

JUDICIAL PROCESS IN INDIA: A CRITICAL ANALYSIS IN CONTEXT OF PART III AND IV OF THE CONSTITUTION

*Irfan Rasool Najar**

*Rohin Koul***

“... when the Supreme Court declared unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”

Alexander Bickel***

Abstract

Judicial process is an intellectual procedure adopted by the judges to authoritatively decide on “what the law is.” It is pertinent to note that all social science is based on the assumption that people, acting as an agent or instrumentalities of state, act rationally and reasonably. This is true even for judicial institutions. The aptitude of judicial control and judicial discretion is the foundation of any legal apparatus. However, the methods of how judicial officers arrive at their conclusion and adjudication have perplexed legal, political academic intellectuals for years. It has generated unending attempts to limit and balance between judicial discretion and judicial justice. The controversies which have enfolded the exercise of the judicial adjudication of the superior court of India require a re-examination under the controlling Constitution. The judicial institution continues to issue judgments based on their reading of the Constitution, as the supreme interpreters of the holy document. This judicial imperative supremacy, however, has to be answering the role for which it was established and entrusted with the power to make any decree or order as may be necessary for doing complete justice.

- I. Introduction**
- II. Judicial Process in India**
- III. Judiciary as a state**
- IV. Law for the purposes of Article 13**
- V. Presumption of Constitutionality**

* Assistant Professor, School of Law, Sharda University, Greater Noida, U.P.

** Assistant Professor, School of Law, Sharda University, Greater Noida, U.P.

*** Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-17* (Indianapolis, New York, 1972).

- VI. Equal protection clause
- VII. Life and liberty
- VIII. Right To Education
- IX. Right to livelihood
- X. Conclusion

I. Introduction

POWER¹ WHEN exercised has the ability to change the legal position and imply liabilities on others.² It is either structured or unstructured and for the law to serve as an instrument of social transformation,³ the power has to be structured, defining the lines along which it is permitted to flow. Necessarily, therefore, the correlation between power wielder and power yielder is to be found on a purpose-driven arrangement of power which indicate both permissions and prohibitions for a valid exercise of power. A Constitution thus becomes the fundamental law of superior obligation indicating the constitutionally granted use of power as well as the purposes for which it can be validly exercised. A controlling Constitution, like the Indian Constitution, will have to have provisions which specifically indicate denials, directions, divisions, permissions, or prohibitions

¹ Power is the ability to change the legal position of another person. According to Foucault, power can be studied in terms of cratology, the study of power in its various ways and usages. For a detailed inquiry refer to C. Gordon (ed.) *Michel Foucault, Two Lectures on Power/Knowledge, Selected Interviews and other Writings 1972-1977* (Pantheon Books, New York, 1980); see also Michel Foucault, "The Subject and the Power" 8(4) *Critical Inquiry*, 777-895 (1982), available at: http://www.unisa.edu.au/Global/EASS/HRI/foucault_-_the_subject_and_power.pdf (last visited on Apr. 2020). For the study of the power spectrum and their implications on the judicial process, refer to chapter 14 of Julius Stone, *Social Dimensions of Law and Justice* (Universal Law Publishing Co. New Delhi, Second Indian Reprint, 2009). See also, Karl Loewenstein, *Political Power and Governmental Process* 8 (The University of Chicago Press, Chicago, 1957). For the study of power in its various forms, refer to J. G. Merquior, *Foucault* 108, 113-14 (University of California Press, US, 1985).

² The exercise of the power is not simply a relationship between partners, individuals... it is a process in which some acts affect others. This is to suggest, of course, that there is no such thing as power, with or without a capital letter, which is assumed to exist universally in a concentrated or diffuse. Power operates when it is placed into practice, even though it is incorporated into diverse fields of possibilities to bear on permanent structures. Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* 291 (The University of Chicago Press, Chicago, Second Edition, 1983). See also John Scott (ed.) *Power: Critical Concepts* 227- 229 (Routledge, London Vol I, 1991); see also chapter 10 by Roberta Garner and Black Hawk Hancock (eds.), *Social Theory: Volume II: From Modern to Contemporary Theory* 367- 380 (University of Toronto Press, 3rd edn., Toronto 2014); see also Michel Foucault, "The Subject and the Power" 8(4) *Critical Inquiry* 777-795 (1982).

³ In our contemporary disillusionment, it is again becoming fashionable to underestimate both the role that the law currently plays in world power and the role that, with more effective organization, it might play in preserving the principles of a democratic, peaceful and free society. McDougal and Myres S., "Law and Power" 14(1) *American Journal of International Law* 102, 102-114 (1952).

for the exercise of structured power. The constitutional matrix of power would regulate the legislature, the executive and the judiciary.

As per Aristotle⁴ there is six-fold classification⁵ of *politeia* among which democracy⁶ is the corrupt form of government because power is exercised to promote only the interests of the power-holders.⁷ Its nobler version what he referred Polity⁸ or Constitutional⁹ a government is a political system where power lays down certain propositions as basic for the governance of the people subjected to it and owing allegiance to it. To ensure that the set limits of power are respected by

⁴ The different types of governments are classified in chapter IV and V of classic work of Aristotle, Polity. They differ according to whether the sovereign is one individual or a few or more, and according to whether they rule for the common good or for their own interests. This gives the three correct constitutions and three deviations which are Royalty, Aristocracy, Constitutional Polity and Tyranny, Oligarchy, Democracy respectively. H Rackham (Trn.) *Aristotle Politics* xviii (William Heinemann Ltd. London, Reprinted 1959). See also Benjamin Jowett (Trn.) *The Politics of Aristotle* (Clarendon Press, London, 1885). Also for classification of government refer to John William Burgess, *Political Science and Comparative Constitutional Law* vol. II (Ginn and Company, Boston, 1891); See also Karl Loewenstein, *Political Power and Governmental Process* (The University of Chicago Press, Chicago, 1957).

⁵ In the sixteenth century, Jean Bodin, wrote six books on the Commonwealth, and further advanced Aristotle's classifications of constitutions. He was however, perplexed with the question of 'what kind of constitution was best' and his vast array of facts about contemporary constitutions and his conviction that the form of government depended on economic and geographical factors, as well as political factors, enabled him to make substantial advances in the study of politic. Alan R. Ball, *Modern Politics and Government* 37 (Palgrave Macmillan, UK, 1988).

