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Judicial Process Commutative Study of Different Countries

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ABSTRACT

Judicial process is the method of attaining justice[1] which seeks to achieve the desirables[2], and prohibit undesirables[3]. Justice[4], is itself an irrational concept[5], However in a layman word justice means absence of fear which is possible only when there is - lack of arbitrariness, freedom of liberty, and equal access to the quick affordable satisfactory credible dispute settlement forum. The essence of justice lies in Rule of law which requires that law of land is stable and not arbitrary that is to say, law is not ruled by the changing government rather the government and its instrumentalities are ruled by the law. In the modern times there are two interpretations of the Rule of law, the first the more traditional view is that of the plenary adhering to the rules of the laws while the second view allows the encompassing of the ideal rules based on criteria of morality and justice within its province. Modern states follow the second principle of rule of law because a law which is stable becomes oppressive after some time, due to its failure to satisfy the needs of the progressive society.

KEYWORDS: *Freedom of Liberty, Grundnorm, Judicial Process in USA, UK etc*

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The ideal notion of the rule of law can be traced in ancient Indian legal system which laid greater emphasis on the duty, by making the king as the head of administration. Dharma in ancient India did not denote any kind of religion or right but only the performance of the duties[6]. Everyone had to perform his assigned Dharmas (Duties) .The duties assigned to the king was known as Rajadharma which was a combination of several Dharmas, hence it was considered as very pious and supreme Dharma. Although the king was the fountain head of the administration of justice, his powers were limited by the norms of Rajadharma. He neither could impose arbitrary taxes nor could favour his relatives, and if he deviated from the performance of the norms of Raja dharma, the punishment prescribed for him was thousands times more than an ordinary individual. There was no distinction between weaker and stronger and the weaker was able to prevail over stronger with the assistance of the king if his rights or liberty was encroached. This duty approach setup of Raja dharma was distorted with the coming of the Moughals and subsequently after the coming of Britishers.

Power is like a river, if controlled, it brings happiness and prosperity otherwise destruction and curse. Justice[7] without power[8] is inefficient, power without justice is tyranny so in order to make power of the government purposive, efficient and in interest of the people, India adopted a normative written constitution[9] on 26th day of November 1949

[1] Stone, Julius, "SOCIAL DIMENSIONS OF LAW AND JUSTICE", Universal Law Publishing Co. Pvt Ltd, 1999.
[2] Loewenstein Karl, "Political power and the governmental process", university of Chicago press, (1965)
[3] Fitzgerald, P.J, "SALMOND ON JURISPRUDENCE", Twelfth Edition, London Sweet and Maxwell, 1966
[4] Seervai, H.M, "CONSTITUTIONAL OF INDIA", Fourth Edition, Universal Law Publishing Co.
[5] Jain, M.P, "INDIAN CONSTITUTIONAL LAW", Fifth Edition 2003, Wadhwa and Co Nagpur.
[6] Basu, Durga. Das, "COMMENTARY ON CONSTITUTION OF INDIA" 8th Edition 2009, Lexis Nexis, Butterworths Wadhwa, Nagpur.
[7] Jois, M. Rama, "LEGAL AND CONSTITUTIONAL HISTORY OF INDIA: Ancient Legal, Judicial and Constitutional System", Universal Law Publishing Co. Pvt. Ltd.
[8] Pound, Roscoe, "JURISPRUDENCE", The Books Exchange Ltd, Union, New Jeresy 2000.
[9] Ross, "ON LAW AND JUSTICE"1958.

demarcating the power arrangement between the three organs of the state namely executive, judiciary, and legislature. The constitution also kept few most cherished values of the humankind beyond the reach of these three organs[10]. Constitution seeks to remove three kind of disparity namely social, economic and political, so that weaker can prevail over stronger with the help of law if his right is violated and, Each organ of the state is required to work in this context without violating the power arrangement of the constitution .

The author in this paper seeks to deal with the commutative study of the Indian judicial process as well as different countries by analysing its present and past scenario, keeping in mind constitution of India as the Grundnorm of country.

