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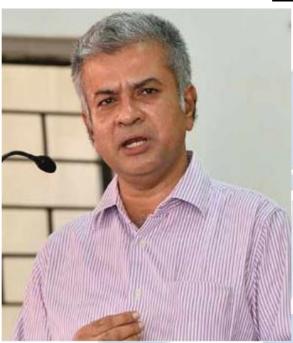
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ABOUT US

white BLACK LEGAL is an open access, peer-reviewed and

refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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JUDICIAL PROCESS IN CONSTITUTIONAL ADJUDICATION

AUTHORED BY - RESHMA S & SRINITHI K

Introduction:

While constitutionalism has a rather long history. A worldwide demand for constitutional adjudication arose only after the experiences with the many totalitarian system of the 20th century. The post totalitarian constitutional assemblies regarded judicial review as the logical consequences of constitutional- ism. In a remarkable judgement the ¹Israeli Supreme Court said in 1995: "Judicial review is the soul of the constitution itself. Now there is no wonder that judicial review is now developing. The majority of democratic states have judicial review. Based on this universal trend the Israeli Court claimed the power of judicial review although it had not been explicitly en- dowed with it in the constitution. Let us briefly see about the special dimensions of judicial process in constitutional adjudications.

Constitutional Adjudications:

Constitutional Adjudication is the process by which the superior courts - the Constitutional Courts are concerned with the constitutionality of any legisla- tion or an action of an administrative agency and includes resolution of disputes between different organs of state. Its a way to ensure that the states functions are legal, and to prevent violations of the rights granted by the constitution.

Constitutional adjudication involves:

- 1) Reviewing legal acts, such as statutes and decrees, that are related to the Constitution.
- 2) Checking the fairness of elections and their preconditions
- 3) Resolving disputes between different government bodies.

¹ United Mizarhi Bank Ltd. v. Migdal Village, HCJ 6821/93.

Special dimensions of Judicial Process in Constitutional Adjudication:

Notions of Judicial Review:

Judicial review is a process that allows the judiciary to review and inval- idate actions taken by the executive or legislative branches that are inconsistent with the constitutions. The judiciary also reviews past decisions. This power is called **"Judicial Review."**

The article 13 clearly provides that constitution is the Supreme law of the land and any law in consistent there with is void. The term refers to "the power of a court to inquire whether a law executive order or other official action is inconsis- tent or consistent with the provision of the constitution and if the court con- cludes that it does, to declare it unconstitutional and void."

There are two primary functions of Judicial Review:

- 1) Legitimizing government action and
- 2) To preventing the government from overstepping its legitimate au- thority or power in a way that is excessive, unjustified, or harmful to the consti- tutional framework. This provision was first acquired by the Supreme Court in **Marbury vs Madison case 1803**² is a landmark decision by the U.S. Supreme Court, where Chief Justice John Marshall established the principle of judicial review. This ruling gave the judiciary the power to review and potentially invalidate actions taken by the executive and legislative branches if those ac- tions are found to be unconstitutional. Essentially, it cemented the Court's role in ensuring that the Constitution remains the supreme law of the land, and that no branch of government can exceed its constitutionally granted powers. Ac- cording to Dr. M.P. Jain, "The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution."

Judicial Review and Constitution

According top Article 13(2), the union or the state shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall to the extent of the contra- vention be void;

1) Judicial review plays a central role in protecting fundamental rights guaranteed under

² Marbury v. Madison, 5 U.S. 137(more)1 cranch 137; 2 L. Ed. 60; 1803 U.S. LEXIS 352

Part III of the Indian Constitution

2) Article 32 is a powerful provision in the Indian Constitution that enables individuals to seek direct remedies from the Supreme Court when their fundamental rights are violated. The right to move the Supreme Court for en- forcement of these rights guarantees that citizens have an accessible and effec- tive means to challenge unconstitutional actions and to ensure that their funda- mental rights are upheld. Constitutional Provisions

In India constitutional the phrase i.e. judicial review has not been used but the provisions of several Articles explicitly confers the power of judicial tribe on the Supreme Court and the High Court.

The provisions are explained below:

- Article 32 guarantees the rights to move the Supreme Court for the en- forcement of the fundamental rights and empowers the Supreme Court to issue directions or orders or writ for that purpose.
- Article 131: Original Jurisdiction of the Supreme Court in Center-State and Inter-State Disputes
- Article 132: Appellate Jurisdiction of the Supreme Court in Constitu- tional Cases
- Article 133: Appellate Jurisdiction of the Supreme Court in Civil Cases
- Article 134: Appellate Jurisdiction of the Supreme Court in Criminal Cases
- Article 134-A: Certificate for an Appeal to the Supreme Court from the High Courts
- Article 135: Exercise of Jurisdiction and Powers of the Federal Court un- der Pre-Constitution Law
- Article 136: Special Leave to Appeal
- Article 143: Advisory Jurisdiction of the Supreme Court
- Article 226: Power of High Courts to Issue Directions, Orders, orWrits
- Article 227: Superintendence of High Courts over Subordinate Courts
- Article 245: Territorial Extent of Laws Made by Parliament and State Legislatures
- Article 246: Distribution of Legislative Powers Between Parliament and State Legislatures
- Article 251 and Article 254 provide that when there is a conflict between central laws and state laws on a matter in the Concurrent List, the central law prevails.

There are three aspects to judicial review in India:

- i. Judicial review of legislative action,
- ii. Judicial review of administrative action,
- iii. Judicial review of judicial decisions.

