

# **A CRITICAL STUDY OF STATE OF WEST BENGAL V. COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS (2010) 3 SCC 571**

*By Ritupriya Gurtoo*

*Assistant professor, School of Law, SVKMs Narsee Monjee Institute of Management and  
Studies, Indore, India*

---

## **ABSTRACT**

The aim of the research paper is, to discuss the above case in light of whether a violation of Fundamental Rights can be immunized from judicial scrutiny on the touchstone of the doctrine of separation of powers between the Legislature, Executive, and the Judiciary. This case has once again restored faith in the doctrine that any direction by the Supreme Court or the High Court in the exercise of power under Article 32 or 226 to uphold the Constitution in maintaining the rule of law cannot be termed as violating the federal structure or doctrine of separation of power. But such extraordinary power must be exercised sparingly, cautiously, and in exceptional situations. Given the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the High Court under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts about the enforcement of fundamental rights. Such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Thus, this case has justified Lord Steyn's definition of judicial review: "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review".

**Keywords:** Central Bureau of Investigation, Rule of Law, Separation of Power, Basic Structure and Judicial Review

## INTRODUCTION

For a Constitution to be living it must be growing. If the impediments to the growth of the Constitution are not removed, the Constitution will suffer a virtual atrophy. The Constitution of India has engrafted several Fundamental Rights in Part III of our Constitution. Even in the most elaborate and meticulous form, a mere enumeration of rights is not enough. What is needed in addition to all this is the provision of their enforcement. That is why they provided for a guaranteed remedy, in case of infringement of such rights. Constitutionally, they relied on the superior court which is the Apex Court for undertaking the stupendous responsibility. Therefore A High Court is as much bound as the Supreme Court to enforce the Fundamental Rights under Article 226 and Article 32 guaranteed by the Constitution.<sup>i</sup>

The Constitution ordains itself as the supreme law of the land and everything is to be done according to and in terms of the Constitution. Courts have an important role to play in the transformation demanded by the Constitution. In so doing this they need to be sensitive to the role of the legislature and the executive in a democratic system of government and to the difficulties inherent in governing a country with a history such as ours, where resources are limited and demands are multifarious.

The researcher in this project would critically analyze the *project in light of the administrative aspect of the rule of law, the doctrine of separation of power, and judicial review through myriad cases*. One has to agree to the fact that the court acts as an institution to impose checks and balances on the three arms of the state. In the present case, the honorable court for once and all has settled that the matter related to the rule of law, doctrine of separation of power, and Judicial review thus a fundamental mechanism for keeping public authorities within due bounds and upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question of whether the act or order under attack should be allowed to stand or not. The administrative action cannot be absolute and unfettered. If it is against the rule of law then the court has the

legitimate right to pass the order which would uphold the principle of natural justice and the rule of law.

The High Courts in India can issue writs like prerogative writs. High Court can also issue directions, orders, or writs other than prerogative writs. They are enabled to mold the relief to meet the peculiar and complicated requirements of the country.<sup>ii</sup> The power under 226 is discretionary. It will only be exercised to further the interest of justice and not merely to make a legal point. <sup>iii</sup>the expansive and extraordinary power of the High Court under Article [226](#) is as wide as the amplitude of the language used indicates and so can affect any person a private individual be available for any (other) purpose, even one for which another remedy may exist. This court has spelled out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the qui vive, and to cut back on or liquidate that power may cast a peril to human rights. We hold that the award here is not beyond the legal reach of Article 226. However, this power must be kept on a severely judicious leash.<sup>iv</sup> the object of the proceeding provided by Article 226 is to ensure that the law of the land is implicitly obeyed and to see that various authorities and tribunals act within the bounds of their respective jurisdiction.<sup>v</sup>

So long as the jurisdiction of the High Courts under Articles 226/227 and that of this court under Article 32 is retained, there is no reason why the power to test the validity of legislation against the provisions of the Constitution cannot be conferred upon administrative tribunals created under the act or upon tribunals created under Article 323b of the constitution. It is to be remembered that, apart from the authorization that flows from Articles 232a and 323b, both parliament and the state legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to parliament under entries 77, 78, 79, and 95 of List I and to the state legislatures under entry 65 of List II; entry 46 of List III can also be availed of both by parliament and the state legislatures for this purpose.<sup>vi</sup>