INTRODUCTION

An Overview of Judicial Process

Judicial Process in USA:-

"If they have respect for the work of the court, their respect for law will survive any shortcomings"

(Arthur Vanderbilt)

First, the federal court system is discussed, and then, the state courts are covered in this project. The three levels of the federal court system and the order in which they were established are: the Supreme Court; the courts of appeals; and the district courts. It is important, first of all, to understand the history which led up to creation of the federal judicial system. Prior to ratification of the Constitution, the country was governed by the Articles of Confederation. The Articles of Confederation were dramatically flawed because, among other things, no provisions were made for a national judiciary. The first event to remedy this situation was the Constitutional Convention (in Philadelphia) of 1787 where two (2) proposals were debated:

1. *Randolph, or Virginia Plan* – proposed creation of both a Supreme Court and a series of inferior federal courts. This is a creation of the supreme court of USA (the nationalist position).
2. *Paterson, or New Jersey Plan* – proposed creation of a Supreme Court only, to handle appeals from state courts, protect national rights, and provide uniform judgments throughout the country (the states' rights position, which held sway, resulting in the compromise contained in Article III of the Constitution: [11]"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.")

The second event involved in creation of the federal court system was the Judiciary Act of 1789 (aka Senate Bill 1). This law set up a Supreme Court (consisting of six justices), three circuit courts (of appeals), and thirteen district courts. Here, the states' rights advocates lost out because not one, but two lower federal court systems were created.[12] A majority of legislators felt that relying upon state courts alone would be too parochial and might result in unjust and/or inconsistent decisions. There was also the need for establishment of places were foreign litigants could have their cases heard.

The three levels of the federal court system are illustrated below:-

U.S Supreme Court: seats 9 justices, a chief and eight associates; has original jurisidiction in cases involving ambassadors or state versus disputes; hears other cases when 4 agree to issue a writ of certiorari (pronounced sur-shee-uh-rah-ree) to review a lower court case, and different sides file briefs and attorneys make oral arguments; a vote of 5:4 or higher, with concurring opinions and/or dissents may be a landmark decision if it ends controversy and settles Constitutional interpretation.

U.S. Circuit of Appeals: consist of 167 judges among 13 courts, dispersed regionally, twelve to look for judicial error in lower courts, and one that handles patents and when the U.S. government is a defendant; they have mandatory jurisdiction (must hear appeals) from lower courts, and appeals are either frivolous, ritualistic, or nonconsensual, with nonconsensual appeals sometimes settled as precedent at this level.

U.S. District Courts: consist of 650 judges among 95 courts dispersed in every state and territory; they have original jurisdiction (conduct trials) over criminal violations of federal law, and are assisted by 369 U.S. Magistrates who handle pre- trial matters and may try minor offenders; some courts at this level have specific responsibilities; many have cases backlogged.

ROLE OF THE US SUPREME COURT

It has been said that the US Supreme Court is distinctly American in conception and function[13]. The

[10] Bentham, J, "AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (ed. J.H. Burns and H.L.A. Hart,1970), The Athlone Press, University of Londo." Dworkin, R, " TAKING RIGHTS SERIOUSLY

[11] Lewis, Anthony. 1964. GIDEON'S TRUMPET. New York: Random House.

[12] Schuck, Peter. 1990. AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN COURT. Cambridge, MA: Harvard University Press

[13] (Hughes 1966)

Supreme Court must, of course, interpret federal legislation, but that is what any supreme court in any country would do. In America, the Supreme Court also plays two additional roles: (1) balancing state and national interests; (2) maintaining the rights and duties of individuals.[14] The first of these should be evident from our discussion of the historical context above, and the second is what most people think of when they think of constitutional law – the relationship between individuals and the state. Nowhere in the world other than the US does a Supreme Court exist that so directly influences the everyday lives of individuals. Let's examine a few landmark as well as some very important mile stone cases or we can say historical cases.