⁶ 'Democracy' is a common term for a wide spectrum of governments which include radical and moderate democracies, representative and direct democracy, parliamentary and presidential, majoritarian and consensus democracy as opposed to partial democracies, to name but a few examples. Manfred G. Schmidt, "Political Performance and Types of Democracy: Findings from Comparative Studies" 41 *European Journal of Political Research*, 147, 147-163 (2002) See for detailed inquiry on various types of governments in its comparative perspective refer to John William Burgess, *Political Science and Comparative Constitutional Law* (Ginn and Company, Boston, Vol II, Book III, 1891).

⁷ If the one, the few or the many rule for the public benefit, these would be obviously correct constitutions; but they are deviants when the rule for the personal benefits, either one, few or many. Don Tontiplaphol, Aristotle and the Correct Constitutions, , available at: http://scholar.harvard.edu/files/tontiplaphol/files/tontiplaphol_aiming_july3.pdf (last visited on Apr. 10, 2020).

⁸ 'For what denotes the term 'Polarity' refer to H Rackham (Trn.) *Aristotle Politics* 282 (William Heinemann Ltd. London, Reprinted 1959); see also for the understanding of the term 'constitutional polity', Karl Loewenstein, *Political Power and Governmental Process* (The University of Chicago Press, Chicago, 1957).

⁹ According to Aristotle, Constitutional Polity, which is based on the virtues of the middle class, is average. H Rackham (Trn.) *Aristotle Politics* xx (William Heinemann Ltd. London, Reprinted 1959). See also S. Mukherjee and S. Ramaswamy, *A History of Political Thought: Plato to Marx* 126 (PHI Learning Private Limited, New Delhi, 2007). Aristotle defined four kinds of democracy that followed a continuum from moderate to an extreme democracy, where all constraints are abolished, becoming completely lawless. A study of the political factors in democracy and oligarchy made it possible for Aristotle to find the form of government that would be reasonable for a large number of states, suggesting that no more virtue or political ability was required for it to be realized than the states would be able to gather. Although not an ideal, it was the best possible state, keeping with its golden mean concept, to avoid extreme tendencies within oligarchic and democratic structures. This is called polity or constitutional government, the name given to moderate democracy in Book III. See also Bodenheimer Edgar, *Jurisprudence: The Philosophy and Method of the Law* 10 (Universal Law Publishing Co. Ltd. New Delhi, 2001). Aristotle suggested a state based on law as the only feasible means of achieving a "good life" and according to him that was the main objective of the political government. "Man, he exclaimed, when perfected is the best of animals, but if he is isolated from law and justice he is the worst of all".

the power holders the judiciary, under a liberal democratic system, is allowed to verify and speak to the correctness¹⁰ in the exercise of powers by the power-holders.¹¹ It has, however, also created the difficulty of counter-majoritarianism.¹² Gordon, unlike Alexander Hamilton¹³ has argued that *Marbury* was one reason that the ‘least dangerous’ organ of the State can be seen becoming the most powerful¹⁴ adjudicatory body ever known.¹⁵

Judicial behaviour¹⁶ has been receiving attention, especially since 1998 when it was observed by one of the retired judges of the Superior Court that, “everything was rotten about the Indian Judiciary”.¹⁷ It also brings to mind the statement by Felix Frankfurter, Professor at Harvard, who cautioned against depending on adjudicatory bodies and officers to preserve liberty.¹⁸ The Indian

¹⁰ Most people, particularly members of the judiciary, try to make decisions that are correct, reasonable, ethical and free from bias and prejudice. John F. Irwin and Daniel L., “Real, Unconscious Influences on the Judicial Decision Making: The Illusion of Objectivity” 42 *McGeorge Law Review* (2016).

¹¹ In the context of the effective judicial review, the courts have the power to deny the application of a statute in a particular case or to modify the effect of a law in order to ensure that its implementation is compatible with the individual rights. Moreover, the courts in this context have the power to decide, as a matter of law, that a statute or a provision is not to be enforced in such a way that, as a result of stare decisis and preclusion, the law which they have declined to enforce is in effect a dead letter. In addition, a form of stronger judicial review would allow the courts to strike a piece of legislation out of the statute entirely. Jeremy Waldron, “The Core of the Case Against Judicial Review” 115 *The Yale Law Journal* 1354, 1346-1406 (2006).

¹² David S. Law, “A Theory of Judicial Power and Judicial Review” 97 *Georgetown Law Journal* 723, 727 (2009) According to Alexander Bickel the idea of judicial review which poses a ‘counter-majoritarian difficulty’, has become the cornerstone on which contemporary American constitutional theory rests. See also Corinna Barrett Lain, “Upside-Down Judicial Review” 101 *The Georgetown Law Journal* 114, 117, 113- 183 (2012).

¹³ See Jacob E. Cooke (ed.) *The Federalist No. 78*, (Alexander Hamilton) 522 (1961) (evaluating the role of the judiciary in the American political system). See also Margaret L Moses, “Beyond Judicial Activism: When the Supreme Court is no Longer a Court” 41(1) *Journal of Constitutional Law* 163, 161-174 (2011). The constitutional framers, in particular Alexander Hamilton, argued that the judiciary was the least dangerous of all the three organs of the state because its power was the most constrained. See also Michael L. Principe, “Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain” 22 *Loyola L. A. International and Comparative Law Review* 357, 360 (2000), available at: <http://digitalcommons.lmu.edu/ilr/vol22/iss3/2> (last visited on 30th Apr. 20, 2020). It may be so in the case of Britain, where parliamentary supremacy was the basis of the political structure that emerged from Thomas Hobbes’ political philosophy and was further carried by William Blackstone and Albert Venn Dicey.

¹⁴ For contrast see Henry F. Tepker, “Marbury’s Legacy of Judicial Review after two Centuries” 57 *Oklahoma Law Review* 136, 124-142 (2004). The opinion itself...fails to explain why... the contribution of judicial review to the American experiment... has been positive.

¹⁵ *Ibid.*

¹⁶ For a subsequent inquiry on the analysis of ‘judicial behavior’ refer to Julius Stone, *Social Dimensions of Law and Justice* 687- 696 (Universal Law Publishing Co. New Delhi, Second Indian Reprint, 2009); Also see Glendon Schubert, *Quantitative Analysis of Judicial Behavior* (The Free Press, Illinois, 1959).