## **FACTS OF THE STATE OF WEST BENGAL V. COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS<sup>vii</sup>**

The *facts of the case* are Abdul Rahaman Mondal (hereinafter referred to as, "the complainant") along with a large number of workers of a political party had been staying in several camps of that party at Garbeta, District Midnapore, in the State of West Bengal. On 4<sup>th</sup> January 2001, the complainant and a few others decided to return to their homes from one such camp. When they reached the complainant's house, some miscreants, numbering 50-60, attacked them with firearms and other explosives, which resulted in several casualties. The complainant managed to escape from the place of occurrence, hid himself, and witnessed the carnage. He lodged a written complaint with the Garbeta Police Station on 4<sup>th</sup> January 2001 itself but the First Information Report ("the FIR" for short) for offenses under Sections 148/149/448/436/364/302/201 of the Indian Penal Code, 1860 (for short "the IPC") read with Sections 25/27 of the Arms Act, 1959 and Section 9(B) of the Explosives Act, 1884 was registered only on 5<sup>th</sup> January 2001. On 8<sup>th</sup> January 2001, the Director General of Police, West Bengal directed the C.I.D. to take over the investigations in the case. A writ petition under Article 226 of the Constitution was filed in the High Court of Judicature at Calcutta by the Committee for protection of democratic rights in West Bengal, in the public interest, *inter alia*, alleging that although in the said incident 11 persons had died on 4<sup>th</sup> January 2001 and more than three months had elapsed since the incident had taken place yet except two persons, no other person named in the FIR, had been arrested; no serious attempt had been made to get the victims identified and so far the police had not been able to come to a definite conclusion whether missing persons were dead or alive. It was alleged that since the police administration in the State was under the influence of the ruling party which was trying to hide the incident to save its image, the investigations into the incident may be handed over to the CBI, an independent agency. Meanwhile, the High Court felt that in the background of the case it had strong reservations about the impartiality and fairness of the investigation by the State police because of the political fallout, therefore, no useful purpose would be served in continuing with the investigation by the State Investigating Agency. Having regard to all these circumstances, the High Court deemed it appropriate to hand over the investigation into the said incident to the CBI. The state appealed to the Supreme Court thereby raising the contention that whether the High Court, in the exercise of its jurisdiction under Article 226 of the Constitution of India,

can direct the Central Bureau of Investigation (for short "the CBI"), established under the Delhi Special Police Establishment Act, 1946 (for short "the Special Police Act"), to investigate a cognizable offense, which is alleged to have taken place within the territorial jurisdiction of a State, without the consent of the State Government.

## **RATIO DECIDENDI OF THE CASE**

Hon'ble Judges K.G. Balakrishnan, C.J., R.V. Raveendran, D.K. Jain, P. Sathasivam and J.M. Panchal, JJ thought that looking at the gravity of the problem and intricacies involved in it the doctrine of separation of powers cannot curtail the power of judicial review conferred on the Constitutional Courts especially in situations where the Fundamental Rights are sought to be abrogated or abridged under the garb of these doctrines. As stated in the judgment *“Violation of Fundamental Rights cannot be immunized from judicial Scrutiny under Article 226 or Article 32 on the touchstone of doctrine of separation of powers between the Legislature, Executive and the Judiciary”*

- **Powers of Central Bureau of Investigation**

Central Bureau of Investigation is India's premier investigating agency, responsible for a wide variety of criminal and national security matters. It was established on 01 April 1963, and evolved from the Special Police Establishment established in 1941. The Central Bureau of Investigation is controlled by the Department of Personnel of the Union Government headed by a Minister of State who reports to the Prime Minister, although it is administratively part of the Union Ministry of Home Affairs headed by a Cabinet Minister.

