court. Even if two judges give an adverse opinion, the CJI should not send the recommendation to the Government.

(b) Giving primacy to the CJI's opinion as laid down in the 1983 judgment, the judges said, "The collegium should make the decision in consensus and unless the opinion of the collegium is in conformity with that of the Chief Justice of India, no recommendation is to be made."

(c) Regarding the transfer of High Court judges, in addition to the collegium of four senior most Judges, the Chief Justice of India was obliged to consult the Chief Justice of the two High Courts (one from which the Judge was transferred and the other receiving him).

(d) In regard to the appointment of High Court Judges, the CJI was required to consult only two senior most Judges of the Apex Court.

(e) The consultation process requires "consultation of plurality of Judges." The sole opinion of the CJI does not constitute the" consultation" process.

(f) The transfer of puisne Judges of the High Courts was judicially reviewable, only if the CJI had recommended the transfers without consulting four

senior most Judges of the Apex Court and two Chief Justices of the High Courts concerned.

(g) The requirement of consultation by the CJHI with his colleagues does not exclude consultation with those Judges who are conversant with the affairs of the High Court concerned-either as a parent court (the High Court from where the transfer is made) or who have occupied the office of a Judge or Chief Justice of that Court on transfer from his parent High Court or any other court.

(h) Strong and cogent reasons must exist regarding a person's name not being recommended. Only positive reasons may be given. The views of the other Judges consulted by the CJI should be in writing and the same should be conveyed to the Government, along with the recommendation by the CJI. (Judgment dated 28th October, 1998).

Consultation

Consultation must be effective, and implies exchange of views after examining the merits, but does not mean concurrence. See the under mentioned cases:

(i) *S.P. Gupta v. President of India,* AIR 1982 SC 149: 1982 Raj LR 389: 1981 Supp SCC 87.

(j) *Union of India v. Sankalchand Seth,* AIR 1977 SC 2328: (1977) 4 SCC 193: 1977 Lab IC 1857: 1977 SCC (L&S) 435.

Text of Article 124 of the Constitution (After Constitution 99th Amendment Act 2014)

124. Establishment and constitution of Supreme Court –

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal[7] [on the recommendation of the National Judicial Appointments Commission referred to in Article 124A] and shall hold office until he attains the age of sixty-five years:

[8][***]

Struct down by Supreme Court – 99th Constitutional Amendment as unconstitutional violating basic features -

124A. [9]National Judicial Appointments Commission – (1) There shall be a commission to be known as the National Judicial Appointments Commission consisting of the following, namely:-

(a) the Chief Justice of India, Chairperson, *ex officio;*

[7] Subs. by the Constitution (99th Amendment) Act, 2014, sec. 2(a), for "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose".

[8] First proviso omitted by the Constitution (99th Amendment) Act, 2014, sec. 2(b). First proviso, before omission, stood as under: "Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:".

[9] Ins. by the Constitution (99th Amendment) Act, 2014, sec. 3.

(b) two other senior judges of the Supreme Court next to the Chief Justice of India – Members, *ex officio;*

(c) The Union Minister in charge of Law and Justice - Members, *ex officio;*

(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People — Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

(3) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

124B. Functions of Commission - It shall be the duty of the National Judicial Appointments Commission to -

(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;

(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

(c) ensure that the person recommended is of ability and integrity.

Law Minister while presenting the Constitution (121st Amendment) Bill, 2014 delivered following speech on 12th August 2014 in Lok Sabha.

The Constitution (121st Amendment) Bill, 2014

(Insertion of New Articles 124A, 124B and 124C) and National Judicial Appointments Commission Bill, 2014.

And

THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION BILL, 2014

HON. SPEAKER: Before we take up the combined discussion on the Motions for consideration of the Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 and the National Judicial Appointments Commission Bill, 2014, the time has to be allotted for discussion. If the House agrees, we may allot two hours for this discussion. Is it sufficient for this?

