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JUDICIAL REVIEW: AN UNRULY HORSE WITH UNBOUNDED INTERPRETATIONS

"We are not final because we are infallible but are infallible only because we are final"

By

Justice Robert H. Jackson

The Authors

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I. INTRODUCTION

"***It is emphatically the province and duty of the judicial department to say what law is***"

With these lines originated the concept of Judicial Review in the case of *Marbury* v. *Madison*[1] where the court held that the state action cannot be against the US Constitution and no law can be against the basic principles of the Constitution. The Judicial Review over administrative action has evolved along the lines of Common law doctrines such as proportionality, legitimate expectation, reasonableness and principles of natural justice[2], while the Supreme Court of India and the various High Courts were given the power to rule on the Constitutionality of legislative as well as on administrative actions. According to Dr. BR Ambedkar, Article 32 is the heart and soul of the Constitution and without this provision a democracy cannot work on the fundamental principles.

Judicial Review seeks to achieve Rule of law which is the fundamental principle of democracy and implementation of Rule of law is the very basic need to maintain and uphold the Constitutional values of democracy. Judicial Review seeks to monitor the executive and legislative action by maintaining a system of check and balances by ensuring that they are Constitutional and upholds the faith of the citizens in the Constitution through the protection of the Fundamental Rights. Judiciary acts against the arbitrariness of the law by the exercise of its authority under Judicial Review. Under the ambit of Judicial Review lies the inherent concept of

[1] 5 U.S. 137 (1803)

[2] Dr. B.R. AMBEDKAR MEMORIAL LECTURE (London – June 13, 2009)
'JUDICIAL ACTIVISM' AND THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS– THE INDIAN EXPERIENCE by Hon'ble Mr. K.G. Balakrishnan, Chief Justice of India.

Separation of Powers[3] which demarcates the power of the organs of the government while in India the doctrine of separation of power is partially present in our parliamentary form, what we have is a separation of functions rather than power.

The Concept of Judicial Review was extensively discussed[4] by Dr Br Ambedkar who highlighted the importance of the Judicial Review and the role of Judiciary in exercising the power to uphold the Constitutional values. In the post-Independence period the role of Judiciary especially the Supreme Court has been a pro-legislature approach that was characterised by caution and circumspection. The growth of the Judicial Review in India has not been very encouraging in the post-independence period for about 25 years; the Judiciary repealed only 100 laws passed by the legislature which were against the spirit of the Constitution. There were many instances where the Judiciary kept the legislative action above the Fundamental rights[5]. The Judiciary evolved with the time and it realised the need to play an active role in the democracy with the advent of the social action litigation from 1980 onwards it started exercising its power extensively to enforce the rights of the citizens[6].

Judicial Review was America's most important contribution to the field of Constitutional law; the American colonists were greatly influenced by the decisions of Sir Edward Coke, a great Chief Justice of the King's Bench who held that the common law of England could even control and nullify Acts of Parliament.The case of *Marbury* v. *Madison*[7] firmly established the principle of Judicial Review and the power of a Constitutional court to invalidate the law as being inconsistent with the fundamental law that is the Constitution of the United States.In India, Judicial Review has been read into the Constitution as constituting 'basic structure' laid down in *Keshavananda Bharati*[8], which was reiterated by the Supreme Court in its various other judgments[9]. In the *Minerva Mills Case*[10] the Court stated that Judicial Review is fundamental to the maintenance of democracy and the rule of law.

II. JUDICIAL REVIEW IN THE LIGHT OF THE LIVING OR DEAD CONSTITUTION

An interpretation is never same due to different variations and greater variations imply a diverse set of interpretations.These interpretations are defined by text and the nature of these texts makes up for the limitations and power of authority that can be exercised.The greatest document in the country is the Constitution and its nature construes and exemplifies the circumference for the Constitutional discharge of power.The power of Judicial review also derives its authority from the constitution so what is living or dead Constitution as a process means?