The Delhi Special Police Establishment Act was therefore brought into force in 1946 as amended by the Central Vigilance Commission Act, 2003. The CBI's power to investigate cases is derived from this Act. An Act to make provision for the constitution of a special police force<sup>2</sup> (in Delhi for the investigation of certain offenses in <sup>3</sup>(the Union Territories)), for the superintendence and administration of the said force and the extension to other of the powers and jurisdiction of members of the said force regarding the investigation of the said offenses. Whereas it is necessary to constitute a special police force (in Delhi for the investigation of certain offenses in <sup>3</sup>(the Union territories) and to make provision for the superintendence and administration of the said force and



the extension to other areas of the powers and jurisdiction of the members of the said force regarding the investigation of the said offenses. According to section 6<sup>viii</sup> of the Delhi special police act, of 1946 consent of the state is mandatory to probe crime in that state.

- **Critical analysis of the case- power of judicial review exercised by courts**

In a country having a federal system, the judiciary acts as a balance wheel of federalism by settling the disputes between the center and the state or among states inter se. federalism is a legalistic form of government because of the distribution of the power between the center and the state and therefore an arbiter. The judicial power requires courts to interpret and uphold the Constitution, and this inevitably gives rise to a potential tension between the courts and the other arms of government. The tension exists in all cases where the legislature or the executive has made choices that are challenged in the courts. This tension has to be managed by the courts and the Constitutional Court has said that it will be necessary to develop a doctrine of separation of powers.

The power of judicial review is not intended to assume a supervisory role or the robes of omnipresence. The power is not intended either to review governance under the rule of law or do the courts step into the areas exclusively reserved by the supreme lex to the other organs of the state. Decisions and actions that do not have adjudicative disposition may not strictly fall for consideration before a judicial review court.<sup>ix</sup> Judicial review thus is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question of whether the act or order under attack should be allowed to stand or not. If the home secretary revokes a television license unlawfully, the court may simply declare that the revocation is null and void. Should the case be one involving a breach of duty rather than an excess of power, the question will be whether the public authority should be ordered to make good a default. Refusal to issue a television license to someone entitled to have one would be remedied by an order of the court, requiring the issue of the license.

If administrative action is over power (*ultra vires*), the court has only to quash it or declare it unlawful (these are in effect the same thing) and then no one needs to pay any attention to it.

The minister or tribunal or other authority has in law done nothing and must make a fresh decision. It is well-settled that while exercising the power of judicial review the court is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are seriously disputed questions of facts when the decision of the tribunal or the decision of the fact-finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision-making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality, or procedural impropriety. How far the court of judicial review can reappraise the findings of facts depends on the grounds of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case coming to a plausible conclusion, and then testing the decision of the authority on the touch-stone of the tests laid down by the court with special reference to a given case. This position is well-settled in Indian administrative law.

Therefore, to a limited extent of scrutinizing the decision-making process, it is always open to the court to review the evaluation of facts by the decision maker."<sup>x</sup> Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters. Unfairness is set right by the judicial review. The judicial power is exercised to rein in any unbridled executive functioning. Judicial review is concerned with reviewing not on the merit of the decision in support of which the application of judicial review is made, but the decision-making process itself. The power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation is equally to be avoided. However, it is important to emphasize that though the subordinate judiciary or tribunals created under ordinary legislation cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental--as opposed to a substitution - role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses clause (3)

of Article 32 of the constitution. If the power under Article 32 of the constitution, which has been described as the "heart" and "soul" of the constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the constitution.

In the *State of Madras v. Row*,<sup>xi</sup> it was held that the constitution contains express provisions for judicial review of legislation as to its conformity with the constitution and that the courts "face up to such important task and none too easy task". They do not out of a desire "to tilt at the legislative authority in a crusader spirit but in a discharge of a duty laid upon them. As long as some Fundamental Rights exist and are part of the constitution the power of the judicial review has also to be exercised to see that the guarantees afforded by these rights are not contravened.....judicial review has thus become an integral part of our constitution"<sup>xii</sup>. Separation of powers in one sense is a limit on the *active jurisdiction* of each organ. But it has another deeper and more relevant purpose: to act as a *check* and balance over the activities of other organs. Thereby the *active jurisdiction* of the organ is not challenged; nevertheless, there are *methods of prodding* to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of the polity.<sup>xiii</sup> So judicial review being itself the basic feature of the Constitution, no restriction can be placed even by inference and by the principle of legislative competence on the powers of the Supreme Court and the High Court about the enforcement of Fundamental Rights and protection of the citizens of India.<sup>xiv</sup>