Importance of Judicial Review:

Judicial Review is needed for the following reasons:

Guarding the Constitution and Rule of Law:

Judicial review ensures that all government actions whether by the legislature, executive, or administrative bodies are consistent with the constitu- tion. This helps protect the fundamental framework and principles that guide a country's political and legal system.

Protecting Fundamental Rights and Freedoms:

Judicial review acts as a mechanism to protect individual rights and freedoms. If any law or executive action infringes on basic human rights (such as freedom of speech, the right to a fair trial, or the right to privacy), the judiciary can strike down such laws or actions, ensuring that the government does not violate constitutional rights.

Preventing Abuse of Power:

Judicial review is an essential part of the separation of powers and checks and balances in a democratic system. By giving courts the authority to review government actions, it ensures that no branch of government can exceed its constitutional authority or infringe on the rights of citizens.

Promoting Accountability and Transparency:

Judicial review holds lawmakers, government officials, and agencies accountable for their actions. It ensures that all branches of government remain transparent in their actions and decisions, as they know their actions are subject to judicial scrutiny.

The judgment in **Shankari Prasad v. Union of India** $(1951)^3$ is a land- mark case in Indian constitutional law, particularly with regard to the scope of Article 368 and the power of Parliament to amend the Indian Constitution. This case set the stage for understanding the

³ 1951 AIR 458

limits (or lack thereof) on the power of Parliament to amend the Constitution and raised important questions about the relationship between the amending power and fundamental rights.

The judgment in Sajjan Singh v. State of Rajasthan $(1965)^4$ reaffirmed the principles established in Shankari Prasad v. Union of India (1951) and Golaknath v. State of Punjab $(1967)^5$, with respect to the scope of Par- liament's power to amend the Constitution under Article 368 and its relation- ship to Article 13(2). These cases collectively deal with the constitutional amendment power of Parliament, judicial review, and the application of Article 13(2), which prohibits laws that violate fundamental rights. The key principle that emerged from these decisions was the distinction between ordinary laws and constitutional amendments, and the view that constitutional amendments were not subject to judicial review under Article 13(2), which only applied to or- dinary laws.

The **Golaknath v. State of Punjab** (**1967**) case is indeed a landmark deci- sion in Indian constitutional law, primarily because it reversed the Supreme Court's earlier stance regarding Parliament's power to amend the Constitution, particularly in relation to Fundamental Rights enshrined under Part III of the Constitution. This case fundamentally altered the understanding of the amend- ing power under Article 368 and set important limitations on the scope of that power.

The provided that,

- **1. Limitations on Parliament's Power to Amend the Constitution:** The decision made it clear that constitutional amendments that violated funda- mental rights were unconstitutional and could be struck down by the judiciary.
- 2. No Amendment of Fundamental Rights: The judgment had a profound impact on the interpretation of Article 368, establishing that fundamental rights were not amendable by Parliament. This interpretation was based on the belief that fundamental right represented the core values and principles on which the Indian Constitution was based.
- Prelude to the Basic Structure Doctrine: The Golaknath ruling laid the groundwork for the later Keshavananda

⁴ 1965 AIR 845

⁵ 1967 AIR 1643

4. Bharati v. State of Kerala (1973)⁶ case, where the Supreme Court introduced the basic structure doctrine. Under this doctrine, while Parliament can amend the Constitution, it cannot alter or destroy its basic structure. The Court clarified that the basic structure of the Constitution includes the fundamental rights, and therefore, these rights are not amendable.

5. Judicial Activism and Strengthening Judicial Review:

The Golaknath case marked an expansion of judicial activism in In- dia, as the Court upheld the principle of judicial review over constitutional amendments, especially with regard to fundamental rights. This was an impor- tant moment in the development of India's constitutional jurisprudence, signal- ing that the judiciary had a significant role in safeguarding constitutional principles, including fundamental rights.

Subsequently the constitutional validity of the 14th, 25th, and 29th Amend- ments was challenged in the **Keshavananda Bharati case or Fundamen- tal Rights case.** The government of India claimed that it had the right as a matter of law to change or destroy the entire fabric of the constitution through the instrumentality of parliament's amending power One of the first major cases that was brought before the supreme court in this regard was A.K. Gopalan vs. State of Madras. 1951⁷ in which the Preven- tive Detention Act, 1950 was challenged as invalid and unconstitutional. The court by a unanimous decision declared section 14 of the act invalid.

Roles in Constitutional Adjudication:

• Independent Judiciary in India:

The independence of the judiciary is one of the core principles of the In- dian Constitution. An independent judiciary is crucial for the protection of the Rule of Law and the fundamental rights of citizens, ensuring that the govern- ment does not exceed its powers or infringe on individual liberties. The Indian Judiciary is envisioned as an impartial body that can check the powers of the Executive and the Legislature, safeguard constitutional rights, and interpret the law without any external influence.

Need for the independence of the judiciary:

 \checkmark To check on the other branches of government—the executive and the legis- lature.

⁶ AIR 1973 SC 1461

⁷ A. K. Gopalan v. State of Madras AIR 1950 SC 27; 1950 SCR 88; (1950) 51 Cri LJ 1383

- ✓ The interpretation of the Constitution is one of the most critical func- tions of the judiciary in a democratic system
- ✓ Judicial independence is vital to ensuring that courts can **act impartially**, without bias or undue influence.