… (<u>व्यवधान</u>)

श्री मल्लिकार्जुन खड़गे (गुलबर्गा) : मैडम, सफिशिएंट टाइम दीजिए। ...(व्यवधान)

शहरी विकास मंत्री, आवास और शहरी गरीबी उपशमन मंत्री तथा संसदीय कार्य मंत्री (श्री एम. वैंकैय्या नायडू): मैडम, तीन घंटे का समय दीजिए, उसमें डिस्कशन हो जाएगा और उसमें आधा घंटा कुशन के लिए होगा। ...(व्यवधान)

HON. SPEAKER: All right. Three hours are allotted.

THE MINISTER OF COMMUNICATIONS AND INFORMATION TECHNOLOGY AND MINISTER OF LAW AND JUSTICE (SHRI RAVI SHANKAR PRASAD): Madam, I beg to move:

"That the Bill further to amend the Constitution of India, be taken into consideration."

and

"That the Bill to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto, be taken into consideration."

Madam, I am indeed very very grateful for hon. the Speaker, this House, all the Members, Shri Kharge and my other colleagues in the Opposition and hon.

Members for permitting me to put this Bill of great historical importance for consideration of this august House.

I will come to the rationale of this Bill subsequently. But, I would like to make two initial observations, at the very outset. We all have the highest respect for the institution of judiciary. We all fully trust in the independence, in the integrity of the great institution of judiciary. Speaking for us, I would like to share with this House that many of us in our earlier student days' activism, have fought for the independence of judiciary. I am referring to seventies when there was a strain and stress on independence of judiciary, when there was a strain and stress on individual freedom and also on the freedom of the Press. I am very assured to share with this House that many Members of the present Government including hon. the Prime Minister himself have been in the forefront of that struggle which was basically designed to ensure the independence of judiciary, the media freedom and the individual freedom.

When we save the respect of the institution of judiciary, we not only want it to be really independent but we also share, applaud the courage of the institution of judiciary that let them be completely fearless too. It is because an independent judiciary is indeed the very bedrock of our constitutional scheme of governance and of our democratic polity.

When I am standing today as the Law Minister of India, initiating a debate on such a historic Bill, I need also to salute the great judgments of the Supreme Court and High Courts which have laid the foundation of the rule of law in India, the way they have developed many institutions to address the concerns of the poor and under-privileged, to the genuine use of public interest litigations and also if there have been excesses by any of the segments including the Executive, they have come whether in case of impropriety or corruption. These have been the real bedrock of our democratic credentials that today judiciary is there as an institution for respect. But why is this Bill? It is indeed very important. I would also like to share it.

I would like to dispel one more issue here, at the very outset. I have seen some of the observations that we are rushing through the Bill. I want to assure this House with all the emphasis and responsibility at my command that 'no', we are not at all rushing through the Bill.

What we are doing today, Madam Speaker, is basically the culmination of the exercise of the last twenty years. How many attempts have been made, let me count. There was the 67th Constitution (Amendment) Bill in 1990, the 82nd Constitution (Amendment) Bill in 1997, the 98th Constitution (Amendment) Bill in 2003, and the 120th Constitution (Amendment) Bill, a component of Judicial Appointments Bill 2013 which the then government was kind enough to bring. Therefore, there have been as many as four attempts in the last twenty years to

have an amendment to the Constitution as far as the appointments of judiciary are concerned.

How many reports have been there in the past? Let me share it with this august House today. There has been Justice Venkatachaliah Commission in 2003. Justice Venkatachaliah was the Chief Justice of India, a very eminent judge. There has been the Administrative Reforms Commission in 2007 under the very distinguished Chairmanship of Shri Veerappa Moily, I do not know if he is present here, which recommended that a National Judicial Commission be established in whatever form and that the collegium system needs to be changed. The Law Commission of India in its 214th Report in 2008 made its recommendation. I will refer to that subsequently.

There have been Parliamentary Standing Committee's 21st Report on Judges (Inquiry) Bill, 28th Report on Supreme Court (Number of Judges) Bill, and the 44th Report on the Age of Retirement of Judges. Therefore, there have been four attempts for Constitutional amendment, and seven recommendations by various Committees over the years, all emphasising that the collegium system of appointment for the hon. Judges of the High Court, of the Supreme Court, and the Chief Justices, needs to be changed.