[3] By Charles-Louis de Secondat, baron de La Brède et de Montesquieu, an 18th century French social and political philosopher in *Spirit of the Law*s.
[4] Constituent Assembly Debate Proceedings 9th December,1946 to 24th January ,1950
[5] Shankari Prasad Singh Deo v. Union of India (AIR. 1951 SC 458); Sajjan Singh v. State of Rajasthan (1965 AIR 845, 1965 SCR (1) 933); Golaknath v. State Of Punjab (1967 AIR 1643, 1967 SCR (2) 762)
[6] Minerva Mills Ltd. and Ors. v. Union of India and Ors. (AIR 1980 SC 1789); Union Carbide Corporation v. Union Of India AIR 273, 1989 SCC (2) 540; L. Chandra Kumar v/s U.O.I (A.I.R 1997 SC 1125); M. Nagraj & Ors v. Union of India and Ors. AIR 2007 SC 71
[7] Id
[8] Kesavananda Bharati Sripadagalvaru and Ors. v.State of Kerala and Anr. (1973) 4 SCC 225
[9] The State of Uttar Pradesh **v**. Raj Narain (1975 AIR 865, 1975 SCR (3) 333)
[10] Supra note 6

The term living Constitution[11] or dead refers to the Constitutional interpretation in which 'living' means the claim that it is dynamic in nature and evolves according to the needs of the populist. Pragmatic view contends that interpretation in accordance with its original meaning or intent is occasionally unacceptable as a policy matter, and thus that an evolving interpretation is necessary. Another view talks about that the Constitution in broad and flexible terms to create a dynamic, "living" document.The critique of this idea argues that the Constitution should be altered only through the amendment process and passing the power baton to judiciary to determine an ever-changing meaning of the Constitution undermines democracy. The alternative to the Living Constitution is described as originalism which states that the meaning of the Constitution is fixed and rigid.

It is an established principle of the Constitutional spirit that the process of amending the Constitution should not be used to break the Constitution[12].In the United States of America [13]the Court interpreted the Constitution as it was written 100 years ago not taking into consideration the present conditions and adopted the strict interpretation of the Constitution.But in another instance, there was an application of the living Constitution framework were it referred to "evolving standards of decency" under the 8th Amendment[14].In *Trop* v. *Dulles*[15] the Court held that the amendment must draw its meaning from the evolving standards of decency that mark the progress of an advancing society.the Court's interpretation of those terms should reflect current societal conditions – is the heart of the "living Constitution" doctrine[16].

The interpretation of the American Constitution has been multifarious for it being 'living or dead', on the other hand, the Indian Constitution was conceived as a living document. The founders simplified the process of amendment as compared to the American or the British Constitution.The American Constitution has had 27 amendments in its 227-year history; the Indian Constitution, on the other hand, has had nearly a 100 in its 67 years of existence.The Constitution of India restrains the original intent because of its length and this complexity allows greater interpretations to the Constitution.

Interpretations offered by judiciary and legislature may substantially change the original intent of the Constitution but if the strict interpretation is followed then it in contravention of the fundamental rights.The same has been reciprocated in *Kesavananda Bharati Sripadagalvaru and Ors*. v. *State of Kerala and Anr.*[17] where the doctrine of basic structure[18] was evolved.In a free democracy personal liberty and freedom are the basic pillars and if a constitution is perceived as a dead one then these ideas fade away so a more liberal approach where the Constitution is treated as a flexible and living being is to be adopted.The biggest problem with the exercise of judicial review lies within the judiciary as who will keep a check on the judiciary when it tries to override the other organs of the government by being an unruly horse running according to the

[11] 1927 "The Living Constitution, a consideration of the realities and legends of our fundamental law, by Howard Lee McBain"
[12] Is a Dead Constitution better than a Living One? by Ujwal Batra , Centre for Civil Society
[13] Missouri v. Holland 252 U.S. 416 (1920)
[14] Us Constitution,1789
[15] 356 U.S. 86 (1958),
[16] Balkin, Jack. Alive and Kicking: Why no one truly believes in a dead Constitution. August 29, 2005, http://www.slate.com/id/2125226/
[17] 1973) 4 SCC 225
[18] Principally meaning that the basic fundamental of the Constitution cannot be altered

whims and fancies of the judges who ultimately decides what is constitutional and unconstitutional.The question is when the justice system itself behaves in a manner inconsistent with its real function what would be its legal ramifications?

III. EVOLUTION IS REVOLUTION

There are two types of laws: just laws and unjust laws. What is the difference between the two? An unjust law is a man-made code that is out of harmony with the moral law –

By Martin Luther king

In the history of legal jurisprudence, evolution has been the only constant which allowed itself to spread its branches according to the needs of the society and its actors. The dynamism of law revolves around the various political, technological and social changes which define the mechanisms of a legal system.