¹⁷ T. Devidas and H. Bhandri, “Judicial Accountability”, 48 *Journal of Indian Law Institute* 94 (2006).

¹⁸ Pran Chopra, *The Supreme Court versus the Constitution: A Challenge to Federalism* 81 (SAGE publications Pvt. Ltd. 2006). See also Felix Frankfurter, “Some Observations on the Nature of the Judicial Process of the Supreme Court Litigation” 98(4) *Proceedings of the American Philosophical Society* 233, 233-39 (1954). Those who know me tell me that the most illuminating light on painting has been furnished by painters, and the deepest revelations on the writing of poetry have come from poets. It is not so with the business of judging. The power of searching analysis of

judiciary has come into notice¹⁹ for the role played by it in contrast to the role assigned to it under the Constitution.²⁰

II. Judicial Process in India

It is a well established principle that the job of the superior courts in any organization is fundamentally adjudicatory that is declaring “what the law is”.²¹ A plain reading of the provisions of the Constitution of India indicate that the superior judicial institution was conceived²² of as a

what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition, or because they are inhibited from practicing it. The fact is that pitifully little of significance has been contributed by judges reading the nature of their endeavor, and, I might add, that which is written by those who are not judges is too often a confident caricature rather than a seer’s vision of the judicial process of the Supreme Court.

¹⁹ Judges, like the rest of us, have prejudices and these prejudices may affect their understanding of the Constitution. K. K. Mathew, *Three Lectures* 6 (Eastern Book Company, Lucknow, 1983). See also V. R. Krishna Iyer, “Time for Change” 28(5) *Frontline*, Feb. March 2011. The judges are expected to maintain the highest standards in their conduct. But it is an undoubted fact in India that corruption has inflicted the Indian judiciary also.

²⁰ The Constitution of India, 1950 is a controlling constitution. A controlling Constitution is one which not only enumerates power and function of the organs of the State but also sets limitations on exercise and lays instrument of instruction for their exercise. The Constitution of India establishes parity-of-power by providing denial of power under Part III; direction of power under Part IV and distribution of power under Part XI and seventh Schedule of the Constitution. The denial of power in particular coupled with article 32 of the Constitution makes it a controlling Constitution. For analysis of power and its control in a governmental process refer to Karl Loewenstein, *Political Power and Governmental Process* (The University of Chicago Press, Chicago, 1957). For analysis of ‘Directive Principles of State policy’ as ‘Instrument of Instruction’ refer to T. Devidas, “Directive Principles: Sentiment or Sense” 17(3) *Journal of the Indian Law Institute* 478-484 (1975). See also T. Devidas and H. Bhandri, “Judicial Accountability” 48 *Journal of Indian Law Institute* 94 (2006).

²¹ The statement does not mean that almost every dispute could be solved by the judiciary through adjudication. Lon Fuller, for instance, has identified ‘polycentric’ issues require handling by the method of either *ad hoc* discretion or of negotiation or of legislation. Lon Fuller’s *The Forms and Limits of Adjudication* set out the essential features of adjudication. Lon Fuller, “The Forms and Limits of Adjudication” 92 *Harvard Law Review* 353, 394 (1978). See also J. W. F. Allison, “Fuller’s Analysis of Polycentric Dispute and the Limits of Adjudication” 53(2) *The Cambridge Law Journal* 367, 369, 367- 383 (1994). Fuller made a leading contribution to the understanding of the adversary system and the process of adjudication. Fuller’s analysis of polycentric disputes describes complex disputes comparable to those in which the Law Lords ought not to develop the law because “it would be impracticable to foresee all the consequences of tampering with it”... Fuller contributed to discussion of adjudication mainly by differentiating between disputes. To describe disputes which cannot be resolved adequately by adjudication, he introduced the concept of polycentricity. See also Anthony J. Sebok, “Reading The Legal Progress” 94(6) *Michigan Law Review* 1575, 1571-1595 (1996). According to Sebok, the structure of the work *The Legal Process* reveals an extraordinary concern with the problem of adjudication and that the book adopts and defends Lon Fuller’s conception of adjudication. See also Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1958). The book provides detailed information on the making and application of law. See also William N. Eskridge Jr., and Philip P. Frickey, “The Making of “The Legal Process”” 107(8) *Harvard Law Review* 2031-2055 (1994). The authors have maintained that *The Legal Process* was a splendid synthesis of public law themes that had become prominent before World War II... and its philosophy made a comeback in the 1980s and have freshly become relevant for a new generation of lawyers.

²² We are glad that the court has been an activist in the area of personal freedoms. Upendra Baxi is right in saying that the appellate opinions and judgements have multiple constituencies. They are not addressed to litigating parties alone,
available

policy controlling body²³ having the power to pronounce authoritatively the law and to elucidate it in cases of obscurities.²⁴ It was certainly not designed to have any policy making power because such power has always been seen as entirely belonging to and as an exclusive feature of the Parliament.²⁵ However, the Indian judiciary has consistently²⁶ abrogated powers that followed in disparity in the original constitutional structure. The judicial process is neither a mechanism of avulsion nor a mechanism of dissolution, and this basic concept does not seem to have been regularly upheld by the superior courts.²⁷

Judicial process secures importance and substance in the light of their role in administration of justice.²⁸ The advantage of the Constitution was that article 32 secured a legal right for anyone in the form of a right to appeal to the Supreme Court for the protection and implementation of fundamental rights. Comparably, article 226 of the Constitution mandated the high courts to provide similar treatment, with only one exception that the rule laid down by the Supreme Court should be alone the law of the land. And, within this context, the desirable uniformity has also been guaranteed for a substantive equal security provided by article 14 of the Constitution which

http://14.139.60.114:8080/jspui/bitstream/123456789/16680/1/041_K.K.%20Mathew%20on%20Democracy%2C%20Equality%20and%20Freedom%20%28583-593%29.pdf at 587 (last visited on May 20, 2020).

²³The judiciary has to take measures, when there is disparity by the legislative or executive organ in the approximation of the 'is' to the 'ought', to bridge the gap between the 'is' and the 'ought' by authoritatively stating whether policy making or policy execution is in conformity with the fundamental law of superior obligation. This is known as policy control. For subsequent inquiry on the judiciary exercising inter-organ control (Horizontal Control) towards the two other power-holders refer to *supra* note 20, at 238-240. In *Political Power and Governmental Process*, Karl Loewenstein defined law as power and analyzed its operation in terms of cratology.