In *Chisholm v. Georgia*[15], the Court ruled that a citizen of one state could sue another state in federal court. This became quite controversial and had to be overturned by the Eleventh Amendment in 1798. The Court then expanded its powers, under the leadership of Chief Justice John Marshall, into the policy-making arena by asserting its power, under *Marbury v. Madison* (1803) to declare an act of Congress unconstitutional. A few years later, the Court also claimed the right of "judicial review" – a similar power to declare the actions of state legislators unconstitutional. Judicial review is a feature that sets American courts apart from those in other countries.[16]
In an average year, the Supreme Court provides decisions and signed opinions on about ninety cases, but hundreds of more cases are disposed of with less than the full treatment. In principle, US judges are not supposed to make policy, but in practice, whenever a judge chooses between two or more interpretations of law, they are making policy, at least for the specific litigants in the case. Also, if the interpretation is accepted by other judges, policy has been made for all jurisdictions in which that view prevails. Most of what the Supreme Court does, however, is related to its role as "final arbiter" (the highest appellate tribunal in the country). In this role, it conducts reviews of lower court decisions by deciding whether or not to grant a "writ of certiorari" which orders the lower court to send up a complete record of the case. Denial of a writ of certiorari usually means that the lower court decision stands, but occasionally the Court will issue an unsigned, brief opinion on a lower court issue, known as "per curium" opinion. The Supreme Court (SCOTUS) is in session every year from the first Monday in October until the business of the term is completed, usually in late June or July.[17] The court can normally hear four cases in one day in terms of the approximately thirty minutes given to each side for "oral arguments." Attorneys usually relish the opportunity to present oral arguments before the Justices, and attorneys are usually interrupted with probing questions when doing so. However, most of the work of the Court is spent in "conference" behind closed doors where informal discussing and voting takes place. Usually Wednesdays and Fridays are set aside for conferences. The "opinion of the court" is the majority opinion, which must be a written opinion by the Chief Justice or in cases where the chief justice sides with the minority, the written opinion of the next most senior member of the majority group. Those who disagree with the majority opinion may write a "concurring opinion" (which essentially agrees with the majority but disagrees over the reasoning for reaching that conclusion) or may write a "dissenting opinion" (which doesn't technically require the written reasons for dissent, but if more than one justice dissents, then each justice may write an opinion or they may join together in their single opinions). It can be noted that there is nothing like this American practice of issuing divided judgments anywhere else in the world. Other countries require their Supreme Court to issue only one judgment, with no dissenting or concurring opinions.[18]

EXECUTIVE INFLUENCE ON JUDICIAL PROCESS

Some of the most interesting questions in the study of judicial process involve asking how independent a judiciary can be if the executive branch influence is oriented toward appointments (some would argue,

[14] Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 773 (1998).
[15] 2 Dallas 419 (1793)
[16] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking Judicial Function*, 114 HARV. L. REV. 1833, 1852-53 (2001).
[17] Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. Rich. L. Rev. 769, 769 (1998); *see Muskrat v. United States*, 281 U.S. 346, 354 (1911); Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), *reprinted in 3 The Correspondence and Public Papers of John Jay* 486-87 (Henry P. Johnston ed., 1890).
[18] Note that strategic models are not inevitably attitudinal in the sense that they necessarily posit judges acting strategically to maximize policy preferences. A judge might act strategically to advance some other end, such as to achieve an outcome most consistent with her preferred theory of statutory interpretation. *See* Adrian Vermeule, *Foreword: System Effects and the Constitution*, 124 HARV. L. REV. 4, 58-59 (2009) (identifying four types of judges via "their positions on two different axes: whether the judge is attitudinal or legalist, and whether the judge is strategic or nonstrategic.").

rightly so) of judges and justices who (deliberately or just happen to) share the executive's policy-making viewpoint or personal and political philosophies. This is, of course, commonly known to go on, but do executives "stack" the bench when it comes to judicial appointments? Is the Senate an adequate balance of power for this? [19] Does political party affiliation "spill over" as a proxy for shared ideology? Do judges even have ideological tendencies? It is apparent that an unchecked judiciary can fairly easily accomplish ideological goals, if they wanted to, on social issues that strongly affect the national agenda (e.g., affirmative action, immigration, campaign finance, federalism, the rights of criminal defendants, sex, race, and disability discrimination, corporate privilege, distribution of wealth, property rights, capital punishment, and abortion, to name a few). It is therefore important that we must study this as more than a branch of government problem; as nothing less than the study of Executive-Legislative-Judiciary policy links.

Contrary to the thesis that political controversies over judicial appointments are a relatively new phenomenon, it is more factual that political clashes over nominees have always existed (Epstein & Segal 2005), especially at the upper court levels (Epstein & Segal reporting that no more than 20% of lower court nominations generate any opposition). The way it works is the way the framer of the Constitution set it up -- the President has the power to appoint, and the Senate has the power to approve -- this being called the "advice & consent" role of the Senate). It should be noted that this is a distinctively American approach, as in most other countries around the world, a kind of "shared power" procedure is followed where the executive branch gets to appoint judges for about half of the vacancies and the legislature (or parliament) gets to appoint the other half. However, even in such non-American arrangements, there are still controversies, with different political parties in the legislature usually vetoing each other's candidates, resulting in the usual solution that half the judicial slots go to one party and half to the other. In the United States, during every two-year session of Congress, the Senate is called upon to approve about 4,000 civilian and 65,000 military nominations.