Madam, today I would like to share with this House as to how we have come here. It is very important that I do so. When the Constitution was framed,

great debate occurred as to what should be done and what should not be done. Various modes had been suggested. Three modes came to great scrutiny. Should the President make the appointments himself? Should the President make the appointments in consultation with the Executive? Should the President make the appointments in consultation with the Parliament? Or should the President make the appointments in consultation with the Chief Justice of India? These were indeed the great issues which were matters of great concern and consideration.

Madam, ultimately Dr. Ambedkar in his very persuasive and very eloquent words stated that no, we need to consider that judiciary should be independent, due credit and importance must be given to the office of the Chief Justice, and also the Executive must have a say. Therefore, article 124 for Supreme Court, and article 217 for the High Court were enacted stating *inter alia* that the President shall appoint the Chief Justice and the Judges of Supreme Court, and while doing so he will certainly consult the Chief Justice. And while doing so for the High Court, consultation with the Chief Justice of the High Court was also postulated. Therefore, it was a proper balance of the Executive and the Judiciary.

Madam, I would like to quote Dr. Ambedkar here, it is very important, about the role of Chief Justice. I have great personal regard for Dr. Ambedkar, one of the finest visionaries India has ever produced. His outstanding ability, his understanding and his contribution in the working of the Constitution and creation

of the Constitution is indeed legendary. And I would request many of the young members of the Parliament to please read the life of Dr. Ambedkar.

I would like to quote Dr. Ambedkar from the Constituent Assembly Debates. He said,-

> *"With regard to the question of concurrence of the Chief Justice it seems to me that those who advocate the proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgement. I personally feel no doubt the Chief Justice is a very eminent person, but after all the Chief Justice is a man with all the failings, all the sentiments, and all the prejudices which we common people have. And I think to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that that is also a dangerous proposition."*

Therefore, Dr. Ambedkar, while framing the Constitution was very clear. Today, as the Law Minister of India, while moving this important Bill, I wish to salute Dr. Ambedkar, Shri Jawaharlal Nehru, Sardar Patel and Dr. Rajendra

Prasad for understanding the real wisdom of India's polity that there must be a healthy blend, namely, the President must not have unbridled powers and the Chief Justice also must not have unbridled powers; there must be healthy co-ordination and consultation. It worked very well.

There were some ups and downs when we heard about committed judiciary. That is a separate chapter altogether. Today, the people of India have learnt how to trust the polity of India. They have the power and authority. They can unseat any political leader and any political party from power, be it in the States or at the Centre. Surely, the maturity of Indian democracy has emerged which also recognises the supremacy of Parliament, respect of Parliament and also the integrity and independence of the Judiciary. That is how it has grown over the years.

Now, today, I would like to share my experience. I had the privilege of working as a Minister of Law at a junior level in the Vajpayee Government. I have also been a practising lawyer in Patna High Court and then Supreme Court. I had the occasion to see the works of Judiciary over the years, apart from being an activist fighting in the JP Movement and anti-Emergency struggle. From 1950, till 1993, the system worked very well. Occasionally, there was stress.

Today, there is no pre-collegium appointee as a judge in India. Shri Kalyan Banerjee may correct me if I am wrong. All of them are appointed by the

collegium system, after 1993. I will come to that separately. Today, I would like to ask a question in this hon. House. Why do we not have judges like V.R. Krishna Iyer? Why do we not have judges like H.R. Khanna? Today, this question has to be asked. The reason why I have taken the name of H.R. Khanna is this. Individual freedom was under great stress in the 1970s. In the ADM Jabalpur Shukla case, when the Supreme Court gave a judgement, I would say regretfully, that even if a detenu is killed in a prison there is no remedy, he held aloft the flag of liberty. I remember the *New York Times* writing about him, 'If ever democracy will return to India, India must erect a plaque of gold for H.R. Khanna'. That has been the tradition of judges of India. … (*Interruptions*)

SHRI KALYAN BANERJEE (SREERAMPUR): First take the name of Justice Bijan Mukherjee.

SHRI RAVI SHANKAR PRASAD: Bijan Mukherjee, Vivian Bose, Patanjali Sastri, S.R. Das – they are legends. … (*Interruptions*)

SHRI KALYAN BANERJEE: I am not objecting to it. But take the name of Justice Bijan Mukherjee first.