If we look at this case then through this verdict the Supreme Court has not crossed any line nor interfered with the legislative and executive function of the government. The task of interpreting the construction is a highly creative judicial function. A democratic society lives and swears by certain values- individual liberty, human dignity, rule of law, constitutionalism, and limited government. Also, the courts interpreted the provisions of the constitution in such a way that it does not stand still; it is dynamic and not static; social and economic conditions change continually. Therefore the courts must interpret the constitution so that it does not fall behind changing and contemporary social needs. Judicial review has two prime functions legitimizing the governmental action; and 2 to protect the constitution against any undue encroachments by the government. These two functions are interrelated. In exercising the power of judicial review, the courts discharge a function that may be regarded as crucial to the



entire governmental process in the country. The bare text of the constitution does not represent in itself the 'living' law of the country. one has to read the fundamental text along with the loss put thereon by the courts. In other words, the study of constitutional law may be described in general terms as a study of the doctrine of judicial review in action.<sup>xv</sup>

- **Rule of law**

Rule of law has been derived from the French phrase: '*la principal de legalite*' that connotes a government based on the principles of law. Lawrence Solum notes, "*When it comes to horrendously evil laws, anarchy or revolution is likely to be preferable to the Rule of Law.*"<sup>xvi</sup> The rule of law contributes to effective democracy by constraining the discretion of both leaders and citizens. The rule of law is not a set of substantive values or desiderata; it is a set of procedures by which governance takes place. With its emphasis on procedures, the rule of law constrains the actions of individuals and limits what government can do.<sup>xvii</sup> Neither citizens nor leaders are free to act in any way they please; instead, they must act according to the law. To the extent that law needs to change, the rule of law requires that it does so only through a set of established procedures. Thus, the rule of law emphasizes universalism over particularism; political action must be principled--not determined by short-term self-interest or whim.

It should not be surprising, then, to find many observers who believe that the rule of law is the sine qua non of effective democratic government and that the rule of law is particularly crucial to the success of democratic transitions.<sup>xviii</sup> Emerging democracies typically suffer from tattered institutions, deep political divisions, strong feelings of historical injustice, and the widespread availability of arms. Learning to manage conflict through the rule of law, rather than on the battlefield, is essential to the success of these transitions.<sup>xix</sup> Democratic theorists have long placed significant emphasis on the rule of law as a crucial component of effective democracy.<sup>xx</sup> In its simplest form, the rule of law is little more than proper procedure. In a democracy, rulers are bound to follow established procedures and legal rules, which significantly constrain their discretion<sup>xxi</sup>. From this perspective, the rule of law implies little substantive content.<sup>xxii</sup> Instead, it emphasizes consistency: *Where power is arbitrary, personal, and unpredictable, the citizenry will not know how to behave; it will fear that any action could produce an unforeseen risk. Essentially, the rule of law means (1) that people ... will be treated equally by the institutions administering the law - the courts, the police, and the civil service;*

*and (2) that people and institutions can predict with reasonable certainty the consequences of their actions, at least as far as the state is concerned.*<sup>xxiii</sup> A primary function of the rule of law is to impede tyranny. The logic is simple and compelling: both the masses and the elite are often confronted with circumstances in which their interests are at odds with the requirements of democratic politics. For example, the masses may wish to stifle political expression by unpopular minorities;<sup>xxiv</sup> the elite may seek to undermine the effectiveness of their political challengers. The rule of law is designed to protect against these arbitrary intrusions on individual liberty. If the above principle is followed then case judgment is corollary with the rule of law.

Thus rule of law according to Dicey implies absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of the prerogative, or even the wide discretionary authority on the part of the government. It implies that a man may be punished for a breach of the law because no man is above the law. The argument that the rule of law would require the courts, which are subservient to the Constitution, to ensure that the federal structure embodied in the Constitution as a basic principle, is not disturbed by permitting/directing the police force of a State to investigate an offense committed in another State without the consent of that State does not hold any value because These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. If in the future, judicial review was to be abolished by a constitutional amendment, as Lord Steyn says, the principle of parliamentary sovereignty even in England would require a relook.