FOUR WAYS OF EXECUTIVE INFLUENCE

Carp et al. (2004) present a theory of judicial appointments which holds that the following are ways a chief executive can influence a judiciary, or at least get one that is sympathetic:[20]

- *Ideological appointments* -- express a deep commitment to only nominate party loyalists or only those who share similar ideologies. Party loyalty and loyalty to the President were last tried by Truman, liberal activists by Johnson & Carter, ideologically uncommitted by Clinton, and committed ideological conservatives by Reagan and both Bushes. Presidents are often surprised by the outcomes of this strategy, not only in the amount of Congressional obstruction, but in the subsequent legal-decision making patterns of appointees.
- *the filling of vacancies* -- take what vacancies are inherited from the previous administration (usually 25 or so), vacancies from judicial retirement and death (usually another 25 or so, depending upon the length of Presidential office), and vacancies resulting from new positions created by Congress (a likely event if the same party controls the Presidency and Congress, averaging about 5 or so per year). The sum may represent an executive influence over about 20% of the judiciary, enough to make a difference. Reagan was able to appoint 50% of the judiciary.
- *Political horse trading* -- make deals with senators to nominate one of their "favorites" in return for unblocking a vote on another, more "favored" nominee. Political skill and public popularity play a part here, as does clout and/or adroitness with the Senate Judiciary Committee, a skill lacking in some presidents, like Kennedy and Clinton.
- *count on previous appointments* -- the influence of the sitting judiciary on a new judge can be substantial in terms of judicial climate (however, in recent years, the ratio of Democratic to Republican appointees has been close to 50:50), so the existing elders in the judiciary can be counted on for socialization purposes (if reflecting the President's ideology in controlling legal precedent and constitutional interpretation).

JUDICIAL PROCESS IN UK

Judicial Appointments Process: - There appears to be a consensus that all judicial appointments should be made on merit and that the process should respect the

[19] This account has been challenged. *See, e.g.,* Brian Tamanaha, *The Bogus Tale about the Legal Formalists*, available at http://ssrn.com/abstract=1123498.

[20] "The difficulty outsiders have in understanding judicial behavior is due partly to the fact that judges deliberate in secret, though it would be more accurate to say that the fact that they do not deliberate (by which I mean deliberate *collectively*) very much is the real secret." POSNER, HOW JUDGES THINK, at 2.

constitutional principle of the independence of the judiciary. Beyond this, there is a range of questions including achieving greater diversity of those selected, ensuring appropriate accountability and transparency, the efficiency and effectiveness of the appointments systems, and the respective roles of the independent selection commissions, ministers, the judiciary and parliament.

The Committee will ask whether the appointments system is fair, independent, transparent and open.

- It will examine a range of questions including the following.
- Does the judicial appointments process secure an independent judiciary?
- Should Parliament scrutinize judicial appointments?
- How can public understanding of the appointments process be improved?
- Is the system based on merit?
- Do we have a sufficiently diverse judiciary?[21]

The House of Lords Constitution Committee has 28 March 2012 published its report on Judicial Appointments and concludes that a more diverse judiciary would improve public trust and confidence in the justice system. The Report includes statistics showing that in 2011 only 5.1% of judges were Black Asian and Minority Ethnic (BAME) and just 22.3% were women. The Committee stressed that diversity incorporates a number of other elements including disability, sexual orientation, legal profession and social background and rejected any notion that those from under-represented groups are less worthy candidates or that a more diverse judiciary would undermine the quality of our judges.[22]

The Committee set out a number of recommendations to improve diversity. These include:

- **The Lord Chancellor and Lord Chief Justice should have a duty to encourage diversity amongst the judiciary** as the Judicial Appointments Committee (JAC) does currently.
- While appointment based on merit is vital and should continue, **the Committee supports the application of section 159 of the Equalities Act 2010 to judicial appointments**. This would allow the desire to encourage diversity to be a relevant factor where two candidates are found to be of equal merit.
- **Opportunities for flexible working and the taking of career breaks within the judiciary should be made more widely available** to encourage applications from women and others with caring responsibilities.
- **There needs to be a greater commitment on the part of the Government, the judiciary and the legal professions to encourage applications for the judiciary from lawyers other than barristers**. Being a good barrister is not necessarily the same thing as being a good judge.
- While the Committee does not currently support the introduction of targets for the number of BAME and women judges, it says this should be looked at again in five years if significant progress has not been made.