SHRI RAVI SHANKAR PRASAD: I agree with you. Therefore, we are very proud of the legend of judges.

When I am speaking here, let me share something with you all that there have also been flaws. Justice G.P. Singh was the Chief Justice of Jabalpur High

Court for five years. I call him a *rishi* of modern jurisprudence. He has written books on interpretation of statutes and they are quoted like an authority. But it is also a fact that G.P. Singh could not come to the Supreme Court. Those are issues to be considered. Justice Mohammedali Currim Chagla was a Chief Justice for 11 years in Bombay High Court but he also could not come to the Supreme Court. A brilliant judge, I salute him here.

In 1993 a judgement came. What was the judgement? Article 24 says that the President shall appoint a judge in consultation with the Supreme Court Chief Justice and also the High Court Chief Justice in the case of High Courts. In fact, the substance of the judgement is, I say with great respect, that the Chief Justice will appoint the judges in consultation with the President. That is how it became reversed. I am sorry to say that. What was the message? It is that you will only have an informal arrangement to be communicated. You can seek a reconsideration of the proposals made, and if the collegium in its wisdom decides to reiterate the decision, it is binding on you. Therefore, the role of the Executive became very very limited. Yes, they have got the right to be consulted, namely, informed. But this was how it was re-read.

Madam, this issue has come about repeatedly. Today, I would like to share with you how this whole concern was expressed. The first concern came from the Government, which sought a reference to the Supreme Court, under Article 143, the ‘Second Judges Case’. In 1998, what the Supreme Court did? It enlarged ‘the

Chief Justice with two judges' with 'the Chief Justice with four judges'. So, it became five. But the Collegium system said, 'For the independence of Judiciary, we are having these principles established'.

Madam, I say – and I think that the entire House is with me – that all of us want independence of Judiciary and give respect for that. But when I say 'independence of judiciary', I must reiterate that the sanctity of Parliament is equally important, which we all need to appreciate. Sitting in Parliament, we talk about it. We are the representatives of the people of India; we represent the diversity of India, the hope, aspiration and agony of India; and all of us come here with a view that when we reflect them, we seek accountability of the Executive, and we also reflect the concern of the people of India.

Surely, the supremacy of the Parliament is equally important. While I say that the independence of the Judiciary is important, separation of power is equally a basic structure; it is also a part of the Constitution. Therefore, with Parliamentary democracy, integrity, independence, supremacy of Parliament, and with integrity and independence of the Judiciary, and also by respecting the people's wish, the democracy functions.

I want to assure the hon. Members of this House that the Government has got no intention whatsoever to have any confrontation with the Judiciary – no, not at all. We respect the Judiciary as an article of faith. But when we have come to

have this Bill, we are seeking to only reiterate that the Constitutional arrangement as envisaged, which has been reflected upon from time to time, by so many Commissions, Standing Committees with wider consultation possible, needs to be reflected.

Madam, let me share with this Hon. House, how the whole issue has been articulated from time to time. There was the 85th report of the Law Commission. I want this to go on record for the information of the Hon. Members and I quote:

> *"This Committee is aware that for this state of affairs, the Union Law Ministry is not blame-worthy. As the entire process of initiation of proposal for appointment of new Judges is no longer the responsibility of the Executive, as a result of a decision of the Supreme Court, though it was not contemplated in the Constitution, responsibility for judicial appointment now rests in the domain of the Judiciary. The Union Law Minister is accountable to Parliament for the delay in filling up of the vacancies of judges, but he has functionally no contribution to make. The Supreme Court read into the Constitution a power to appoint judges that was not conferred upon it by the text of the context. The underlying purpose of securing judicial independence was salutary, but the method of acquiring for the court, the exclusive power, to appoint judges, by the process of judicial interpretation is open to question."*

This is what the Law Commission report said.

Madam, late Justice J.S. Verma, a very eminent Judge, who wrote the judgment of 1993, clearly said this:

> *"My 1993 Judgment, which holds the field, was very much misunderstood and misused. It was in this context, that I said that the working of the judgment, now, for some time, is raising serious questions, which cannot be called unreasonable. Therefore, some kind of re-think is required. My Judgment says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise, between the Executive and the Judiciary, both taking part in it."*

Justice J. S. Verma, who wrote the 1993 Judgment, establishing the Collegium system, himself was critical that his Judgment has been completely misread and not being properly used.