²⁴ Legality needs judges and administrators to apply provisions in accordance with the principles of interpretation, not according to their fancy, that are relevant to their place in the legal ordering. Lon L. Fuller, *The Morality of Law* 82 (Yale University Press, Connecticut, 1995).

²⁵ For detailed analysis of what functions belong to what agency of State refer to *supra* note 20.

²⁶ See for further details *supra* note 17.

²⁷ This is true even in the cases of critical social needs. See Benjamin N. Cardozo, *The Nature of the Judicial Process* (Universal Law Publishing Co., New Delhi, First Indian Reprint, 1999). Even the comprehensive and balanced inquiry by Cardozo fails to adequately articulate the major problems of judicial interpretation. See also Joseph W. Bellacosa, "Three Little Words: The Nature of Judicial Process Revisited" 78(4) *ABA Journal*, 114 (1992). Then Judge Benjamin N. Cardozo's analysis on the judicial process 70 years ago produced his metaphorical observation that judges are not knights-errant, wandering the countryside looking for cases or causes to fulfill their vision of good versus evil. In the role and function of adjudication, judges must decide only the controversies people bring into their courthouses. See also Sandipto Dasgupta, "A Possible Reading of 'The Nature of Judicial Process'" 15 *Student Bar Review* 37, 38, 37-47 (2003). In terms of content, the central feature of Cardozo's characterization of the judicial process is a debunking of the idea of the then prevalent view of the oracular judge, whose role was perceived as merely finding and pronouncing the extant law. Rather, he insisted that the judicial role necessarily entailed the creation of law.

²⁸ Julius Stone, *Human Law and Human Justice* 3 (Universal Law Publishing Co., New Delhi, Third Indian Reprint 2008).

is a command to both the Union and the States. The imperative requirement of article 14 of the Constitution “not to deny equal protection of law and equality before law” would impose a responsibility on the state, including the superior adjudicatory bodies, to comply with the time-band of the power spectrum by ensuring that there is no time gap for the approximation of the “is” to the “ought”. It is in this background that some of the specific case laws are being analyzed in the light of the fundamental law of superior obligation, the Constitution.

III . Judiciary as a state

In the case of *Naresh Shridhar Mirajkar v. State of Maharashtra*,²⁹ the Supreme Court of India ruled, by a majority,³⁰ that the order banning the publication of the testimony of the witness was within the legal competence of the court.³¹ The facts of the case were that in a suit for defamation against the editor of a weekly newspaper, “Blitz”, published in Bombay brought on the original side of the high court, one of the witnesses demanded that an order may be issued that his evidence should not be made public in the said weekly newspaper because his business would be affected. Upon hearing the claims, the trial judge issued an oral order banning the release of the witness’s evidence. Against this order, the reporter of “Blitz” along with some other journalists, approached the Supreme Court to question the legality of the order on the premises of guarantee of freedom of expression under article 19(1)(a) and argued that the said order was subject to writ jurisdiction under article 32 of the Constitution and accordingly contended that writ of certiorari may be issued by the Supreme Court against the order of the high court.

²⁹ AIR 1967 SC 1.

³⁰ The majority opinion was delivered by Gejendragadkar, CJ, himself and on the behalf of other five learned Judges including Wancho, Mudholkar, Sikri, Bachawat and Kainasawmi, JJ. Sarkar, Shah and Bachawat JJ. delivered separate opinions while Hidayatullah, J. delivered a dissenting opinion.

³¹ In the opinion of Sarkar, J. the high court had the valid discretion to prohibit the reporting of the proceedings and that it was a facet of discretionary power of the court to conduct a hearing in camera and stemmed from it. He was of the opinion that the order prohibiting reporting does not violate the fundamental rights of the petitioner to freedom of express and consequently the Supreme Court has no power to issue certiorari to the high court. Shah, J. however, was of the opinion that civil procedure law did not contain any provision enabling the court to conduct its proceedings in camera, but that if widespread coverage itself serves as an instrument of injustice, the court has inherent competence to issue an order excluding the public where the essence of the case requires such a course of action (*emphasis supplied*).

The question before the court was whether the judicial order passed by the high court prohibiting the publication in a newspaper of evidence is amenable to be corrected by a writ of certiorari and consequently determine whether judiciary is “State” under article 12 of the Constitution. It was held that, even if the high court is a “State” within the context of article 12 of the Constitution, the validity of the order passed by the high court cannot be open to be challenged by a writ jurisdiction as the impugned order has been passed in the exercise of its inherent powers and thus such orders cannot be said to be in violation of fundamental rights. It would be difficult to concede a proposition that the Court is “State” for article 12, but yet the highest court had the inherent powers to disregard the imperatives of the Constitution. Sarkar J., was of the opinion that if a court of law issues an order that it has legal competence to make by adopting a law, valid in all aspects, that order cannot infringe a fundamental right.³² On the other hand Hidayatullah, J. while delivering a dissenting opinion held that a rule requiring the furnishing of the security for a petition under article 32 will abridge the rights under Part III of the Constitution. He was of the opinion that the word “State” in article 12 and 13 would include “Courts” otherwise they will be enabled to make rules which may take away or abridge fundamental rights and any such judicial decision would also offend fundamental rights. This cannot be ignored for a simple reason that it happens to be judicial order. He further recapitulated that if there is no suitable legal cure available to get such a decree removed because the adjudicatory body has no higher authority, it still may not be a good order in law. Once judged on the basis of the Constitution, it is still an unconstitutional order, although it can bind the parties unless it is set aside. It appears that Hidayatullah’s J., dissent is more in line with the constitutional structure than with the majority.

In *A. R. Antulay v. R.S. Nayak*,³³ The Supreme Court subsequently adopted the view of Hidayatullah J. The court unequivocally stated that the judiciary was “State” for the purposes of article 12 of the Constitution and established guidelines for the speedy trial of persons accused

³² It may be noted that Sarkar J., recapitulated that if an order is passed by a court of competent jurisdiction by applying a law which is constitutional in all aspects that order cannot be contrary to fundamental rights. He was of the opinion that an order which falls within the legal capacity of the court which has made it, if the court has jurisdiction to determine the issue which has been brought before it, and if the law which has been applied to make the order is legal, cannot be interfered with. It has been repeated that the court having this jurisdiction does not operate without jurisdiction if it makes an error in the application of the rule. The presumption here is that the law has been clearly interpreted and adequately applied to the facts of the case. (*Emphasis supplied*).