In the Indian context judicial evolution had varying intensities in different times. On one hand in the post-independence period judiciary complied with the legislature but post-1970 judiciary enunciated the concept of judicial activism when the legislature tried to alter the basic fundamentals of the constitution. The parliament abused article 31A, 31B, 31C[19] which exempted the agrarian laws from the judicial review. The legislature enacted 225 laws and kept under the ninth schedule of the constitution to exploit the limitation of judicial review to generate a constitutional dustbin where anything can be dumped. In our system there is a separation of functions not the separation of powers[20] , the implication being a quasi-federal structure which enumerates that the power of organs of the government is not bifurcated properly. It intimidates one organ to encroach upon the functions of the other and the tussle between the organs on amending power continues[21]. After the end of emergency in 1975, the judiciary was on the receiving end of severe criticism for having delivered a series of judgments which were perceived as being violative of the basic human rights of Indian citizens[22]and it changed the judicial perception of Constitution. The Supreme Court held that any legislation is amenable to judicial review, be it momentous amendments[23] to the Constitution or drawing up of schemes and by-laws of municipal bodies which affect the life of a citizen[24]

In late 1980, there was a growing intellect and consciousness in the democracy with respect to the conflict of power between organs of government and how they tried to overpower the Constitution. The populist sought redressal for their grievances through the public interest litigation and demanded judiciary to work coherently in the interest of justice. By enforcing rights and in pursuance of judicial authority Court often overreached its mandate popularly known as Judicial Activism[25].

[19] Constitution of India,1950
[20] By Baron de Montesquieu In *The Spirit of the Laws*(1748)
[21] I.C. Golaknath v. the State of Punjab, (1967) 2 SCR 762; Sankari Prasad Singh Deo v. The Union of India, 1952 SCR 89; Sajjan Singh v. State of Rajasthan,(1965) 1 SCR 933.
[22] ADM v. Shivakant Shukla, (1976) 2 SCC 521
[23] Shankari Prasad Singh Deo v. The Union of India, AIR 1951 SC 458; Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845; Golak Nath v. the State of Punjab, AIR 1967 SC 1643; Kesavananda Bharati v. the State of Kerala, (1973) 4 SCC 225; Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625; Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., (1983) 1 SCC 147; Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1.
[24] M.C. Mehta v. Union of India, (1996) 4 SCC 351; M.C. Mehta v. The Union of India, (1992) 3 SCC 256.
[25] By Arthur Schlesinger Jr. in a January 1947 Fortune magazine article titled "The Supreme Court: 1947"

In *Ratlam Municipality case* [26] the idea of Social Action Litigation or more popularly the public interest litigation was established. In M.C. Mehta v. Union of India [27] the Court ordered to ensure green belts and open spaces to maintain ecological balance, forbidding the stone crushing activities in the residential places and directed installation of air pollution controlling devices. In Banwasi Seva Ashram v. State of U.P [28] it earmarked a part of reserved forest for tribals to ensure their habitat and means of livelihood while in B.L. Wadehra (Dr) v. Union of India[29] compelled the municipal authorities of the Delhi Municipal Corporation to perform their statutory obligations for protecting the health of the community and compelled the industrial units to set up effluent treatment plants[30].

Although the judiciary acted in the interest of justice but in the exercise of its authority it acted as the only interpreter of a living document without drawing limitations. Judiciary has used its power of judicial interpretation to frame guidelines akin to law such as the Vishakha case[31] in which rape laws were enumerated and the Aruna Shauna Aug case[32] where Passive Euthanasia was discussed widely, in the absence of the same from the legislature. It brought about appointments in executive authorities who were unable to manage their workload due to poor human resource management in the infamous Saradha Chit fund case[33] concurrently being a party in perpetuating some fundamental wrongs, such as the Sahara bail case where he was imprisoned for a crime in which bail is a matter of right, not discretion of the court. This overriding exercise of authority makes it a double-edged sword, ***the right side of which is definitely sharper than the wrong side.***

The activist judiciary has been able close small business that pollutes ganga but unable to take a stance on mega irrigation projects and nuclear power plants such as the Narmada valley project. It proclaims Constitutional secularism values while being incompetent in dealing with the issue of the Babri masjid or communal violence and recently showing it incompetence by asking for an outside court settlement. It talked about Gender justice in Vishakha case but failed to protect victims of rape and sexual violence. It pronounces norms of natural justice and yet gave settlement order to Bhopal gas tragedy victims allowing the criminal to escape the wrath of punishment.