Madam Speaker, Justice Venkatachaliah, a distinguished Chief Justice, was heading the Constitution Review Commission formed by the Government headed by Shri Vajpayee. I would like to assure my friends from the Opposition that we in the BJP have been supportive of the National Judicial Commission right from day one. There have been views of some political parties to go to pre-1993 position but even during Vajpayee Government our commitment was that.

Even in 2009 our commitment was that. Even during 2014 Lok Sabha election our manifesto clearly stated that we wanted a National Judicial Commission. Therefore, we have been quite consistent as far as this is concerned.

PROF. SAUGATA ROY (DUM DUM): Why are you then bringing a truncated Bill?… (*Interruptions*) This is a truncated Bill.

SHRI RAVI SHANKAR PRASAD: I will come to that.

Madam, I must acknowledge that Shri Kharge's Party, when the Congress was in power, also brought it as an enabling provision of a Bill and the rest was a separate ordinary Bill. It was passed by the other House and then it came to the Lok Sabha. When the Bill was referred to the Standing Committee, it recommended bringing the entire architecture into the Constitution itself and suggested not to bring an ordinary Bill. The Standing Committee also recommended improvement in the ordinary Bill by laying down the procedure for appointment, etc. In fairness again the previous Government brought an amendment to that Bill in the Lok Sabha but it lapsed because the House was dissolved. I have withdrawn that Bill.

In the present Bill, about whom I will talk separately, all the recommendations of the Standing Committee have been substantially taken into account. I will reply to that elaborately once I hear all the points during discussion. But Madam, I must say in all fairness, when I became the Law

Minister I started taking up this cause and the first thing I decided was that I will have proper fresh consultations with eminent people. The first consultation I did was with an eminent jurist. I called a meeting. Justice A. Ahmadi, former Chief Justice of India, Shri V. N. Khare, former Chief Justice, Shri Soli Sorabjee, Shri Fali Nariman, Shri Shanti Bhushan, Shri K. Parasaran, Shri K.K. Venugopal, Shri K.T.S. Tulsi, Justice A.P. Shah, Chairman of the Law Commission, Prof. Madhava Menon, Shri Upendra Singh, Shri Anil B. Divan, the Chairman of Bar Council of India Bir singh Ji, the present Attorney General, the present Solicitor General, Shri Arun Jaitley, in capacity of an eminent lawyer, all came and I presided over the meeting. All except one supported the National Judicial Commission. Many could not come but I remember the former Chief Justice, Shri G.B. Pattanaik rang me up saying that he could not come but he completely approve this proposal. Shri P.P. Rao, Shri Ashok Desai, Shri T.R. Andhyarujina, Shri Harish Salve and Shri G.N. Vahanvati, all supported it. This was the widest consultation possible. Thereafter, as a Law Minister I wrote personal letters to 26 Heads of political parties in India seeking their opinion. I am happy to announce, Madam, that both Shri Mulayam Singh and Ram Gopal ji were kind enough to support the initiative. Ram Vilas Paswan Ji's Party also supported it. CPI, CP (M), Sudhakar Reddy and Shri Prakash Karat wrote to me. Shri Tariq Anwar is here. Shri Sharad Pawar wrote to me. Madam Mayawati wrote to me. Madam Jayalalaitha… (*Interruptions*)

SHRI P. KARUNAKARAN (KASARGOD): There are some reservations also. You just do not say that we have written to you.

SHRI RAVI SHANKAR PRASAD: I will come to that. You have a right to speak and I will reply to that. I am only telling what I did. I will come to that. Just give me five minutes more.

I have regards for both Hon. Mamata ji and hon. Jayalalitha Ji. They have given certain suggestions. I have tried to address that. I will come to that separately. I also wrote to Hon. Sonia ji. I am sure her Party's views will be known to me. I understand that she will be conveying her views. Shri Sharad Yadav wrote to me. Almost all major political parties wrote to me. Madam, I must tell you in all fairness that there have been some suggestions made. We have accepted the spirit of some suggestions and with regard to others I will reply when points are made by the Members. What is the architecture today and that is the last point I wish to say.