The Committee also stresses the importance of the independence of the judiciary and believes that the Lord Chancellor's role in individual appointments should be limited. It says that his power to reject nominations for posts below the High Court should be transferred to the Lord Chief Justice. In order to ensure judges continue to have appropriate independence from Parliament, the Committee says that **judicial candidates should not be subject to US-style pre or post-appointment parliamentary hearings**. Political considerations would undoubtedly influence both the parliamentarians chosen to sit on the panels and the questions put to candidates. **The Committee suggests that a system of formal appraisals should be introduced for judges**. They point out this is now common practice in business, the professions and the civil service and would be of benefit to judges, as well as helping to assure the public that the judiciary is of the highest possible quality. The Committee also recommends that the retirement age for the most senior judges, those in the Court of Appeal and the Supreme Court, should be raised to 75. This would prevent a loss of talent in the highest courts whilst allowing more time for women and others who have not followed a traditional career path to reach the highest levels of the judiciary. The retirement age for all other judges should continue to be 70.[23]

[21] David Cameron speech at CBI annual conference, November 2012: http://www.cbi.org.uk/media centre/news articles/ 2012/11/david-cameron-sets-out-plans-to-slash-red-tape-at-cbi-annual-conference/

[22] The Compact: The Coalition Government and civil society organizations working effectively in partnership for the benefit of communities and citizens in England.' 2010. http://www.compactvoice.org.uk/sites/default/files/the_compact.pdf

[23] Varda Bondy and Maurice Sunkin, 'Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse.'

Commenting on the report Baroness Jay, Chairman of the Committee, said:

"It is vital that the public have confidence in our judiciary. One aspect of ensuring that confidence is a more diverse judiciary that more fully reflects the wider population. That even by 2011 only 5% of judges were from minority groups and only 22% were women suggest there is still work to be done in this area. It is important that judges are appointed on merit but the Committee felt there are steps that could be taken to promote diversity without undermining that principle. Requiring the Lord Chancellor and Lord Chief Justice to encourage diversity and supporting flexible working within the judiciary would be a good start. It is also important that solicitors, who are a more representative group of society than barristers, do not face any impediments to a career in the judiciary. We also looked at the important principle of judicial independence from political interference. Here the Committee felt that neither the Lord Chancellor nor Parliament should be given enhanced powers to decide who becomes a judge. The respective roles of politicians and judges are distinct and it is important they are kept separate. The Constitutional Reform Act 2005 created an open, transparent and independent appointments process. As the Constitution Committee, we believe that the independence of the process should be preserved."

JUDICIAL REVIEW PROCESS

What is judicial review?

Judicial review is a form of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. It is a challenge to the *way in which a decision has been made*. It is not really concerned with the conclusions of that process and whether those were 'right', as long as the law has been correctly applied and the right procedures have been followed. The court will not substitute what it thinks is the 'correct' decision. This may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way. If you want to argue that the decision was incorrect, judicial review may not be best for you. You should look at the alternative remedies judicial review may be appropriate where: an unlawful decision or action has been taken by a public body and, no alternative remedy is available.

http://ukconstitutionallaw.org/2013/01/10/varda-bondy-and-maurice-sunkin-judicial-review-reformwho- is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/

What makes a decision unlawful?

Judicial review looks at the lawfulness of actions and decisions. These can be challenged on a number of grounds, which are usually described as follows:

- *Illegality;*
- *Irrationality; and*
- *Unfairness.*

Illegality. Public bodies must correctly understand and apply the law that regulates their decision making powers.[24] An action or decision may be unlawful if the decision maker had no power to make it or exceeded the powers given to him/her. Four kinds of illegal activity may be identified

- *refusing to act* in a certain way in a mistaken belief that the law does not allow the body to act in that way;
- *misuse of discretion*- e.g. using a discretionary power for the wrong purpose or in the wrong circumstances, or putting unlawful limits on the exercise of discretion (often called *fettering of discretion* and typically applying a local policy rigidly);
- *taking irrelevant factors into account* or failing to take account of all relevant factors; and,
- *failing to take account of the Human Rights Act 1998*. *Irrationality.* The court can reverse a decision if it is so unreasonable as to be "perverse" or "irrational". Arguing that a decision is irrational is extremely difficult and such claims are usually linked to challenges based on *illegality* and/or *unfairness*, if this is possible. *Unfairness:* This deals with the process for reaching a decision and includes *the right to a fair hearing* (which includes the rule against bias). Also the courts have recently extended the idea of fairness to prevent abuses of power where public bodies have sought to go back, without sufficient justification, on promises made (called *'legitimate expectations'*).[25]

Whose decisions can be challenged by judicial review?

The sort of *public bodies* whose decisions may be challenged include:

- Government ministers and departments;
- Local authorities & health authorities;
- Chief constables & prison governors;

[24] *Brown v Hamilton District Council*, 1983 SC (HL) 1.