- **Is this judgment violating doctrine of separation of power**

There are three distinct activities in every government through which the will of the people is expressed. These are the legislative, executive, and judicial functions of the government. Corresponding to these three activities are three organs of the government, namely the legislature, the executive, and the judiciary. The legislative organ of the state makes laws, the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public.<sup>xxv</sup> Thus, even when acting in the ambit of their power, overlapping functions tend to appear amongst these organs. Though, just like the American

constitution, in the Indian constitution also, there is express mention that the executive power of the Union and a State is vested by the constitution in the President and the Governor, respectively, by Articles 53(1) and 154(1), but there is no corresponding provision vesting the legislative and judicial powers in any particular organ. It has accordingly been held that there is no rigid separation of powers. Although prima facie it appears that our constitution has based itself upon the doctrine of separation of powers. The judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or the legislature.<sup>xxvi</sup> The Constitution restricts the discussion of the conduct of any judge in the Parliament. The High Courts and the Supreme Court have been given the power of judicial review and they can declare any law passed by parliament as unconstitutional. The judges of the Supreme Court are appointed by the President in consultation with the CJI and judges of the Supreme Court. The Supreme Court has the power to make Rules for the efficient conduction of business. It is noteworthy that A. 50 of the constitution puts an obligation on the state to take steps to separate the judiciary from the executive. But, since it is a Directive principle of state policy, therefore it's unenforceable.

Under the constitutional scheme, there is a well-defined distribution of legislative powers contained in part 11 of the constitution. The parliament and every state legislature have the power to make laws concerning any matter that falls within the field of article 246 read with the seventh schedule of the constitution. Legislation by one of the states cannot be held to be discriminatory or suffering from the vice of hostile discrimination against its citizens simply because the parliament or the legislatures of the state have not chosen to enact a similar law.<sup>xxviii</sup> The Constitution of India delineates the contours of the powers enjoyed by the state legislature and the parliament concerning various subjects enumerated in the seventh schedule. The legislative power of both the union and state legislatures is given in precise terms. In case of conflict, courts must iron out the differences.

However, it has been held in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr*<sup>xxviii</sup>, that wherein while finding certain basic features of the Constitution, it was opined that separation of powers is part of the basic structure of the Constitution. Nevertheless, apart from the fact that our Constitution does not envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. Being itself part of the basic structure of the Constitution, it cannot be

ousted or abridged by even a Constitutional amendment. George Whitecross Paton, an Australian Legal scholar, said that "the distinction between judicial and other powers may be vital to the maintenance of the Constitution itself", the learned judge said that the principle of separation of powers is a principle of restraint which "has in it the percept, innate in the prudence of self-preservation (even if history has not repeatedly brought in home), that discretion is the better part of valor"<sup>xxix</sup> Separation of powers in one sense is a limit on *active jurisdiction* of each organ. But it has another deeper and more relevant purpose: to act as a *check* and balance over the activities of other organs. Thereby the *active jurisdiction* of the organ is not challenged; nevertheless, there are *methods of prodding* to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of the polity.<sup>xxx</sup>

In India, the court has opined that Before advertng to the controversy directly involved in these appeals we may have a fresh look at the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity the constitution makers have meticulously defined the functions of various organs of the State. The Legislature, executive, and judiciary have to function within their spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. The Legislature and executive, the two facets of the people's will, have all the powers including that of finance. The Judiciary has no power over the sword or the purse, nonetheless, it has power to ensure that the aforesaid two main organs of the State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain the unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken into its fold the concept of social and economic justice. While the exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our exercise of powers is the self-imposed discipline of judicial restraint.<sup>xxxi</sup>

When a State action is challenged, the function of the court is to examine the action by law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the constitution, and if not, the court must strike down the action. While doing



so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinated branch of the Government. Separation of power in one sense is a limit on the *active jurisdiction* of each organ. But it has another deeper and more relevant purpose: to act as a *check and balance* over the activities of other organs. Thereby *the active jurisdiction* of the organ is not challenged; nevertheless, there are *methods of prodding* to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of the polity. Therefore, it is suggested to not understand the Separation of Power as operating in a vacuum. The separation of power doctrine has been reinvented in modern times.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.<sup>xxxii</sup> So if we analyze the court's action then one can safely conclude that Equality, rule of law, judicial review, and separation of powers form parts of the basic structure of the Constitution. Each of these concepts is intimately connected. There can be no rule of law if there is no equality before the law. These would be meaningless if the violation was not subject to judicial review. All these would be redundant if the legislative, executive, and judicial powers were vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