• Guardian of the Fundamental Rights:

In India, the judiciary plays a pivotal role as the guardian of fundamental rights. The Indian Constitution grants a set of fundamental rights to the citi- zens, which are essential for the protection of individual liberty and dignity. These rights are enshrined in Part III of the Constitution, and their protection is paramount for maintaining democratic values and the rule of law. The judiciary, especially the Supreme Court and the High Courts, is entrusted with the re- sponsibility of safeguarding these rights through judicial review and interpreta- tion.. The judiciary is that interprets the law, settles disputes and administers justice to every citizens. The judiciary is considered the watchdog of democracy and also the guardian of the constitution.

• Creation of Judge-case law:

He creation of judge-made law, or case law, refers to legal principles and precedents established by judicial decisions. In doing so, judges have built up a 'judge-made law' or 'case law'. As per the doctrine of 'stare decisis', the previ- ous decisions of judges are generally regarded as binding on later judges in re- lated cases. This judicial role of lawmaking, though not formally creating laws like the legislature, has a significant influence on the evolution of law.

Administration of Justice:

The administration of justice refers to the process by which laws are enforced, rights are protected, and disputes are resolved through the judicial sys- tem. In India, the administration of justice is an essential function of the State and is governed by the Constitution, statutes, and judicial decisions. It ensures that justice is accessible, timely, and equitable for all citizens, thereby maintain- ing the rule of law and safeguarding fundamental rights.

Theories of Adjudication:

The relevance and applicability of different decisions can sometimes lead to confusion within a legal system. This is a recurring issue in legal theory and practice, particularly when judges in different courts provide conflicting deci- sions or when new issues arise that have not been clearly addressed by existing precedents or statutes. Theories of judicial decision-making and

adjudication help to address these concerns and provide guidance for judges in determining how to approach legal disputes.

Theory by Benjamin Nathan Cardozo:

- Benjamin Cardozo, a renowned American jurist who made significant con- tributions to legal theory, particularly through his ideas on judicial decision- making and the role of law in society. Cardozo's work is foundational in the Realist Theory of law, and his book *The Nature of the Judicial Process* is consid- ered a key text in understanding the development of legal thought, especially in terms of judicial discretion, precedent, and the relationship between law and society.
- Cardozo believed that judicial decision-making is not simply a mechanical application of the law, but rather a process of compromise between conflicting ideas and approaches. Cardozo was critical of approaches that saw the law as simply a set of abstract, logical rules that could be applied without regard to context. He rejected the Austrian school of thought, which advocated for a logical interpretation of the law, and argued instead that judges must interpret the law in light of the social realities and needs of society.
- He believed that judges should use a combination of established legal prin- ciples, precedents, and their own reasoning to decide cases. Judges must inter- pret the law flexibly to meet the demands of justice, especially when faced with novel issues not directly covered by statutes or prior decisions.
- One of Cardozo's most significant contributions to legal thought was his view on the role of precedent in the legal system. He emphasized that prece- dent, or past judicial decisions, are not mere historical artifacts; they are living expressions of the law that continue to shape future decisions.
- Cardozo was a pragmatic thinker who saw adjudication as an experimental process. This means that judges often face situations where the law may not provide a clear answer, and they must experiment with applying existing legal principles to novel situations, sometimes in ways that have not been previously tried.
- As society changes, legal principles must adapt as well. Cardozo believed that judges play a vital role in shaping the law through their decisions, and that they must take into account the experiences of the people and the evolving needs of society in making their decisions.

2. Theory by Ronald Myles Dworkin:

Dworkin's contributions show that there is no single consensus on how judges should approach the law. This debate between legal positivism and nat- ural law, between mechanical application of rules and the moral interpretation of law, is at the heart of the ongoing conversation about what constitutes judi- cial process.

Jurists and legal thinkers continue to disagree about the nature of law, its sources, and how judges should interpret and apply it. Theories like legal posi- tivism focus on the written law and rules, while natural law theorists like Dworkin emphasize the moral and political principles that underpin legal sys- tems.

Regardless of theoretical differences, it is clear that the judiciary plays a crucial role in ensuring justice and ensuring that law evolves in accordance with the changing needs of society. Whether through interpretation of legal rules, application of precedents, or the inclusion of moral principles, the judiciary must navigate these complexities to protect the rights of individuals and uphold justice.

Tools and Techniques in Policy Making and Creativity in Constitutional Adjudication:

The judiciary indeed plays a critical role in a democratic society, espe- cially when it comes to constitutional interpretation. In countries like India, the judiciary's role is paramount not only in interpreting laws but also in safeguard- ing fundamental rights, ensuring justice, and upholding the supremacy of the constitution. Since the constitution is the highest law of the land, the courts par- ticularly the Supreme Court and High Courts are entrusted with the task of en- suring that all laws and government actions conform to its provisions.

Powers of Supreme Court and High Court:

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Under the Indian Constitution Supreme Court and High Court are em- powered to issue of writ, for the enforcement of fundamental rights

- 1. Supreme Court Article 32
- 2. High Court Article 226

The Supreme Court under Article 32 and the High Courts under Article 226 are vested with the powers to issue directions, orders or writs in the natures of habeas corpus, mandamus,

prohibition, quo warrants and certiorari, which ever may be appropriate in the case. A brief explanation of these remedies in appropriate here.

Writs are effective safeguards against arbitrary exercise of powers by public au- thorities. It is an order or process issued by a court or judicial officer asking any person to perform or refrain from performing any act. It is a legal instrument to enforce obedience to the orders and sentences of the courts.