The haunting question is whether it is evolution or devolution?

IV. UNIFORM CIVIL CODE – AN EMPTY HOLLOW

"Those who until yesterday were the greatest opponents of Hindu Code and greatest champions of the archaic Hindu Law as it exists to-day now claimed that they were 'prepared for an All-India Civil Code' this was because they hoped that while it had taken "four or five years to draft the Hindu Code will probably take ten years to draft a Civil Code" - Dr. B. R. Ambedkar

[26] Municipal Council v. Vardichan, (1980) 4 SCC 162.
[27] (1996) 4 SCC 351
[28] 1993) 2 SCC 612
[29] 1996) 2 SCC 594
[30] Satish Chander Shukla (Dr) v. the State of U.P., 1992 Supp (2) SCC 94
[31] Vishakha and others v State of Rajasthan, 1997 (6) SCC 241
[32] Aruna Ramachandra Shanbaug v. The Union of India, (2011) 4 SCC 454
[33] Subrata Chatterjee v. Union of India & Ors. Civil no 401 of 2013

Article 44 of the Constitution of India states that - "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." The vision of Mahatma Gandhi combined with the wisdom of B.R. Ambedkar gave rise to Uniform Civil Code. It was also promulgated by the Supreme Court in various cases mainly as an obiter dictum due to a characteristic of Article 44 as not enforceable in the court of law being a Directive Principles of State Policies. Uniform civil code basically deals with the personal laws of the country relating marriage, succession, divorce etc. India being a country with diverse population has various personal laws existing in the country.

The case of *Mohd. Ahmed Khan* v. *Shah Bano Begum*[34] was the clarion call of Uniform Civil Code in Indian legislation. The bench stated- "Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.

In *Sarla Mudgal* v. *Union of India*[35] the Supreme Court was prompted and provoked to ask the union government of its activity in pursuance of the directive principles of state policy contained in article 44 of the Constitution which enjoins upon it to take steps for providing a uniform civil code.[36] In the case, the bench has consistently talked about the dire need of the Code and also referred to the Shah Bano case. Justice Kuldip Singh has stated that Uniform Civil Code would be strengthening national integration. Since all the observations of the Supreme Court have come mainly in a form of obiter dicta they should be carefully scrutinized and thought upon by the parliament. The Supreme Court in a number of cases *Mohd. Ahmed Khan* v. *Shah Bano Begum, Mrs. Mary Roy etc.* v. *State of Kerala & ors*[37], *John Vallamattom & anr* v. *Union of India*[38] and by Calcutta High Court in Swapna Ghosh v. Sadananda Ghosh and anr[39] have called on the legislature to work on the following issue.

On one hand, we have the sentiments of the different religious groups and their personal laws and on the other the need to have a uniform civil code which will bring about equality and protection of rights and enhance the Constitutional spirit of rule of law.

V. ECONOMIC LEGISLATIONS

Courts have played a vital role in the shaping the economic system of the country. Just like any other policy, economic policies undergo the policy process. They pass through the agenda-setting, formulation, implementation, legitimation and evaluation phases. The manners by which they are to be formulated and adopted are constitutionally as well as statutorily enshrined. Likewise, the Constitution contains specific economic provisions that must be taken into account in policy formulation and execution.[40] The judiciary acts as a driving force in the policy process, specifically in the legitimating phase. If we take Indian judiciary into consideration there have

[34]Mohd. Ahmed Khan v. Shah Bano Begum,1985 SCR (3) 844
[35]Sarla Mudgal v. The Union of India, 1995 SCC (3) 635
[36]Uniform Civil Code: Implications of Supreme Court Intervention- S.P. Sathe
[37]Mrs. Mary Roy etc. v. State of Kerala & Ors., 1986 SCR (1) 371
[38]John Vallamattom & anr v. The Union of India, Writ Petition (civil) of 242
[39] Swapna Ghosh v. Sadananda Ghosh and anr., AIR 1989 Cal 1
[40] Carmona, Cheselden George V., Judicial Review of Economic Policies: Implications for Policy Formulation and Implementation (November 30, 2003).

been multiple phases and each phase comprising of decades and different socio-political conditions affecting the particular phase.