[25] While the court does have the discretion under Rule 3.1(2)(a) of the Civil Procedure Rules to allow a late claim, this is only used in exceptional circumstances. **Compliance with the protocol alone is unlikely to be sufficient to persuade the court to allow a late claim.**

- Some tribunals (but not if you can appeal to a higher tribunal or court);
- Magistrates, coroners and county courts; and,
- boards of school governors (but not independent schools).

What can judicial review do?

If an application for judicial review is successful, the court can grant a *remedy* by making of one of six orders:

- *Quashing order;*
- P*rohibiting order;*
- *Mandatory order;*
- *Declaration;*
- *Injunction;* and/or,
- *Damages.*

Quashing order: This is the most commonly requested remedy. It *overturns* an invalid decision that has already been made. The public body must then take the decision again applying the proper legal test or following a fair procedure.

Prohibiting order: This *prevents* a public body from taking an unlawful decision or action – for instance, to prevent the Home Office from deporting someone whom it has wrongly decided is an illegal immigrant.

Mandatory order: This order *requires* the performance of a duty, either an action the body has a duty to perform or the duty to reach a discretionary decision. For instance the court may order the public body to consider an application for a benefit when it has failed to do so (though the court *cannot* require that a specific decision is made, such as ordering that benefit be paid).

Declarations: The court may simply declare what the law is, or declare the respective rights of the parties, without making any other order.[26]

Injunction: These prevent an illegal act or enforce the performance of a duty. Since a *prohibiting* and *mandatory order* serve similar purposes, injunctions are relatively rare. However, they are sometimes granted at the permission stage of the proceedings as a temporary order made before the court considers the case fully at the final hearing. For example, an injunction can be sought at an early stage to require a local authority to continue to provide community care services in a case disputing the lawfulness of withdrawal of those services.

Damages. Before the Human Rights Act came into force, damages were rarely awarded in judicial review and were not available to compensate people who had unlawful decisions made against them. Damages may now be awarded where a public body has unlawfully interfered with your human rights.

How do I apply to court?

All claims for judicial review are heard at the Administrative Court in central London. This can make it extremely inconvenient for claimants outside London. Claims for judicial review are made in two stages:

1. *The permission stage.* This allows the court to filter cases by deciding which should be allowed to go to a full hearing. The permission stage is decided on the basis of a written claim and will involve a fairly brief look at the case to decide whether:
   - there is an arguable case; and,
   - the case has been brought promptly or if any delay can be justified.

The claimant must prepare all the papers at this stage. A court fee of £50 is payable. The judge will read the documents and will decide whether to grant permission. The decision will be notified by post and very short reasons may be noted if permission has been refused.

2. *Full hearing.* The claimant must pay a further fee of £180 within 7 days of the decision to grant permission. The judge may also make an order concerning the way in which the case should proceed, called case management directions. When all parties are ready, and when the court has time available, the case is listed for a full hearing at which argument by both sides is heard by the court.[27]

How long does it take? Claimants currently wait between 6 months and 1 year for a case to go to a full hearing, though urgent cases can be heard within 24 hours if necessary. However, the first 'permission' stage of the proceedings May only take a few weeks and many cases are "settled" following the decision of the court to grant permission. Very often making a claim will encourage a previously unresponsive defendant to review the matter, as they can see that you mean business. A public body's concentration on the issues involved will be increased even more if permission is granted.

[26] *West v Secretary of State for Scotland*, 1992 SC 385,1992 SLT 636, (reported as *West v Scottish Prison Service*, 1992 SCLR 504).

[27] *R v Secretary of State for Scotland*, 1999 SC (HL) 17 at 41 - 42 per Lord Clyde (reported as *Reid v Secretary of State for Scotland*, 1999 SCLR 74; [1999] 2 WLR 28, [1999] 1 All ER 481).

JUDICIAL PRECEDENT PROCESS

A judgment of a court of law cited as an authority for deciding a similar set of facts; a case which serves as authority for the legal principle embodied in its decision. The common law has developed by broadening down from precedent to precedent.