1. Writ of Habeas Corpus:

The writ of Habeas Corpus is one of the most important constitutional remedies available to individuals for the protection of personal liberty. The term *Habeas Corpus* is derived from the Latin phrase, meaning "You shall have the body." This writ is primarily used to challenge unlawful detention or imprison- ment, ensuring that no person is deprived of their liberty without due legal pro- cess. The writ of Habeas Corpus ensures freedom of the individual against arbi- trary detention and is a safeguard against wrongful imprisonment. It requires the authorities to produce the detained person before the court, along with the reasons for the detention. The court then evaluates whether the detention is law- ful or not. The writ of Habeas Corpus is specifically provided for under Article 32 and Article 226 of the Indian Constitution. Article 32: This gives individuals the right to move the Supreme Court for the enforcement of fundamental rights. The Supreme Court has the power to issue writs, including Habeas Corpus, to protect personal liberties. Article 226: This empowers the High Courts to issue writs for the enforcement of any rights, including fundamental rights, and also for any other purpose.

2. Writ of Mandamus:

The writ of Mandamus is one of the five types of writs provided in the Indian Constitution to protect fundamental rights and ensure the proper func- tioning of public authorities. The term *Mandamus* comes from the Latin word meaning "We command." It is an order issued by a higher court (usually the Supreme Court or High Court) directing a public authority or government offi- cial to perform a public duty that they are legally obligated to do but have failed or refused to perform. In **Manjula Manjari**

vs. Director of Public In- struction⁸, The case highlights how the writ of Mandamus serves as an effec- tive tool for ensuring accountability in government and public authorities, espe- cially when there is a failure to fulfill statutory duties. It also reinforces the concept that if an authority has a legal obligation, and there is no other adequate remedy, the courts can issue a writ to compel the performance of that duty.

3. Writ of Certiorari:

The writ of Certiorari is a powerful judicial tool used to ensure justice and fairness in legal proceedings. This writ is issued by a higher court (like the Supreme Court or High Court) to a lower court or tribunal directing it to send the records of a particular case for review. The writ of Certiorari is primarily issued to correct errors of jurisdiction, to quash illegal orders, or to correct pro- ceedings that have been made in excess of the court's or tribunal's legal authori- ty. Purpose of Certiorari- Reviewing and Correcting Errors, Preventing Abuse of Power. After the famous case, **Assistant Collector of Customs vs. Soorajmull Nagarmull and Anr.**⁹ It is now settled that the writ can be sought by any member of the public can be provided and he is not disentitled by his bad conduct.

4. Writ of Prohibition:

The writ of Prohibition is a judicial order issued by a higher court (typ- ically the Supreme Court or a High Court) to a lower court or tribunal. It di- rects the lower body to stop (or prohibit) further proceedings in a case that is outside its jurisdiction or authority. The primary purpose of the writ of Prohibi- tion is to prevent an inferior court or tribunal from exceeding its jurisdiction or from acting in an unlawful or unjust manner, ensuring that public authorities do not act beyond their legal powers. The writ of Prohibition plays a vital role in maintaining the integrity of the legal system. It ensures that lower courts, tri- bunals, and authorities do not act beyond their jurisdiction or violate the law. By issuing this writ, higher courts can prevent the continuation of unlawful pro- ceedings before a decision is made, thus protecting the rights of individuals and maintaining the rule of law.

⁸ Manjula Manjari Dei vs. M.C. Pradhan, AIR 1952 ORI 344, AIR 1952 ORISSA 344

⁹ Assistant Collector of Customs vs. Soorajmull Nagarmull and Anr. AIR1952CAL656, 56CWN453, AIR 1952 CALCUTTA 656

5. Writ of Quo Warranto:

The writ of Quo Warranto is a judicial order issued by a higher court to a public official or authority questioning the legality of their holding a public office. The term "quo warranto" comes from Latin, meaning "by what authori- ty" or "what is your authority?" This writ is typically issued when a person is oc- cupying a public office without the legal right to do so, or if they are abusing or exceeding the powers granted by their position. The writ of Quo Warranto aims to prevent a person from continuing in an office if they are not qualified to hold that office or if they are holding the office in violation of the law or the Consti- tution. The writ of Quo Warranto plays a crucial role in upholding the rule of law and ensuring that public offices are not illegally or unlawfully occupied. It serves as an important mechanism for checking the abuse of power and ensures that public officials are held accountable for their actions. By providing a means to challenge the legality of holding public office, this writ reinforces constitu- tional governance and protects the integrity of public institutions.

PUBLIC INTEREST LITIGATION:

Public Interest Litigation is a vital tool for promoting social justice and ensuring that the rights of all citizens are protected. It empowers individuals and organisations to hold authorities accountable and bring about positive change.

M.C. Mehta's legacy as a public interest lawyer and environmental ac- tivist is enduring. His relentless pursuit of justice and his unwavering commit- ment to protecting the environment have left an indelible mark on India's legal and environmental landscape. His PILs have not only helped to clean up the en- vironment but have also empowered citizens to hold authorities accountable for their actions or inaction.

Taj Trapezium Case (1996)¹⁰:

M.C. Mehta observed the deteriorating condition of the Taj Mahal, par- ticularly the yellowing of its white marble due to air pollution. He filed a PIL in the Supreme Court, drawing attention to the urgent need to protect the monu- ment. The Supreme Court issued several directives to protect the Taj Mahal, Many industries in the Taj Trapezium Zone were ordered to shut

¹⁰ IR 1997 SUPREME COURT 734, 1997 (2) SCC 353, 1997 AIR SCW 552, 1997 LAB. I. C. 667, 1997 ALL. L. J. 254, (1997) 1 SCALE 61, (1997) 1 SUPREME 418, (1996) 2 ORISSA LR 435, (1997) 1 CURCC 127

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down or in- stall pollution control equipment. Some industries were relocated to reduce pollution levels. Stricter emission norms were imposed on industries and vehicles in the region.