In the formative years of the, there were unparalleled apprehensions about equipping the courts with a power of Judicial Review as per American jurisprudence or to choose parliamentary sovereignty as per British jurisprudence.Two primary concerns emerged from the debates of the constituent assembly, first concerning the continence of independence of judiciary and second catered to the power of Judicial Review. The members of the constituent assembly, many of whom were lawyers had warned against the excessive use of the power of Judicial Review, which they thought would emanate from an independent judiciary.[41]

The first decade of the Constitution the Supreme Court went upon playing a role of Constitutional adjudication and loads of petitions were filed in the courts from the propertied and land owning class asking the court to protect their right to property, which seemed to be violated by the policy of the legislature after the introduction of agrarian reforms.[42] Though rarely did the court invalidate these statutes of agrarian reforms and out of an estimate, only one such statute was invalidated that brought hardly any relief to the legislature. Rather than checking the Constitutionality of these statutes, creating safeguards for the protection of fundamental rights was the main concern of the court.

The Constitution's first amendment inserted Article 31A, Article 31B and the 9th schedule and was kept outside the purview of judicial scrutiny.The insertion of the 9th schedule was a symbolic assertion of the supremacy of the legislature in India. In *Sahgir Ahmed* v. *State of Uttar Pradesh*[43] there was a Judicial Review on the adequacy of the compensation even when the act came under the purview of schedule 9 and through the interpretation of the existing Constitutional provisions, the court ensured that it remains an important organ on all matters of economic policy. It was the court which determined the future course of trade and industry in India.[44]

In *Swadeshi Cotton Mills* v. *Union of India* [45] the court held that the deciding authority has to follow the principles of natural justice because, "this rule of fair play 'must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands' must make every effort possible to salvage this cardinal rule to the maximum extent possible, with situational modifications.

The Allahabad High court in *Motilal* v. *State of Uttar Pradesh*[46] had unanimously held that that nationalisation of an industry was not possible by a mere executive order, that has to be through legislation otherwise it shall be violative of both Article 14 and Article 19 (1) (g) of the Constitution and such legislation has to be justified under article 19(6) of the Constitution. *State of Bombay* v. *F. N. Baisara*[47] marked the beginning of a long list of cases analyzing whether a particular trade shall get protection under article 19 (1) (g) or not and one more contention suspecting about the moral authority of the judges in the determining factor for the applicability

[41] Constituent Assembly Debates, Vol. VII, Book No.2, p.583.
[42] Kapila, Uma ed. 2006. *Indian Economy since Independence.* Delhi: Academic Foundation. See p. I.
[43] AIR 1954 SC 728
[44] The Supreme Court of India and Economic Policy Perspectives: Peeping through the Rear Window
[45] AIR 1981 SC 818
[46] AIR 1951 Allahabad 257
[47] AIR 1951 SC 318

of fundamental rights.But whether the trade can be protected or not was decided in *K.K. Narula* v. *State of J &K*[48] where the court held that it is a fundamental right to carry trade in liquor.

The morality test was revisited in *Har Shankar* v. *Dy. Excise and Taxation Commissioner*[49] and arguments in respect of gambling were taken care of in *State of Bombay* v. *RMDC*[50]. In *M.H. Quareshi* v. *State of Bihar*[51] prohibition of cow slaughter was held to be constitutionally valid and not against the fundamental rights of free trade and business. Creation of monopolies of agencies was held to be constitutionally valid in *Glass Chitons I & U Association* v. *Union of India*[52] but the government must realize the nature of the agency as reiterated in *Narendra Kumar* v. *Union of India*[53] .

In the second decade, Supreme Court had to deal with the issues of privy purses[54] and bank nationalization[55]. Justice Subba Rao is also credited with devising the agrarian reform test to analyze whether a particular statute naturally falls into the 9th schedule or not and whether such statute is serving the purpose of agrarian reform or not in the case of *K. K. Kochuni* v. *State of Madras*[56] .