The National Judicial Commission shall be headed by the Chief Justice of India. It will have two senior most judges of the Supreme Court of India. Law Minister shall be there. Two eminent persons are to be selected by the hon. Prime Minister, the Chief Justice of India and the Leader of Opposition or the Leader of the largest Opposition Party in the Lok Sabha. One of the eminent

persons shall be from Scheduled Castes, Scheduled Tribes, OBC, women and minority. This is the whole architecture.

The National Judicial Commission has got the right and duty to make appointments to the posts of Chief Justices of the Supreme Court and the High Court as also judges of the Supreme Court and the High Court. They will appoint men of ability and integrity. The senior most judge of the Supreme Court shall be appointed as the Chief Justice if he is able.

Then, the details of their powers and regulations have been framed in the other Bill which I have moved separately which is to be considered together with this Bill. What does it say? The National Judicial Commission shall make appointment of the judges of the Supreme Court. Apart from taking eligibility criteria in the constitution, if they appoint a High Court judge to the Supreme Court, apart from seniority, his ability and merit will also be considered. It has been mentioned clearly.

In case of the High Court, the name shall come from the Chief Justice, who will consult two senior most judges and as many other judges as can be framed by regulation. Why this? We have got Allahabad High Court with nearly 100 judges and we have got Sikkim High Court and other High Courts where the number of judges is small. We have got Calcutta High Court and Mumbai High Court where the number is big. Therefore, let regulation decide as to how many

other judges, the Chief Justice must consult. The Chief Justice will also consider the eminent lawyers of that High Court as laid down by the regulation to be framed by the National Judicial Commission.

The law also says that the names recommended by the Chief Justice would also have separately the views of the Governor and the Chief Minister of that State which shall go to the Commission. When I say, 'the Governor', I mean the Governor in the constitutional sense who has to act on the aid and advice of the Chief Minister.

The Commission can also recommend names for a High Court but it also needs to be approved in the same manner from the High Court, the Chief Justice, the Governor and the Chief Minister.

Madam, in conclusion, I would like to say two more things. If two members of the Commission oppose a recommendation, it shall not be carried. Giving primacy to the judiciary, the Chief Justice, the two hon. judges, the Chief Justice is also a member of the three-member group to appoint eminent persons and also the Chief of the High Court.

There is one more provision in this. The recommendations made by the Commission shall be accepted by the Government. However, if the President of India makes a request, for given reason, to consider any proposal made, then the Commission will consider that and if the Commission considers and reiterates its

previous opinion, then it must be unanimous. This provision is only to give due deference to the highest constitutional authority in India, that is, the President of India.

Madam, this is the brief architecture of the Bill. I will reply to other points when I hear the debate. Lastly, I have to make an appeal to this House. I am not a Member of this House though I am in the other House for the last 14 years. But I always consider that the Lok Sabha is the biggest panchayat of India. Apart from passing law and apart from giving majority to the Party to form the Government, as a panchayat it reflects the aspiration of India, the ecstasy of India and the urges of India. That is the glorious tradition of this House.

With that tradition, today I am appealing to this House to rise above all considerations and show a great unity of purpose that this House has a resolve to work in unison to ensure that the judiciary's dignity is properly maintained and we have a fair procedure for appointment of the High Court and the Supreme Court judges. That is my appeal to this House.

माननीय अध्यक्ष महोदया, मैं बहुत विनम्रता से इस महान सदन के विद्वान सदस्यों से अपील करता हूं कि यह सदन देश की चेतना, राजनीति, लोकनीति और आशाओं का प्रतीक है, आज का दिन ऐतिहासिक है, आप समर्थन करेंगे।

इतना ही कह कर मैं अपनी बात समाप्त करता हूं।

CONCLUSION:

Legislature Executive and Judicial organs of the Government are the basic pillars of the Democratic System which we have adopted after independence. The theory of Separation of Powers is also equally applicable to our system, this theory envisages that all three wings of the Government are independent and they should not encroach upon each other because ultimately our Constitution is supreme and fundamental law of the land and all these three organs has to function within the domain assign to them by the Constitution.