³³ AIR 1988 SC 1701.

with criminal charges. However, it refused to set any specified time schedule for the conclusion of criminal proceedings, which is again a defeat of the time count of the power spectrum.³⁴

IV . Law for the purposes of Article 13

The Supreme Court in *Shankari Prasad v. Union of India*³⁵ was dealing with the question of whether the term “law” under article 13(2) of the Constitution also contains a constitutional amendment. In this case the court took a stand that constitutional amendments were not a law within article 13(2) and therefore opined that an amendment to the Constitution would still be valid even though it contravenes with fundamental rights and was beyond the scope of judicial scrutiny. This view was also followed in the *Sajjan Singh v. State of Rajasthan*³⁶ while up-holding the constitutionality validity of the seventeenth Amendment. In this case the constitutional validity of the Constitution (Seventeenth Amendment) Act, 1964 which introduced changes in article 31A and extended its scope. It may be noted that since 1951 several legislative measures which were designed to give effect to a policy of agrarian reforms faced a series of challenges and to overcome them, article 31A and 31B were added to the Constitution. Again to save the validity of State Acts for giving effect to the policy, Parliament enacted Constitution (Seventeenth Amendment) Act, 1964 adding 44 Acts to the Ninth Schedule of the Constitution. The petitioner in this case contended that the said Amendment was constitutionally invalid as there is no such power under article 368 of the Constitution. The court opined that “*the power conferred by Article 368 includes the power to take away fundamental rights and it also recapitulated that the power to amend is a very wide power*”... *the expression “amendment of the Constitution” plainly and unambiguously means amendment of all provisions of the Constitution*. It also held “*that it would be unreasonable to hold that the word “law” in Article 13(2) takes in Constitution Amendment Acts passed under Article 368*”. This was in effect a wriggle by the State to escape the controls of Part III on its power, very much the same as were the earlier questions accepting the judiciary. The court held

³⁴ This sadly misses the time band count under art. 14 of the Constitution. it may be noted that with reference to the judicial process, the coercion, the ethical, the influence, the interest and the time count band weigh more than the head count band of the power spectrum. For the detailed analysis of the power spectrum refer to Julius Stone, *Supra* note 1. See also T. Devidas, and Hemlal Bhandri, “Judicial Accountability” 48 *Journal of Indian Law Institute* 95 (2006).

³⁵ AIR 1951 SC 458.

³⁶ AIR 1965 SC 845.

that the law made by the Parliament by virtue of article 368 did not mean “law” under article 13(2) of the Constitution. The court categorically stated that while amending the rights enshrined in Part III by article 368, the Parliament exercises its constituent power which cannot be contested before the court of law.³⁷ The court found that the control of Part III exercised on the powers of the state through the traditional “three” and did not include amending power. The parity of power ingrained in clause 2 of article 13 and article 14 seems, in present case, to have been completely defeated by the judiciary by upholding that the term amendment would not fall within the nature of article 13. It appears that the judiciary has thus fallen short to observe the mandate of the controlling character of the Constitution.

The Indian Constitution provides for the establishment of parity of power by guaranteeing and ensuring equality before law and equal protection of law. The state, through its organs is accordingly required to exercise its powers and perform functions to ensure compliance with the requirements of the Constitution. And in doing so they are not to abridge or cause injury to rights guaranteed to the people. There are two ways provided to do so in the light of article 13 and 14 of the Constitution. One of the ways is provided under Article 13 of the Constitution which denies power to the “State” to *abridge or take away* any of the fundamental rights guaranteed to the people by legislative action and under article 14 of the Constitution, the duty not to deny equal protection and equality is to ensure compliance with applicable law at the relevant point of time.³⁸ The presumption is always in favour of the rights granted by Part III of the Constitution, and any action taken by any institution of the state should be in accordance with the provisions of the Constitution. The rights guaranteed in the Part III of the Constitution are non-violable by the legislatures, the executive and the judiciary and the judiciary is placed under a duty to ensure that no violation of the constitutional guarantee are caused by any organ of the state.

³⁷ The first amendment Act inserted art. 31A and art. 31B in the Constitution and a new schedule *i.e.*, Ninth Schedule was added to art. 31 (b) to validate certain land reforms acts which violated the right to private property. The intention of the parliament was to immune these land laws from judicial review for the infringement of rights ensured in Part III of the Constitution.

³⁸ The complementary provision is in art. 256 as respects executive power.; art. 14 stands guard against any arbitrary exercise of power (see *E. P. Royappa v. State of Tamil Nadu* AIR 1974 SC 555). It may be also noted that judicial decisions and accountability is significantly encrypted in article 14, as Judiciary *id.*, “State” for the purposes of constitutional obligations and powers.

However, in *I. C. Golak Nath v. State of Punjab*,³⁹ The Supreme Court upheld the power of judicial review of the constitutional amendments on the ground that amendments were also law and linked them to Entry 93 of List I, Schedule VII, with a view to preserving the rights and liberties of individuals. The court while correcting the past evolved a principle of “Prospective Overruling” in order to ensure that the decision has only prospective operations. The Court was made to hold that the 1st, 4th and 17th amendments should continue to be valid because they were made in reliance of the Court’s earlier decisions.⁴⁰ The challenge to the decision in Golaknath got over by correcting the error behind the holding that amendments were law but managed to hold the amending power under check through a holding that no amendment could change the essential features, *basic structure*, of the Constitution. The court has maintained that the power to say whether there was a violation of the basic structure and this can be characterized as a tactful way of a policy control exercise.

V . Presumption of Constitutionality

The Supreme Court at the beginning of the constitutional journey did not adopt a role of policy control when in *Charanjit Lal Chowdhuri v. Union of India*⁴¹ the court held that there is a “presumption of constitutionality” always in favour of a legislative action. The court in the said case came with the ruling that the laws made by the legislature are deemed to be constitutional and, therefore, they are regarded not to violate any of the rights guaranteed under Part III of the Constitution. It appears that the prohibitions of article 13(1) and 13(2) read with article 14 of the Constitution do not seem to have been properly noticed with regard to policy control dimension which imposes limitation on state power to act contrary to the fundamental rights.⁴² The compulsion under article 14 is that the state is under an obligation to ensure equal protection of

³⁹ AIR 1967 SC 1643.