A judicial precedent is a decision of the court used as a source for future decision making. This is known as *stare decisis* (to stand upon decisions) and by which precedents are authoritative and binding and must be followed. In giving judgment in a case, the judge will set out the facts of the case, state the law applicable to the facts and then provide his or her decision. It is only the *ratio decidendi* (the legal reasoning or ground for the judicial decision) which is binding on later courts under the system of judicial precedent. Any observation made by the judge on a legal question suggested by the case before him or her but not arising in such a manner as requiring a decision is known as *obiter dictum* (a saying by the way). There may several reasons for a decision provided by the judge in any given judgment and one must not assume that a reason can be regarded as 'obiter' because some other 'ratio' has been provided. Thus, it is not always easy to distinguish ratio decidendi from obiter dictum when evaluating the effects of a particular decision.[28] A single decision of a superior court is absolutely binding on subsequent inferior courts. However, certain of the superior courts regard themselves as bound by their own decisions whilst others do not:

1. Decisions of the House of Lords bind all other courts but the House does not regard itself as strictly bound by its previous decisions, for example, in Murphy v Brentwood District Council (1990) the House elected to overrule its earlier decision in Ann's v London Borough of Merton (1978) on the issue of a local authority's liability in negligence to future purchasers of property.[29]
2. The Court of Appeal, Civil Division, holds itself bound by its previous decisions: Young v Bristol Aero plane Co Ltd (1944) but in that case also identified three exceptional cases where it would disregard its own previous decision. These are (i) where two Court of Appeal decisions conflict; (ii) if the decision although not expressly overruled conflicts with a later decision of the House of Lords; and (iii) if the earlier decision was given *per incuriam* (through want of care) however it cannot ignore a decision of the House of Lords on the same basis.
3. Divisional courts of the High Court have adopted the rule laid down in Young's case although judges sitting at first instance are not bound to follow the decisions of other High Court judges although they tend to do so for the sake of certainty

Judicial precedent is an important source of English law as an original precedent is one which creates and applies a new rule. However, the later decisions, especially of the higher courts, can have a number of effects upon precedents... In particular, they may be:

- *Reversed:* where on appeal in the same case the decision is reversed, the initial decision will cease to have any effect
- *Overruled:* where in a later case a higher court decides that the first case was wrongly decided
- A *refusal to follow:* this arises where a court, not bound by the decision, cannot overrule it but does not wish to follow it so it simply refuses to follow the earlier decision
- *Distinguished:* where an earlier case is rejected as authority, either because the material facts differ or because the statement of law in the previous case is too narrow to be properly applied to the new set of facts
- *Explained:* a judge may seek to interpret an earlier decision before applying it or distinguishing it, thus the effect of the earlier case is varied in the circumstances of the present case.

Ratio Decidendi and Obiter Dictum:-

The decision or judgment of a judge may fall into two parts: the ratio decidendi (reason for the decision) and obiter dictum (something said by the way).

RATIO DECIDENDI - The ratio decidendi of a case is the principle of law on which a decision is based. When a judge delivers judgment in a case he outlines the facts which he finds have been proved on the evidence. Then he applies the law to those facts and arrives at a decision, for which he gives the reason (ratio decidendi).

OBITER DICTUM - The judge may go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an obiter dictum.

[28] *West v Secretary of State for Scotland*, 1992 SC 385, 1992 SLT 636, (reported as *West v Scottish Prison Service*, 1992 SCLR 504).

[29] *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935; *Monklands District Independent Taxi Owners Association v Monklands District Council (No 2)*, 1997 SLT 7.

The binding part of a judicial decision is the ratio decidendi. An obiter dictum is not binding in later cases because it was not strictly relevant to the matter in issue in the original case. However, an obiter dictum may be of persuasive (as opposed to binding) authority in later cases. A difficulty arises in that, although the judge will give reasons for his decision, he will not always say what the ratio decidendi is, and it is then up to a later judge to "elicit" the ratio of the case. There may, however, be disagreement over what the ratio is and there may be more than one ratio.

The Court Hierarchy

The European Court Of Justice: Under Section 3(1) of the European Communities Act 1972, decisions of the ECJ are binding, in matters of Community law, on all courts up to and including the House of Lords.

The House of Lords: This is the highest court in the land unless a matter of EC law is involved. The House of Lords was bound by its own previous decisions until 1966 when Lord Gardiner LC announced a change of practice. The Practice Statement [1966] 1 WLR 1234 stated that although the House of Lords would treat its decisions as normally binding it would depart from these when it appeared right to do so. This power has been used sparingly. A decision of the House of Lords binds all lower courts.