The third decade started with a low GDP growth and consequent wars, droughts and oil price shock had put Indian economy in a rotten state. In the bank nationalization case, the Constitutional validity of the ordinance was challenged. The court held the Banking Companies Act, 1969 as unconstitutional. The court devised "effect test" and used in *Bennett Coleman & Co.* v. *Union of India*[57] and expanded the scope of Judicial Review to go into economic policies made by the government. In *Sukhdev* v. *Bhagat Ram*[58] it confronted with a novel issue whether a statutory corporation such as the Oil and Natural Gas Corporation, Industrial Finance Corporation and the Life Insurance Corporation are state or not and the court acted in affirmation.

In *Shree Meenakshi Mills* v. *Union of India*[59], judiciary upheld the power of the government regarding price fixation under the Essential Commodities Act[60]. *In Bhim Singhji* v. *Union of India*[61] the court had acknowledged that socialism is the economic policy of the country and that welfare state is a part of the basic structure. In *Bharat Coking Coal Ltd.* v. *the State of Bihar*[62] and *in Tara Prasad Singh* v. *Union of India*[63] these coal ovens were nationalized on the plea that in a socialist society the material resources should be so distributed that there is no concentration of wealth in a few hands and the court supported the state favoring DPSP's over FR's. In *Srilekha Vidyarthi* v. *the State of U.P.*[64] the court observed that, while the activities of state affect the day

[48] AIR 1967 sc 1368
[49] (1975) I SCC*757*
[50] AIR 1957 sc 699
[51] AIR 1958 SC 731
[52] AIR 1961 SC 1514
[53] AIR 1960 SC 430
[54] *R.C. Cooper v. The Union of India, AIR 1970* SC *1318*
[55] *Madhav Rao Scindia* v. *The Union of India, AIR* 1971 SC *530*
[56] [1960] 3 S.C.R. 887
[57] *AIR* 1973 SC *106*
[58] *AIR* 1975 SC *1331*
[59] (1974) 1 SCC 468
[60] 1955
[61] AIR 1981 SC 234
[62] *(*1990) 4 SCC 557
[63] (1980) 4 SCC 179
[64] (1991) 1 SCC 212

to day life of members of society and with its role in economic activity, its action is also of public interest that is not the case with private entities.

The court has been able to do so by adopting a confrontationist approach as well as by cooperating with the other organs. While confrontation has led to supersession and curtailment of Judicial Review, a lesser assertive role has ensured the continued relevance of the court in economic matters. In both the approaches, the court has relied upon the Constitution as the primary ground for the justification of economic policies.[65]

VI. MINING LEASE AGREEMENT

Indian judiciary played the role of an adjudicator of the lease agreement for a very long time and their principle work was just to adjudicate the disputes in accordance with the agreements and demarcating the rights and liabilities of the parties to the agreement while refused to interfere with the allocation activities. "No fundamental right is violated by non-granting of mining lease"[66] which kept judiciary to have an active interest. But eventually they became proactive, judicial activism of the Supreme Court was essential to fill the void created due to bureaucratic lethargy and political apathy and the courts started intervening with the allocation of the mining lease agreement too. Supreme Court consistently and strategically started making committees. In *Samaj Parivartana Samudaya* v. *State of Karnataka*[67] the appropriate course of action to adopt would be for this Court to appoint a Committee to examine the peculiar facts of each individual allotment.

In 2014 after the Draft report of Contropoller Auditor General there was a public interest litigation that was filed in the Supreme Court and thus the court came into the scenario as an active participant. In Manohar *Lal Sharma v. The Principle Secretary & ors*[68] the hon'ble court canceled the coal allocations. Hon'ble Court also laid down certain guidelines as for how to allocate the mining agreements in future. Therefore with the judgments and the directions court has expanded its reach and applicability of the judicial review on to the mining lease agreements too.

VII. PRESIDENTIAL PARDON

The rule of the presidential pardon originated in England where the kings had the power to pardon a person. In India president has been given the power to pardon under Article 72 of the Constitution of India. Article 72 empowers the president to grant pardons, reprieves, respites etc. and to suspend, remit or commute sentences in certain cases. The rationale behind it is to afford relief from the undue harshness or evident mistake in the operation or the enforcement of the criminal law. Such a rationale has also been taken in *Kuljit Singh* v. *Lt. Governor of Delhi*.[69] Courts in its various pronouncements have limited the power of the president to pardon.