It is specifically mentioned that enacted laws, especially the acts and rules, are drafted by the legal expert and it could be expected that the language used will leave little room for interpretation or construction. But the experience of all those who have to bear and share the task of application of law has been different.<sup>xxxiii</sup> It is quite often we find courts and lawyers busy unfolding the meaning of unambiguous words and expressions and resolving inconsistencies.<sup>xxxiv</sup> Interpretation connotes the process by which the court seeks to ascertain the meaning of legislature through the medium of authority's forms in which it is expressed.<sup>xxxv</sup> A statute is an edict of the legislature<sup>xxxvi</sup> and the conventional way of interpreting the statute is to seek the intention of its maker. A statute is to be construed according to the intent of them



that makes it and judicature must act upon the true intention of the legislature- *the men or sententia legis*.

Lord Cranworth, L.C. said, “*There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine.*” Faced with this problem the court although conscious of a dividing line, does not attempt to draw it for reasons of practical impossibility and decides the particular case in hand within or outside the purview of the relevant word. There is indeed an opinion where the fiction of the intention is lifted and judges are seen acknowledging that they are filling in gaps.<sup>xxxvii</sup> The question of the relative nature of the provisions general or specific has to be determined concerning the area and extent of their application either generally or especially in particular situations. Harmonious construction needs to be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.

In *Secretary, Minor Irrigation & Rural Engineering Services U.P. and Ors. v. Sahngoo Ram Arya and Anr.*<sup>xxxviii</sup>, this Court observed that although the High Court has the power to order a CBI inquiry, that power should only be exercised if the High Court after considering the material on record concludes that such material discloses prima facie a case calling for investigation by the CBI or by any other similar agency. The court further observed in the same case that the other direction, namely, the direction to CBI to investigate "any other offense" is wholly erroneous and cannot be sustained. The Constitution does not require a magic incantation which can only be expressed in a set formula of words. What we have to see is whether the substance of the requirements is there. If consent is given under Section 6 of the Delhi Special Police Establishment Act by the state then the prosecution instituted by CBI cannot be said to be without jurisdiction.<sup>xxxix</sup> Similarly in *Swadeshi Cotton Mills Co. Ltd. v. State Industrial Tribunal, U.P. and Ors.*<sup>xl</sup>, a Constitution Bench of this Court held that where certain conditions precedent have to be satisfied before an authority may pass an order, the satisfaction of those conditions doesn't need to be recited in the order itself unless the statute specifically requires it. Though it should be so reflected, even where the recital is not there on the face of the order, the order will not become illegal or void ab initio. Only a burden is thrown on the authority passing the order to satisfy the Court by other means that conditions precedent were complied with.

- **Adhering to the Basic Structure of the Constitution**

*It was held in His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr<sup>xli</sup>*, wherein finding certain basic features of the Constitution which cannot be abrogated under any circumstances. Nevertheless, apart from the fact that our Constitution does not envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. Being itself part of the basic structure of the Constitution, it cannot be ousted or abridged by even a Constitutional amendment. In the *Minerva Mills* case opined that Directive Principles had an upper hand over the Fundamental Rights and was subject to judicial review as it violated the basic structure of the constitution. So judicial review being itself the basic feature of the Constitution, no restriction can be placed even by inference and by the principle of legislative competence on the powers of the Supreme Court and the High Courts about the enforcement of Fundamental Rights and protection of the citizens of India.<sup>xlii</sup>