⁴⁰The Supreme Court had to contend with the fact that several legislations and administrative actions had altered the fact situations irreversibly.

⁴¹ AIR 1951 SC 41.

⁴² Art. 14 is exhaustively articulated that under the Constitution, the state “shall not deny to any person equality before law or the equal protection of the law within the territory of India.” The state is thus made incompetent to act contrary to any law, existing or enacted, constitutionally filtered through art. 13 (1) and (2) to avoid repugnancies in relation to fundamental rights guaranteed under Part III. *Supra* note 17 at 96, 97.

laws and equality before laws. The assumption should always be in favour of the liberties and protections conferred under Part III of the Constitution and any state actions through its organs have to be in conformity and consonance with the constitutional provisions. In this context it is relevant to note that the mandate under article 13 is that every legislative action has to conform to its mandate and it is upon the legislature itself to prove the constitutionality of its actions. The decision in *Charanjit Lal Case*, does not seem to have an answer to any of the counts of the power spectrum.

This doctrine of presumption of constitutionality of state policy seems to have destroyed parity-of-power and this leads to the negation of the protection guaranteed under article 14 of the Constitution. In order to ensure the denial of power to the State to place on the Statute book any unconstitutional law would mean to evolve a doctrine of the purview of constitutionality of laws, or alternately to guarantee the equality before law and equal protection of law as required by rights guaranteed under Part III, to automatically stay the impugned state action and verify its constitutionality before allowing it. This presumption of constitutionality shifts the onus of proof from the State to an individual and tends to encourage the State action in disrespect of the Constitution.⁴³ By providing the state policy- *the cover of presumption of constitutionality* the judgment failed to articulate the essence of all the factors involved, and as a result failed to perform the duty of controlling the policy⁴⁴ and enforcing the legal obligation of the legislature not to deny equal protection while carrying out particular objectives. Dismissing a challenge on the ground that the state action is presumed to be constitutional would constitute a breach of equal protection provision and the substance thereof.

⁴³ The Constitution requires every state action to be in conformity with the constitutional provisions and would cast a duty on the Legislature to explain the reason for the restriction, for; else it would be failure for the Parliament to make compliance with fundamental law of superior obligation.

⁴⁴ This decision of the court defeats all counts of the power spectrum. it is improper for the courts to posit the constitutionality of the law. It affects the head count, interest count, influence count and time count. According to Julius Stone there are six aspects of power in relation to law which include 1) head count and indicates the number persons that are affected by the application of law 2) influence Count and this count generally deals with the factor which influence any policy making decision, policy execution or policy control 3) Time Count and has two variants which include a) continuance and b) delay 4) Interest Count deals with the problems faced by the power addressees when their legal position is changed by the exercise of powers by the power-holders 5) Coercion Count deals with the degree of sanction behind policy making, policy execution of policy control and 6) Ethical Count deals with the moral aspects of law and its emphasis that every decision must satisfy the 'minimum morality' test. For detailed analysis refer to *supra* note 16, at 589-642.

The connotations drawn in *E.P. Royappa v. State of Tamil Nadu*⁴⁵ and *Indira Sawhney v. Union of India*⁴⁶ are true in its sense. Justice Bhagwati in *E. P. Royappa*⁴⁷ opined that, equality is a dynamic concept with many facets and dimensions that cannot be kept within conventional doctrinal limits.⁴⁸ In holding that equality is antithetical to arbitrariness, the court seems to have given the strongest support for human rights.

VI . Equal protection clause

In *Balaji v. State of Mysore*,⁴⁹ It was upheld by the court that the reservation was made through an executive order. Since then, the Supreme Court has upheld reservations provided through executive orders. Article 14 carefully embodies the idea of equal status and of opportunity as expressed in the Constitution through its Preamble. The provision in article 15(1), 15(2) and 15(3) leave the matter beyond doubt, not to discriminate on the basis of race, religion, sex, place of birth *etc.* Article 14's mandate has made it abundantly clear that in order to provide reservation, the provision of the law is a must and the object and rationality of that law is subject to constitutional limitation. The mandate in article 14 has made it explicitly clear that in order to provide reservation, the requirement of a law is a must and the purpose and reasonability of this law is subject to the constitutional limitations. To have permitted reservations through an executive order disturbs the very arrangement of power in the Constitution and is contrary to guarantee provided under article 14 and the substance thereof.

In *Balaji* the Supreme Court missed the question that a law was necessary for the classification, as was held in *Champakam*, and this permission for the executive power to make classification has ruled since. The judgment delivered in *Balaji* is only a dispute settling mode and not a policy control function. In *Balaji Raghavan v. Union of India*,⁵⁰ It was stated by the court that the

⁴⁵ AIR 1974 SC 555. "Equality is antithetic to arbitrariness".

⁴⁶ AIR 1993 SC 477.

⁴⁷ In this case Bhagwati J., delivers the judgement for himself and opinionated: Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within the traditional and doctrinaire limits. From a positivistic point of view, equality is antithetical to arbitrariness, in fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarchy. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.

⁴⁸ *Emphasis supplied.*

⁴⁹ AIR 1963 SC 649.

⁵⁰ AIR 1996 SC 770.

conferring of national awards like “*Bharat Ratna*”, “*Padma Vibhushan*” would not breach the principles of equality and did not fall within the term “title” under provision of article 18 of the Constitution. The court again seemed to have missed to apply the significance of the provision which denied power to the state to confer any title which was not of an academic or military distinction. To brush the challenge aside on the ground that it was not a title was an escape from a constitutional compulsion and a permission to exercise powers on a technical ground.

VII . Life and liberty

In *A.K. Gopalan v. State of Madras*,⁵¹ the Supreme Court, while interpreting article 21 of the Constitution diminished the notion of personal liberty by selectively applying it without reading it in concurrence with the concept of liberty under article 19 of the Constitution. In this case it was observed by Kania C: ⁵²

As the preventive detention order results in the detention of the petitioner in a cell, it is contended on this behalf that his rights specified under Article 19(a), (b), (c), (d), (e) and (g) have been infringed. It was argued that because of his detention he cannot have a free right to speech as and where he desires and the same argument is urged in respect of the rights mentioned in sub-clauses (b), (c), (d), (e) and (g). Although this argument is advanced in a case of preventive detention, if correct, it should be applicable in the case of punitive detention also to anyone sentenced to a term of imprisonment under the relevant section of penal code. So considered the argument must clearly be rejected. In spite of the saving clauses (2) to (6)... punitive detentions under several sections of the Penal Code... and even ordinary assault will be illegal... In my opinion such is not clearly not the outcome of the Constitution.