GANGA POLLUTION CASE (1986)¹¹:

The case highlighted the severe pollution of the river due to industrial ef- fluents and sewage discharge. The Supreme Court took cognisance of the issue and issued several directives to the Central and State governments, This plan aimed to clean up the river by addressing pollution issues. Many industries were ordered to shut down or install pollution control equipment. Numerous towns and cities along the Ganga were directed to set up sewage treatment plants. This case was a landmark moment in India's environmental history, leading to significant legal actions and environmental initiatives to clean up the Ganga River.

CONSTITUTIONAL INTERPRETATION:

The judiciary plays a crucial role in constitutional interpretation. Courts, particularly the Supreme Court, have the power to declare laws unconstitutional if they violate the Constitution. This power of judicial review is a fundamental aspect of constitutional democracy. Judges interpret the Constitution in light of contemporary societal values and challenges. This allows for the Constitution to adapt to changing times without formal amendments. Courts may infer powers from the express powers granted to the government, especially in areas not ex- plicitly addressed by the Constitution. Judges often have to balance competing rights and interests, making value judgments that shape the contours of constitutional law. In some cases, courts may overrule past decisions, particularly when they are seen as outdated or unjust.

Access of international statute for ensuring constitutional rights. International statutes and treaties are essential tools for reinforcing constitutional rights. They provide an external layer of protection, ensuring that even if a country's own legal system fails to adequately protect rights, international mechanisms can hold states accountable. While national legal systems remain the primary vehicles for the enforcement of constitutional rights, international law acts as a safe- guard, ensuring compliance with human rights principles across the globe. The second world war paved the seed for International law such as covonant, treaties, etc., the main

¹¹ 1988 AIR 1115, 1988 SCR (2) 530, AIR 1988 SUPREME COURT 1115, 1988 (1) SCC 471, (1988) 1 JT 69 (SC), 1988 (1) JT 69, (1988) 1 COMLJ 81, 1988 3 SCC 471, 1988 21 REPORTS 250, 1988 (2) COM LJ 81, 1988 SCC(CRI) 141

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motive and objective of these laws are peace and security of the country, later its just alter motive deeply i.e, for human rights which in- cludes right to life, education, empowerment of women, for children, migrants etc., The India was ratified, signed and member of many organisation, treaties, covenant so India must obey that rules and also in judiciary they delivery a judgments and make a decisions on the bases of this international law in this place the international law is also the tools for the judicial creativity and make a law

UDHR (1948) ICCPR (1976) ICESCR (1976) CERD (1965) CEDEW (1979) WTO (1995)

These are the conventions, treaties ratified by india. Supervisory power of the higher courts on the lower courts:

Higher courts, particularly the Supreme Court and High Courts, possess significant supervisory powers over lower courts. This power is essential to ensure the uniform application of law, the protection of fundamental rights, and the overall efficiency of the judicial system.

- Appeals
- Writs
- Transfers of cases
- Revsional jurisdiction

Judicial Activism:

Judicial activism refers to the proactive role played by courts, particularly in instances where they interpret the Constitution or laws in a manner that pro- motes social change or enhances the protection of rights, even when these issues may not be directly addressed by the legislature or executive. Essentially, it in- volves judges taking an active role in shaping law and policy through their rul- ings, often to protect fundamental rights or ensure justice in the absence of leg- islative action or when legislative or executive actions are deemed insufficient or unjust. Judicial activism is seen as a way for the judiciary to fulfill its duty of en- suring that laws are in line with the Constitution and human rights, sometimes stepping in when the other branches of government are not performing their functions adequately. In the 1800 U.S. presidential

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election, Thomas Jefferson won the presidency, defeating incumbent John Adams. Before leaving office, Adams appointed a number of federal judges (known as "midnight judges") in a last-minute attempt to fill the judiciary with his own party's members. William Marbury was one of the individuals appointed as a justice of the peace for the District of Columbia. However, when Jefferson took office, his Secretary of State, James Madison, refused to deliver the official commission to Marbury, thereby preventing him from taking office. Marbury filed a petition asking the Supreme Court to issue a writ of mandamus compelling Madison to deliver the commission, based on the Judiciary Act of 1789, which granted the Court the power to issue such a writ. Chief Justice John Marshall delivered the opinion of the Court, and the decision has since been regarded as a critical example of ju- dicial activist. Marshall ruled that Marbury had a right to his commission, and that under normal circumstances, he would have been entitled to a writ of mandamus from the Court. However, the case's true significance lies in Mar- shall's assertion that the Judiciary Act of 1789, which granted the Court the power to issue writs of mandamus, was unconstitutional because it exceeded the Court's original jurisdiction as specified in Article III of the U.S. Constitution.

Judicial activism methods:

There are various methods of judicial activism that are followed in India, they are

- 1. Judicial review (power of the judiciary to interpret the constitution and to declare any such law or order of the legislature and executive void, if it finds them in conflict with the Constitution)
- 2. PIL (The person filing the petition must not have any personal interest in the litigation, this petition is accepted by the court only if there is an interest of large public involved; the aggrieved party does not file the petition).
- 3. Constitutional interpretation.
- 4. Access of international statute for ensuring constitutional rights.
- 5. Supervisory power of the higher courts on the lower courts.