[65] The Supreme Court of India and Economic Policy Perspectives: Peeping through the Rear Window
[66] (1973) 1 SCC 584
[67] WRIT PETITION (CIVIL) NO. 562 of 2009
[68] (2014) 9 SCC 516
[69] (1982) 3 SCR 58

The ambit of the presidential pardon has been widely discussed by the Supreme Court in *Kehar Singh* v. *Union of India*[70]. The court made its observations that the president has to make the decision is accordance with the aid and advice of the council of ministers which is binding on him. The court made it clear that the condemned person cannot insist an oral hearing in front of the president. The manner in which the presidents wish to consider the case is his discretion. The president can look upon the merits of the case and scrutinize the records but cannot modify or supersede the records. The president's power to grant pardon under Article 72 can be examined by the Court by the way of judicial review.[71] In *Epuru Sudhakar* v. *Govt. of A.P.*[72] Supreme Court laid down grounds on which there can be a judicial review of the President's and Governor's order to pardon-

1. That the order has been passed without the application of mind;
2. That the order is mala Fide;
3. That the order has passed on wholly irrelevant considerations;
4. That the relevant materials have been kept out of consideration;
5. That the order suffers from arbitration.

Similar powers also have been given to the governor under Article 161 of the Constitution of India. In *Swaran Singh* v. *State of U.P.*[73] it was stated by the Supreme Court that there can be a judicial review of the powers of the governor to grant a pardon.

From time to time, the question of the President's power to commute the sentence of death into a lesser sentence comes up for discussion before the public. This is not a purely legal matter and involves several ethical and social implications. Unfortunately, a few misconceptions prevail on the subject, because of the failure to appreciate several important socio-legal aspects.[74]

VIII. THE AID AND ADVICE OF COUNCIL OF MINISTERS: THE POSITION OF THE JUDICIARY IN MAKING THE PRESIDENT A MERE RUBBER STAMP.

Since the onset of the constitution, India has adopted a parliamentary form of democracy rather the presidential form. President of India is a ceremonial head of the state just like the queen of England. The president has been made the head of the state and not the head of the government and therefore the powers of the president are limited. The president has been provided with the various powers and functions namely financial, judicial, pardoning, ordinance issuing power etc. by the constitution but as with the time, those powers have been diluted by the legislations as well as the judiciary.

Accordingly, from the 42nd amendment, the aid and advice of the council of ministers are binding on the president. The amendment incorporates the view taken in Samsher v. State of Punjab[75]. Even in S.P. Gupta v. Union of India[76] the judiciary has maintained a view that there can be no

[70] AIR 1989 SC 653
[71] ibid
[72] AIR 2006 SC 3385
[73] AIR 1998 SC 2026
[74] P.M. Bakshi: The Constitution of India
[75] AIR 1974 SC 2192
[76] AIR 1982 SC 149

judicial review on the aid and advice of the council of ministers and the confidentiality of the advice. This decision has thus provided the council of ministers with an unchecked amount of power to control the president thus making him an actual rubber stamp of the parliament.

With such combined efforts of judiciary and legislature, the power of the president has become dormant and thus predominantly president acts as a rubber stamp of the council of ministers. The President of India is also required to exercise his power to grant pardon any sentence or punishment on the advice of the council of ministers and the advice of the council of ministers will be binding on him.[77]

Even recently the ordinance making a power of the president has come under the judicial scrutiny and the seven-judge bench ruled out that the satisfaction of the President would not be immune from judicial review and the court in this exercise would not have to determine the sufficiency or adequacy of the material.[78]The President's power to impose state emergency under Article 356 also has come under judicial scrutiny. Uttrakhand High Court in its judgment quashed the order of the president's rule. There have been considerable examples that clear out the position of the judiciary. Its decisions have contributed to converting the position of president as a mere rubber stamp.

IX. CONCLUSION

Whatever may be the merits of demerits of Judicial review, to an extent, the basic structure limitation upon the constituent power has helped arrest such forces and to stabilize the democracy.

[77] Manu Ram v. The Union of India, AIR 1980 SC 2147; Kehar Singh v. The Union of India, AIR 1989 SC 653
[78] Krishna Kumar Singh v. the State of Bihar, Civil Appeal No(s). 5875/1994