It may be noticed that such a finding is simply not the consequences of the Constitution. In fact clause 1 of article 13 of the Constitution addresses the problems in relation to the Indian Penal Code. The makers of the Constitution, most of them, were lawyers themselves and they obviously

⁵¹ AIR 1950 SC 27.

⁵² *A K Gopalan v. State of Madras* AIR 1950 27 at 34-35.

meant what they wrote into article 13(1). In any case, a judge cannot rewrite the fact through interpretation. The court in this case has not taken note of the obligation under clause 1 of article 13 imposing duty on the state to categorically declare any law void to the extent it is repugnant to the rights conferred in Part III of the Constitution. Similarly, clause 2 of article 13 of the Constitution limits the power of the state to make any policy contrary to the constitutional guarantees of Part III and judicial action was no exception. Its decision in the case has failed to respect the prohibitions of article 13 and article 14.

The critical heading of article 13 of the Constitution, that is, “laws inconsistent with or in derogation of the fundamental rights” requires that the state shall not make any law that abridges or takes away the rights in Part III and requires that any law in force not consistent with Part III shall be void to the degree of inconsistency.⁵³ As a result, the rights in Part III have always been given the highest status. The policies that are declared void due to inconsistency with rights guaranteed in Part III do not remain passive but are void as article 13(1) and 13(2) clearly states. Preventive detention constitutes a direct violation of the right guaranteed in article 19. The Constitution contemplates through article 358 only one situation when the rights under article 19 can be no impediment to state action, when an emergency is proclaimed under article 352.

VIII . Right To Education

In the case of *Mohini Jain v. State of Karnataka*⁵⁴ Also famous as the “Capitation Fee Case”, the court interpreted article 21 of the Constitution to also include the right to education and reiterated that it cannot be denied to any person by levying a higher fee or capitation fee. The case was against the denial of admission to a medical course. *Mohini Jain* case is a typical case for error of the Supreme Court in policy control function. Article 14 has encrypted the principle of rule of law and has significantly addressed the time count band of the power spectrum by not permitting

⁵³Art. 13(2) reads as:

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

⁵⁴ (1992) 3 SCC 666.

any time gap in approximating the 'is' to the 'ought'. In the said case, the time count of the power spectrum, which stands encrypted in the silent strength of article 14 appeared to have neither respected nor regarded. The compulsion of article 14 is for restitutive justice but the court did not render any restitutive justice in the said case.

IX . Right to livelihood

In the case of *Olga Tellis and Others v. Bombay Municipal Corporation and Others*⁵⁵ the Supreme Court held right to life includes right to livelihood,⁵⁶ but reiterated that it does not mean to use the public property, without authorization, for private purposes and cause inconvenience to the general public.⁵⁷ The court at the same time dispensed with the requirement of notice before mass eviction.⁵⁸ According to Upendra Baxi, *Olga Tellis* case is a paradigmatic decision which

⁵⁵ AIR 1986 SC 180.

⁵⁶ However it is submitted that the right to livelihood is better covered under art. 14 and provisions in Directive Principles of State Policy. One of the most important facets of the right to life with human dignity is that there should be an adequate means of livelihood. The instruction in the Directive Principle contained in art. 39 (a) and 41 are the mandates on the State to provide for adequate means for living, for without it, the person cannot participate fully and devote himself to the activity that best fulfils his expectation and promotes human worth. Here, the state has to do what can best be done to support the life of those displaced from their normal livelihood openings because a right to livelihood has relevance only for the living and among them for those who can pursue a livelihood. The failure to do so would amount to denial of protection under art. 14 of the Constitution.

⁵⁷ In this way the decision of the court left an unbridled scope of interference for the executive as it failed to test the executive action on the criterion of guarantee encrypted in art.14 of the Constitution.

⁵⁸ Here the Supreme Court could be accused of adopting or following a juridico-discursive model of power which prevented it from looking into the "anticipated reactions" on the problem and synthesizing it for both the power wielder and power yielder which is clear from its disregard towards questions of more fundamental importance which involves check over the negative moral accent of uncontrolled power. The court overlooked power as the key for adjudication. For a detailed study of juridico-discursive models of power refer to Colin Gordon (ed.) *Two Lectures: Law and Power in Michel Foucault, Two Lectures on Power/Knowledge, Selected Interviews and other Writings 1972-1977*, 79-108 (Pantheon Books, New York, 1980); see also Gerald Turkel, "Law, Power and Knowledge" 17(2) *Journal of Law and Society* 170- 193 (1990); see also Thomas Lemake, "Foucault's Hypothesis: From the Critique of the Juridico-Discursive Concept of Power to an Analytics of Government" 9 *Parrhesia A Journal of Critical Philosophy* 31-43 (2010), available at: https://www.parrhesiajournal.org/parrhesia09/parrhesia09_lemke.pdf (last visited on May 2, 2020).

still has to provide a reasoned “judgment”.⁵⁹ The duty of conferring justice⁶⁰ is upon the Courts⁶¹ and therefore it was the duty of the court to take judicial notice of the truth that a substantial group of people were residing on the road side. The court should have taken judicial notice under section 57(1) of the Indian Evidence Act, 1872 that the people residing on the roads were living in inhuman conditions and that it was infringing the rights of pedestrians to use the footpaths for safe use of the roadway.⁶² Nevertheless, the court did not refer to section 57(1) of the Evidence Act to take judicial notice of the fact that the state had allowed the people to start living on the pavements and allowed the state to remove them from the pavements.⁶³ It was the duty of the court to have noticed the obligations of the executive under article 256 of the Constitution and to direct the municipal corporation to perform its legal duty unerringly in the future.⁶⁴

As a result in the said case the court did not lay down the law to govern the executive taking notice of section 166 IPC read with section 44 IPC. Such a course of action could have had a satisfactory admonitory effect on the executive and compelled them to have routine and regular inspections and supervision to comply with all relevant laws as required by article 256 of the Constitution. Perhaps, the court could have gone to restructuring of the administrative set up to answer article 256 and article 257(1) of the Constitution as well. A stitch in time would have saved

⁵⁹ According to Upender Baxi, if a “judgment,” means a discourse in which the reasons for decision have at least some impact on the final result, *Olga Tellis* cannot be worthy of that definition. The consequence, in *Olga Tellis*, is so contrary to the operating part that it is insensible legally and logically, both. He further maintains that not all documents signed by judges and published in law reporters automatically become binding decisions and one would have to take a stand, uncommon, as a matter of duty to explain that in fact no “judgment” appears despite a purported act of issuing it. I. P Massey, *Administrative Law* XLII (Eastern Book Company, Lucknow, Reprint 2008).