Varieties of Judicial Activism:

Judicial Activism examples:

In **ADM Jabalpur v. Shukla¹²** the Supreme Court held that by a majority of 4-1, ruled that during the Emergency, the right to habeas corpus (Article 32) could not be enforced, as the

¹² ADM Jabalpur v. Shukla., 1976 AIR 1207, 1976 SCR 172

suspension of fundamental rights under Article 359 meant that citizens could not approach the courts for enforcement of their rights, including the right to life and personal liberty under Article 21. This deci- sion effectively upheld the government's actions during the Emergency and de- nied any judicial review of detention orders made under the Emergency regula- tions.. The Judicial Activism has set right a number of wrongs committed by the states in the following cases:

- 1. <u>Ban On Smoking In Public Places:</u> In Murali S. Dora vs. Union of India,¹³ The Congress leader Murali S.Deora filed a PIL in the Supreme Court seeking orders for banning smoking in public places and the Supreme Court emphasized the right to health under Article 21 of the Constitution, which in- cludes the right to a safe and healthy environment. The ban on smoking in publ- lic places was seen as a necessary measure to protect the health of non-smokers from the harmful effects of passive smoke. The Supreme Court directed the government to ensure that the ban on smoking in public places was strictly en- forced. It also asked the authorities to take necessary steps to create awareness about the harmful effects of smoking, especially passive smoking. Smoking in public places was seen as a violation of the rights of non-smokers to live in a healthy and safe environment.
- 2. <u>Protection Against Inhuman Treatment:</u> Sunil Batra vs. Union of India¹⁴, The Supreme Court held that Article 21, which guarantees the right to life and personal liberty, applies to all persons, including prisoners. Therefore, prisoners are entitled to be treated with dignity, and they cannot be subjected to cruel, degrading, or inhuman treatment. The Court also addressed issues related to the health and medical treatment of prisoners. The Court suggested that prison reforms were necessary, and it asked the government to consider making changes to improve conditions in Indian jails.

¹³ AIR 2002 SUPREME COURT 40, 2001 (8) SCC 765, 2001 AIR SCW 4505, (2002) 1 ALLMR 279 (SC),
(2002) 1 JCR 5 (SC), 2002 ALL CJ 2 827, 2001 (4) LRI 510, (2001) 9 JT 364 (SC), 2002 (1) ALL MR 279, 2002
(1) UPLBEC 406, 2001 (8) SCALE 6, 2001 (9) JT 364, (2001) 6 KANT LJ 559, (2001) 8 SCALE 6, (2001) 6
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¹⁴ Sunil Batra v. Delhi Administration (1978) 4 SCC 409

3. Protection of ecology and environment: M.C. Mehta Vs. Union Of India,¹⁵ The M.C. Mehta v. Union of India (1986) case was a significant milestone in the evolution of environmental law in India. The Supreme Court's judgment broadened the scope of Article 21 to include the right to a healthy environment, introduced the polluter pays principle, and reinforced the notion of strict liabili- ty for industries causing environmental harm. The case remains a cornerstone in India's ongoing efforts to balance industrial development with environmental sustainability and public health protection., Taj Mahal from deterioration on account of environmental pollution and emphasised Art.49 and also enabled Parliament to enact such law under entry 67 and List 1. The fundamental duty to preserve the rich heritage of our composite Indian culture enshrined in Art.51A of the Constitution is made enforceable by this writ petition.

4. <u>Handicapped to be given job opportunities:</u> National Federation of Blind vs. U.P.S.C.,¹⁶

The Supreme Court has held that the failure of UPSC to provide reason- able accommodations for visually impaired candidates violated their right to equality under Article 14 of the Constitution, as well as their right to equal op- portunity in public employment under Article 16. The Court observed that the rights of persons with disabilities were being compromised by the lack of provi- sions for such candidates to compete in competitive exams. It emphasized that the state is duty-bound to ensure that persons with disabilities are provided with equal opportunities in all sectors, including public employment.

<u>Adequate Medical Services:</u> Paschim Banda Khet Mazdoor Samiti vs. State of West Bengal,¹⁷

The Court emphasized that the right to health is an essential component of the right to life under Article 21 of the Indian Constitution. It stated that the right to life is not just limited to physical existence, but includes the right to live with dignity, which cannot be achieved without access to adequate healthcare. The Court ruled that basic medical

¹⁵ M.C. Metha vs. UOI AIR 1997 SC 734

¹⁶ National Federation of Blind vs. U.P.S.C., AIR 1993 2 SCC 411

¹⁷ paschim Banda Khet Mazdoor Samiti vs. State of West Bengal., AIR 1966 SC 2426: (1996) 4 SCC 37

care and emergency medical treatment are part of the fundamental right to life and that every individual has the right to receive timely medical care in case of an emergency or health crisis.

6. <u>Power to award compensation:</u> Rudal Shah vs. State of Bihar,¹⁸

The Supreme Court awarded Rs. 30,000/- as compensation to the peti- tioner who had to remain in jail for 14 years because of the irresponsible con- duct of the State authorities and in this Petition under Article 32 of the Consti- tution, the Supreme Court laid down that the power of the court to grant such remedial relief may include the power toward compensation in appropriate cas- es and in this case the court exercised its power to award compensation.