## **CONCLUSION**

The case in many ways is a momentous one, in any manner, it lays down the principle that there can be no fetters on the judiciary to do complete justice and the Supreme Court declares itself as a bulwark against the excesses committed by the state or those enjoying power. In many ways, the Supreme Court reiterates a principle that is enshrined in our fundamental rights and is a natural human right, i.e. the right to life and the right to remedy for breach of fundamental rights. In the course of upholding fundamental rights, the Court has held that mere technicalities of law should not be a barrier to getting justice. The Court in some ways seems to think that to do justice it is important that justice is seen to be done and in many cases, the impression that the state agencies are biased towards the Government is a regular and apparent fact, and therefore those at the receiving end of the excesses of the state are very skeptical as to the justice that they may receive at the hands of the state agencies. It is rightly so. The court was empowered to give opinions regarding the constitutionality of legislation so it considered this question from the perspective of both the rule of law and the separation of powers.

## ENDNOTES

<sup>i</sup> Daryao v. State Of Uttar Pradesh AIR 1961 SC 1457

<sup>ii</sup> Dwarka Nath v. It. Kanpur AIR 1966 SC 91

<sup>iii</sup> Ramnikhal N. Bhutta v.State Of Maharashtra AIR 1997 SC 1236

<sup>iv</sup> Rohtas Industries Ltd. And Anr. v.. Rohtas Industries Staff Union And Ors AIR 1976 SC 425

<sup>v</sup> Md. Hanif v. State Of Assam 1969 2 SCC 782

<sup>vi</sup> L. Chandra Kumar v. Union of India and others AIR 1997 SC 1125

<sup>vii</sup> (2010) 3 SCC 571

<sup>viii</sup>Consent of State Government to exercise of powers and jurisdiction. \_ Noting contained in section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in <sup>5</sup>[a State not being a Union Territory or railways area], Without the consent of the Government of that State.]

<sup>ix</sup> State Of Uttar Pradesh v. Johri Mal AIR 2004 SC 3800

<sup>x</sup> State Of Uttar Pradesh v. Johri Mal AIR 2004 SC 3800

<sup>xi</sup> State of Madras v. Row AIR 1952 SC 196

<sup>xii</sup> His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala AIR 1973 SC 1461

<sup>xiii</sup> State of U.P. and Ors. v. Jeet S. Bisht and Anr. (2007) 6 SCC 586

<sup>xiv</sup> I.R. Coelho (D) By LR.s. v. State of Tamil Nadu (2007) 2 SCC 1

<sup>xv</sup> Dowling, cases and materials on constitutional law, 19 (1965)

<sup>xvi</sup> William N. Eskridge, Jr. & John Ferejohn, Politics, Interpretation, and the Rule of Law, in *The Rule of Law* 265, 265 (Ian Shapiro ed., 1994); see also Kaimipono David Wenger & David A. Hoffman, Nullificatory Juries, 2003 *WiSC. L. Rev.* 1115, 1131 (noting that the Rule of Law typically requires that laws be general, applicable to all citizens, and nonretroactive). See generally Lawrence Solum, *Legal Theory Lexicon* 017, *The Rule of Law*, (2004) <http://legaltheorylexicon.blogspot.com/2004/01/legal-theory-lexicon-017-rule-of.html> (giving background of Rule of Law concept) [hereinafter Solum, *Lexicon*].

<sup>xvii</sup> [http://www.twocircles.net/legal\\_circle/doctrine\\_rule\\_law\\_kamaluddin\\_khan.html](http://www.twocircles.net/legal_circle/doctrine_rule_law_kamaluddin_khan.html) on 28th oct,2010

<sup>xviii</sup> ee, e.g., James L. Gibson, *The Evolving Legitimacy of the South African Constitutional Court*, in *Justice and Reconciliation in Post-Apartheid South Africa* (Antje du Bois Pedain & Francois du Bois eds., forthcoming 2007); James L. Gibson, *Russian Attitudes Towards the Rule of Law: An Analysis of Survey Data*, in *Law and Informal Practices: The Post-Communist Experience* 77 (Denis J. Galligan & Marina Kurkchian eds., 2003) [hereinafter Gibson, *Russian Attitudes*]; James L. Gibson & Gregory A. Caldeira, *The Legal Cultures of Europe*, 30 *Law & Soc'y Rev.* 55 (1996); James L. Gibson & Amanda Gouws, *Support for the Rule of Law in the Emerging South African Democracy*, 49 *Int'l Soc. Sci. J.* 173 (1997).