However, if we study the actual working of above system we can notice that, perhaps through Judicial Activism it seems Judiciary is usurfering the functions of other two organs of the Government.

Now-a-days, each and every policy decision of the Government is challenged in the Court of Law and very often Courts are giving large number of directions to the Executive.

Judiciary is asserting its supremacy claiming that, Judicial Review is basic feature of the Constitution and Parliament or Legislature or Executive has no rights to take away the power of Judiciary. The recent example is National Judicial Appointments Commission Policy. The 99th Constitutional Amendment Bill 2015 was passed by both the Houses of Parliament by exercising power under article 368 of the Constitution, ratified by the more than one half of the State, still this amendment was struck down by the Supreme Court as violative of the Constitution asserting that power of Judiciary has been curtailed by this move

of the Government. The effect is that, the Collegium System of appointment of Judges which found no place in the express provision of the Constitution has become constitutional mandate.

So sum and substance of this discussion is that, Judicial upper hand over other two wings of the Government became reality which one has to accept because Judiciary has given power to interpret the Constitution. However, over the years Judiciary has played laudable role in protecting Constitution and democratic norms. If Judiciary itself restraint itself within constitutional scheme and avoid encroaching on the powers of the Executive and Legislature will certainly be beneficial to strengthening the democratic principle contemplated in the Constitution.

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BIO-DATA

Full Name	**Dr. ANANT NAMDEORAO KALSE**	
Office held and assumption of Office	**Principal Secretary; Maharashtra Legislature Secretariat & Secretary; Commonwealth Parliamentary Association (CPA) Maharashtra Branch**	
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Career (in outline only)	1979-1981 - Advocate, District and Sessions Court, Aurangabad 1981-2003 - Joined Maharashtra Legislature Secretariat; served in various capacities 15 July 2003 – Secretary 2 March 2007 – Principal Secretary	
Conferences, Seminars attended / visits abroad	2000, Hyderabad 2001, Chandigarh 2004, Kolkata 2005, Raipur 2007, Thiruvananthapuram February 2010, Bhopal June 2010, Srinagar September 2011, Jaipur February 2015, Lucknow	Conferences of Presiding Officers and Secretaries of Legislative Bodies in India
	2001, New Delhi	All India Conference of Presiding Officers, Chief Ministers, Ministers of Parliamentary Affairs, Leaders and Whips of Parties on 'Discipline and Decorum in Parliament and State Legislatures'
	Australia, New Zealand, Singapore, U.K., France, Italy, Belgium, Holland, Switzerland, Geneva (United Nations Office)	Parliamentary Study Tour

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Academic Information	Delivered lectures on Parliamentary Practice and Procedure, Constitution of India, Administrative Law and Human Rights, International Law, Law of Torts, Interpretation of Statutes, Feministic Jurisprudence. **<u>Visiting Faculty</u>:-** (1) Mumbai University Post Graduate Law Department. (2) SNDT University Post Graduate Law Department. (3) Government Law College, Mumbai. (4) K.C. Law College, Mumbai. (5) Yashwantrao Chavan Academy of Development Administration Institute (YASHADA) Pune. (6) Indian Institute of Public Administration Mantralaya, Mumbai. (7) Returning Officer for the Biennial Elections to the Council of States (Rajya Sabha) and Maharashtra Legislative Council since 1992. (8) Maharashtra Judicial Academy & Indian Mediation Centre and Training Institute, Uttan, Bhayander (W), Dist. Thane.
Books / Articles Published	(1) Parliamentary Practice and Procedure with special reference to Maharashtra Legislature. (2) Law Making Process - An Introduction. (3) Legislative Procedure and Parliamentary Privileges - A Brief Overview. (4) An outline of Comparative Analysis of the Leading Constitutions of the world with special reference to Indian Constitution. (5) Nagpur Session - Myth and Reality - An overview. (6) Dr. Babasaheb Ambedkar Speech before the Constituent Assembly of India dated Thursday, 4th November 1948 – Compilation. (7) संत साहित्य व कायदा-सुव्यवस्था (8) Salient Features of Constitution of India and Financial Business - An Overview (9) Parliamentary Proceeding - A Brief Overview

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