Problems Of Accountability and Judicial Law Making: <u>Meaning Of Judicial</u> <u>Accountable:</u>

The word "Accountable" as defined in Dictionary means 'responsible for your own decisions or actions and expected to explain them when you are asked'

Judicial accountability refers to the mechanisms and processes that en- sure judges and courts are held responsible for their own actions and own deci- sions. It aims to promote transparency, integrity, and fairness within the judicia- ry. Since judges hold significant power in interpreting and applying the law, ac- countability ensures they remain impartial, ethical, and responsive to the rule of law. Judges may be accountable to the public, particularly in countries where judges are elected or subject to public scrutiny. In such systems, voters may have the power to approve or remove judges from office based on their performance. These mechanisms are designed to prevent the concentration of too much pow- er in the hands of one individual or institution, ensuring checks and balances within the government.

Constitutional Provisions for making the Judiciary Accountable:

The Constitution of India provides many privileges to maintain the inde- pendence of judiciary. The preamble of the constitution along with other vari- ous goals intends to secure for the citizens, "JUSTICE- Social, Economic and Political...." And for the judicial independence and judicial accountability both are essential. Judiciary Accountable in respect of its judicial functions and or- ders is by provisions for revision, appeal and review of orders. Apart from

¹⁸ Rudal Shah vs. State of Bihar, AIR 1983 4 SCC 141

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this the judges power are very wide it is the indication of power is not allowed to be absolute. Here is the remedy that Constitutional limitations on Judges, "removal of judges of the High Court/Supreme Court by address of the House of Parliament to the President on the ground of 'Proved misbehaviour¹⁹ or incapacity'. The judges of the Supreme Court and High Court can be removed on the ground of proved misbehaviour or incapacity and this power is vested Articles 124(4) and 217(1)(b) of the Indian Constitution.

The Constitution of India provides for removal of a Judges of the Supreme Court and the High Court for the proven misbehaviour or proven incapacity, it was popularly called the process of impeachment, where under two third of the members of each house of parliament can vote for the removal of the judges. So for only four impeachment proceedings has been initiated against supreme court and high court judges, but it failed because two third majority was not available.

Need for Judicial Accountability:

Judicial Accountability is essential in India because it ensures that the judi- ciary is transparent, free from undue influence. It also necessary to maintain public confidence for the purpose of acceptance of court decisions by the pub- lic. In India from time immemorial judges have been held I high esteem but re- cently the faith in the justice system is faltering and people are taking law in their own hands. Therefore there is an urgent need to make judiciary account- able, as derogation of values in judiciary is harmful for a democracy and the ju- diciary is the guardian of the constitution.

Code of Ethics of a Judge:

The code of ethics is the principle that no man can be judges in his own cause it means that a judge should not adjudicate those cases in which he has any kind of interest. Code of ethics for judge:

1) Nemo Debet Esse Judex Inpropria Causa Sua:

Which means No person should be the Judge in his own cause or "No one should be a judge in their own case." This principle is a fundamental aspect of natural justice and legal fairness. It asserts that a person should not be both a party to a dispute and the decision-maker in that dispute. In other words, if a judge has a personal interest in a

¹⁹ Definition of misbehaviour According to Blacks Law Dictionary: improper or unlawful behaviour

case, they should recuse themselves to avoid conflicts of interest and ensure impartiality in the legal process.

2) Fiat justitia, ruat caelum:

"Let justice be done, though the heavens fall." This powerful expression emphasizes the idea that justice must be upheld at all costs, regardless of the consequences. Justice should not be compromised for fear of potential harm, and it must be administered impartially, regardless of who is affected or what might be at stake.

3) Audi Alteram Partem:

Hear the other side which means that this is a fundamental principle of natural justice and due process in legal systems around the world. It dictates that both sides of a dispute or issue must be heard before a decision is made. In es- sence, it emphasizes the importance of fairness by ensuring that every party in- volved in a legal or administrative matter has the opportunity to present their case, defend their interests, and respond to any accusations or charges against them.

4) Maintain distance from relatives:

Judges and other judicial officers should be free from personal or familial influences when making legal decisions.

5) Media Publicity must be Avoided:

Public exposure or media coverage of ongoing judicial proceedings can compromise the fairness of a trial, influence public opinion, and potentially in- terfere with a judge's impartiality. This principle is rooted in the need for due process and justice being seen to be done without external pressure or bias.

Lack of Judicial Accountability in India:

The Indian Constitution has taken nearly 60 years for the formation, in this Indian Judiciary would emerge as the most powerful institution of the State. The Judiciary that is both the Supreme Court and High Court has been estab- lished as a watch dog establishment independent of the executive and the leg- islative for the purpose of not only giving justice, but also the executive and ju- diciary should not exceed their authority. Thus the judiciary has

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given the pow- er to interpret the constitution and law and also has the power to strike down executive actions which the law or the fundamental rights of the citizens has been violated. It also has the authority to examine the laws framed by the par- liament are constitutional or unconstitutional and declare them void if they vio- late. The judiciary also has the authority to strike down the constitutional amendments which violates the basic structure of the constitution. This definitely makes it crystal clear that the superior courts are the most powerful courts in the world. Executive actions and even Legislative actions could often be struck down by the courts.

The appointment and transfer of judges are also controlled by the Judi- ciary. It is absolutely vital that judges of the Superior judiciary be accountable for their decisions and consent whether it is for corruption, rights of the citizen etc. According to the constitutional provision the judges of the Supreme Court or High court judges cannot be removed except proven misbehaviour, a notice of a motion for presenting an address to the President for the removal of a Judge, if given in Lok Sabha, is to be signed by not less than one hundred mem- bers of the House and if given in Rajya Sabha, by not less than fifty members of that House. The inquiry committee consist of three judges hold a trial of the judge.