<sup>xix</sup> See generally James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (2004) (deeming support for the rule of law to be one of the pillars necessary for reconciliation in South Africa).

<sup>xx</sup> See, e.g., Grazyna Skapska, *Commentary, The Rule of Law from the East Central European Perspective*, 15 *Law & Soc. Inquiry* 699 (1990).

<sup>xxi</sup> <http://www.legalserviceindia.com/article/1457-Rule-of-Law-in-India-&-UK.html> on 4th nov,2010

<sup>xxii</sup> The Secretary-General of the United Nations offered this view of the rule of law:

[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, P 6, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004) (emphasis added). Thus, the Secretary-General disagrees with my understanding of the rule of law by imposing substantive requirements. Because it is so much easier to get agreement from competing sides in politics on procedures rather than on substantive issues, my definition is a minimalist (and pragmatic) one.

<sup>xxiii</sup> Seymour Martin Lipset, *The Social Requisites of Democracy Revisited: 1993 Presidential Address*, 59 *Am. Soc. Rev.* 1, 15 (1994).

<sup>xxiv</sup> It should not be assumed that all violations of the rule of law necessarily go against the perceived self-interest of the majority. For instance, Professor Peter Solomon points to instances in the former Soviet Union in which ordinary citizens demanded that the authorities dispense with the rule of law in dealing with suspects in notorious

criminal cases. Peter H. Solomon, Jr., *Legality in Soviet Political Culture: A Perspective on Gorbachev's Reforms, in Stalinism: Its Nature and Aftermath: Essays in Honour of Moshe Lewin* 260 (Nick Lampert & Gabor T. Rittersporn eds., 1992). There were many instances in which South African "people's justice" had little to do with the rule of law - and perhaps not that much to do with justice either. It is easy to imagine that runaway crime is a circumstance in which the majority may be willing to sacrifice the rule of law for more expedient remedies

<sup>xxv</sup> <http://www.pucl.org/Topics/Law/2006/seperation-of-powers.html> on 1st nov,2010

<sup>xxvi</sup> <http://legal-articles.deysot.com/criminal-law/judicial-activism-versus-doctrine-of-separation-of-powers.html> on 6th nov,2010

<sup>xxvii</sup> *Javed v. state of Haryana* AIR 2003 SC 3057

<sup>xxviii</sup> *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973) 4 SCC 225

<sup>xxix</sup> Julius Stone: *Social Dimensions of Law and Justice*, (1966) p. 668.

<sup>xxx</sup> *State of U.P. and Ors. v. Jeet S. Bisht and Anr.* (2007) 6 SCC 586

<sup>xxxi</sup> *Asif Hameed and Ors. v. State of Jammu and Kashmir and Ors.* [1989] 3 SCR 19

<sup>xxxii</sup> *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, 635 (1952)

<sup>xxxiii</sup> *Keshav Mills. Co. Ltd v.. Cit* AIR1965 Sc 1636

<sup>xxxiv</sup> *Kirby v. Leather*, 1965 2 All ER 441

<sup>xxxv</sup> SALMOND:URISPRUDENCE 11 TH EDITION P 152

<sup>xxxvi</sup> *Vishnu Pratap Sugar Limited v. Chief Inspector Of Stamp, U.P.* AIR 1968 SC 102

<sup>xxxvii</sup> *Shah Mulchand Corporation Limited v. Jawaher Mills Limited* AIR 1953 SC 98

<sup>xxxviii</sup> *Secretary, Minor Irrigation & Rural Engineering Services U.P. and Ors. v. Sahngoo Ram Arya and Anr* 2002 CriLJ 2942

<sup>xxxix</sup> *M. Balakrishna Reddy v. Director, CBI, New Delhi* , AIR 2008 SC 1754

<sup>xl</sup> *Swadeshi Cotton Mills Co. Ltd. v. State Industrial Tribunal, U.P. and Ors* (1961) IIL LJ 419 SC

<sup>xli</sup> *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973) 4 SCC 225

<sup>xlii</sup> *I.R. Coelho (D) By LRs. v. State of Tamil Nadu* (2007) 2 SCC 1