⁶⁰ Here justice means justice according to law. For discussion on Justice refer to John William Salmond, *The First Principle of Jurisprudence* 89-90 (Stevens & Haynes, London, 1893); Roscoe Pound, “Justice According to Law ” 13(8) *Columbia Law Review* (1913). See also Gray S. Goodpaster, “Social Dimensions of Law and Justice by Julius Stone ” 43(1) *Indiana Law Journal* 169, 167- 175 (1967). Justice is a term which is always defined by reference to the conditions and values of a certain society and as identified by Stone, while approaching the question of what justice is by examining various theories of justice, some briefly and some extensively, he identifies that the law is to be used as an instrument of social control, and as a means towards justice.

⁶¹ This justice is delivered under art.14 and another complementary provision is art. 142 for complete justice.

⁶² The court should have also taken notice of the failure of the executive to ensure compliance with the applicable law in terms of art. 256 of the Constitution of India read with s. 57 of the Indian Evidence Act, 1872. It should have declared that the Executive should take administrative action against the guilty officers responsible for having allowed illegal constructions to come up in violation of the devoid of master plan.

⁶³ It is submitted that with respect to the Constitution of India violation of time count could be connected with art.14 of the Constitution and failure of executive (both State and Union) is a clear abrogation from the art. 256 of the Constitution.

⁶⁴ The court violated its duty by not taking judicial notice of the facts as the time count spectrum in terms of power is to be understood in terms of its strain over the more particular point of time when the power relations vary greatly in their permanence through time and court’s inaction resulted into an alteration of the power relation of the parties.

nine. A strong stance in strict conformity with article 14 would have deterred the executive from being lackadaisical in its approach in ensuring compliance with the applicable laws and would have gone a long way in reducing filing of cases. There have been times when the courts have affirmed the sacredness of the controlling Constitution, but, nevertheless, the judicial process is full of dogmatism⁶⁵ and hasn't even answered all the counts of the power spectrum.⁶⁶

X. Conclusion

The judicial process within the Constitution of India involves a technique of adapting the law to meet changing social needs and rendering complete justice by faithfully perceiving the constraints on the power of the state, in accordance with the provisions of the Constitution, falling within its own sphere of action. When there is a gap in law,⁶⁷ The courts are required to settle the clamoring interests of the contesting parties which should be an embodiment of justice to fill the gaps in law.⁶⁸

Judicial process is an essential tool in application and execution of justice, an apt method for approximating the “is” to the “ought”.⁶⁹ The judiciary under a constitutional system would have to be performing policy control in terms of the policy choices reflected in the Constitution and

⁶⁵ Constitution of India, art. 32 and 226 significantly speak of these superior courts being empowered to issue writs for enforcement of fundamental rights. Tragically, however, the procedure attending the judicial process in India as injected by the Britons, seems to have been permitted to continue largely through non-application of mind to the parity of power principles ingrained in art. 14 of the Constitution of India and seems to have consequently destroyed the substance thereof. *Supra* note 17, at 95 (emphasis supplied).

⁶⁶ See *supra* note 17 at 95. With reference to the judicial process, the coercion band, the ethical count band, the influence count band, the time count band and the interest count band weigh more than the head count band of the power spectrum. The preeminence given to the judicial opinion stemming basically from its impartiality and objectivity would tend to give a greater coercive force to the judicial pronouncements and generally secure obedience. This subsumes the ethical and the influence count. The interests affected seem to drive support and the inspiration from the judicial pronouncement primarily for the above reasons. Even the time count seems to receive notice and application through the doctrine of precedent but its fuller dimensions that stand encrypted in the silent strength of article 14, does not appear to have received adequate notice.

⁶⁷ Rousseau A. Brush, “The Nature of the Judicial Process by Benjamin N. Cardozo” 31(6) *The Yale Law Journal* 677-681 (1992).

⁶⁸ Max Radin, “The Nature of the Judicial Process by Benjamin N. Cardozo” 10(4) *California Law Review* 367-369 (1992).

⁶⁹ Judicial Process has emerged as an important part of the administration of justice. It is not just a legal process; it is an ethical process as well. It is no less a human process. It seeks to establish facts, determines the governing rules of law, and then applies the rules to the facts. R. Raghannadha Reddy, “From Jurisprudence to Jurimetrics: A Critical Evaluation of the Emerging Tools in the Judicial Process” 51(1) *Journal of the Indian Law Institute* 92-101 (2009).

state authoritatively what the law is. However, the superior courts in India continue to grapple with the motive judicial process and this problem constitutes a common challenge to the Constitution and the substance of the Constitution. The basic principle of the integrity of the judicial process has come to halt and in practice the judiciary has altered the coherent imperatives of the fundamental law of superior obligation. In the majority of the cases as discussed above, the adjudication of the rule of law was plain but the courts while deciding upon delicate doctrinal matters of government's affirmative obligations under the controlling Constitution,⁷⁰ rendered no attention to the compulsion of the Constitution. The judicial process is within the command of article 14 and all that seems legally pertinent for the superior courts is to approximate the "is" to the "ought" and deny any time gap. However, in doing so, the superior courts would have to set an example and observe with diligence the limits on the power of the State falling on its own acts in compliance with the provisions of the laws in force.⁷¹

⁷⁰ See J.S. Verma, "The Constitutional Obligation of the Judiciary" 1 (7) *SCC Journal* (1997).

⁷¹ The inclusive definition of 'State' in article 12 correctly perceived by the apex court to include judiciary gives dimensions for the restraints on the powers of the judges. The definition of public servant in section 21 of the Indian Penal Code 1860 covers judges. The Judicial Officers Protection Act, 1850 and the Judge Protection Act, 1985 does not confer, consistently with Section 166 of IPC, any immunity for crime. Thus, the laws already prescribe judicial accountability. *Supra* note 17, at 97.