The only impeachment of judge to have gone far was that of Justice V. Ramaswamy in 1990. After the motion was presented, a judges inquiry committee found him guilty of several charges of misconduct, the matter went up for voting to parliament. The ruling congress party directed all their MPs to abstain from voting. Thus the motion was unanimously passed in the Lok Sab- ha, it did not get the support of the majority of total membership of the house and therefore failed. The judge remained in the office till he is retired but was not assigned any judicial work by then Chief Justice.

After this Judgement, the judges has no fear of any criminal action or action for removal even there was documentary evidence of corruption, fraud, misappropriation, etc. This lack of accountability leads to unchecked powers of the court and make the judiciary a very dangerous institution and it is also a serious threat to Indian democracy.

Problems of Accountability in Judicial Law Making:

In the absence of any responsibility of the Judiciary to anyone but it- self, the judges have started considering themselves as demi-Gods. It only goes to show on that 'Corrupt optima pessima'- corruption of the best is the worst of all. There are many factors have contributed to this dire situation and the prob- lem of accountability is wide and complex.

1) The Contempt of courts Act:

The power of the courts to punish for contempt is indeed one of the factors contributing to the low accountability of judges in India. While this power is necessary to uphold the authority and dignity of the judiciary, it has been critiqued for potentially being misused or creating a culture of impunity within the judiciary itself. In our constitution there is guarantee for Freedom of Speech and Expression and the other hand the same constitution gave the pow- er to superior courts to punish for it contempt. These statements were contra- dictory in many cases. In this there is no clarity on which law should prevail. Here serious reforms are needed in the law of Contempt.

2) Appointment and Selection of Judges:

In the case of **S.P. Gupta vs. Union of India**,²⁰ it was held that the President has the right to differ from the advice provided by the judges and it can only be challenge if it is based on mala-fide and irrelevant consideration. This decision was reversed in **SC Advocates on Record Association vs. Union of India**²¹ whereby it was held that in the matter of appointment of judges of high courts and Supreme Court, the Chief Justice should have the primary and the appointment of the Chief Justice should be based on seniority. It further held that Chief justice must consult his two senior most judges and the recommendation must be made only if there is a consensus among them. Fur- ther Third Judge Transfer case held that an advice given by the Chief Justice without proper consultation with other judges is not binding on the govt. These two judgements practically make India the only democracy where judges select themselves. The Second Judge Transfer case is a truly sad decision which un- dermines any kind of accountability in the appointment procedure of the judges. The Judges are appointed by the collegium System, collegium headed by the Chief Justice of India comprising of

²⁰ 981 Supp (1) SCC 87

²¹ AIR 1994 SUPREME COURT 268, 1993 (4) SCC 441, 1993 AIR SCW 4101, (1993) 5 JT 479 (SC), (1993) 5 SERVLR 337

senior most judges of High Court selects and recommends the name to the governments for appointment. The Government may ask the collegium to reconsider the names but in case the col- legium returns back with the same recommendation the government cannot but ask the president to accept the recommendation. In this the whole procedure is arbitrary. There is a secrecy behind this operation and here there is a lack of transparency and the presence of ambiguous and vague methods. There is a critical want of reconstructing the law.

3) **Impeachment**:

The procedure of impeachment of judge in India is held by both house of parliament and should be simple majority of the whole house, and also by two-third members present and voting, this is the procedure but after the inci- dent of K. Veeraswamy's case no one addressed their vote against the guild of Judge.

4) Disciplinary Mechanism:

Still now there is no disciplinary mechanism for complaints against the judge, in many times government had tried to enact a bill for the purpose of disciplinary instrument but its gone vein. For this purpose accountability can be divided into three kinds Collective, Behavioural Accountability and Decisional Accountability.

5) Other Problems (Law Making) regarding accountability:

- i. Immune from any authority's scrutiny and empowered with judicial re- view, the courts have started interpreting laws to suit their aims and fortify them- selves from any external scanning. They have invented their own laws, rules, and methods of implementation, and have used contempt of court as a threat for disobedience of their orders.
- Also every judge tries to impose his own personal philosophy and ideas in his judgments. This has led to a vast number of contradictory judgements on the same issues. Somehow many of them have forgotten that their decisions should be backed by reasons and not by personal ideas.

Criticism:

- ✓ The constitution stated and divided the powers into three organs that is ex- ecutive legislative and judiciary, and also constitution states that one organ should not interfere with the Powers of other organs.
- ✓ Here it has a checks on the power, if judiciary makes the law means it will be against to the separation of power.
- ✓ In judiciary there is no disciplinary mechanism against the judges, there has a terms and conditions for everything but the judges has no any disciplinary mechanism this leads to centralisation of power, here it is considered that one system have more power than others, here the judges will not face any conse- quences so without fear they leads to arbitrary. It affects the whole system.

Conclusion:

Our Indian Constitution has came into force on January 26th, 1950. It has been crossing 74 years, In these period there has been changes of government but the constitution remains the same because constitution is a mother of Law. The major reason is Judiciary, its plays a crucial role in India. The most impor- tant factor of the Indian Constitution is a Judicial Review. In this the Constitut- tional adjudication plays a vital role in Judiciary. The superior Court protect the Constitutional Rights and it fulfils the social needs by the way of Judicial Adju- dication. Constitutional adjudication is essential for upholding the principles of justice, equality, and democracy in a society governed by the rule of law. Ulti- mately, the effectiveness of constitutional adjudication depends on the indepen- dence, impartiality, and integrity of the judiciary in interpreting and applying the constitution in a fair and transparent manner it has also been stated in the Bangalore principle and also this principles designed to provide guidance to judges to offer the judiciary a framework for regulating judicial conduct.

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