Court Of Appeal (Civil Division): The Court of Appeal is bound by decisions of the House of Lords even if it considers them to be wrong. In *Young vs Bristol Aero plane Co Ltd*;[30] the Court of Appeal held that it was bound by its own previous decisions subject to the following three exceptions:

- Where its own previous decisions conflict, the Court of Appeal must decide which to follow and which to reject.
- The Court of Appeal must refuse to follow a decision of its own which cannot stand with a decision of the House of Lords even though its decision has not been expressly overruled by the House of Lords.
- The Court of Appeal need not follow a decision of its own if satisfied that it was given per incur am (literally, by carelessness or mistake).
- Decisions of the Court of Appeal itself are binding on the High Court and the county courts.

Court Of Appeal (Criminal Division)

In principle there is no difference in the application of stare decisis in the civil and criminal divisions of the Court of Appeal. In practice, however, in addition to the Young exceptions, because a person's liberty may be at stake, precedent is not followed as rigidly in the criminal division. In *R v Taylor*[31] the Court of Appeal held that in 'questions involving the liberty of the subject' if a full court considered that 'the law has either been misapplied or misunderstood' then it must reconsider the earlier decision. This rule was followed in *R v Gould*[32] and *R v Newsome*[33].

The High Court

The High Court is bound by the Court of Appeal and the House of Lords but is not bound by other High Court decisions. However, they are of strong persuasive authority in the High Court and are usually followed. Decisions of individual High Court judges are binding on the county courts. A Divisional Court is bound by the House of Lords and the Court of Appeal and normally follows a previous decision of another Divisional Court but may depart from it if it believes that the previous decision was wrong: *R v Greater Manchester Coroner, ex parte Tal*[34].

Crown Courts

Decisions made on points of law by judges sitting at the Crown Court are not binding, though they are of persuasive authority. Therefore, there is no obligation on other Crown Court judges to follow them.

County Courts and Magistrates' Courts

The decisions of these courts are not binding. They are rarely important in law and are not usually reported in the law reports.

The Judges' Role in Precedent

The old view of the judges' role was that they were merely 'declaring' the existing law (the 'declaratory theory'). Lord Esher stated in *Willis v Baddeley*[35]: "There is … no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable." The modern view is that judges do make law. Lord Radcliffe said (Not in Feather Beds, p215, 1968): "… there was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?" The reality is that judges are continually applying the existing rules to new fact situations and thus creating new laws.

The Position of the House of Lords

In the mid-nineteenth century the House of Lords developed the practice that it would be bound by its own decisions. This was reaffirmed in *London*

[30] [1944] KB 718

[31] [1950] 2 KB 368
[32] [1968] 1 All ER 849
[33] [1970] 2 QB 711
[34] [1985] QB 67
[35] [1892] 2 QB 324

Tramways Co v London County Council[36]. The House of Lords felt that decisions of the highest appeal court should be final in the public interest so that there would be certainty in the law and an end to litigation. However, this practice was criticized from the 1930s. Some of the Law Lords said that the rule did not produce the desired certainty in the law and it had become too rigid (e.g., Lord Wright, Lord Denning and Lord Reid). Nevertheless, the practice was not changed until 1966 by Lord Gardiner LC, through the Practice Statement[37]. The practice statement was accompanied by a press release, which emphasized the importance of and the reasons for the change in practice:

- It would enable the House of Lords to adapt English law to meet changing social conditions.
- It would enable the House to pay more attention to decisions of superior courts in the Commonwealth.
- The change would bring the House into line with the practice of superior courts in many other countries. In the USA, for example, the US Supreme Court and state supreme courts are not bound by their own previous decisions.

A. Paterson's survey of nineteen Law Lords active between 1967 and 1973 found that at least twelve thought that the Law Lords had a duty to develop the common law in response to changing social conditions (A. Paterson, The Law Lords, 1982).

Examples of Judicial Activism

1. *In Herrington v British Railways Board*[38], the House of Lords overruled (or at least, modified) *Addie v Dumbreck*[39]. In Addie, the House of Lords had held that an occupier of premises was only liable to a trespassing child who was injured by the occupier intentionally or recklessly. In Herrington, their Lordships held that a different approach was appropriate in the changed social and physical conditions since 1929. They propounded the test of 'common humanity' which involves an investigation of whether the occupier has done all that a humane person would have done to protect the safety of the trespasser.
2. *In Miliangos v George Frank (Textiles) Ltd*[40], the House of Lords overruled *Re United Railways*[41]. In *Re United Railways*, it had been held that damages in an English civil case could only be awarded in sterling. In Miliangos, the House of Lords held that damages can be awarded in the currency of any foreign country specified in the contract. A new rule was needed because of changes in foreign exchange conditions, and especially the instability of sterling, since 1961.
3. *In R v Howe*[42], the House of Lords overruled DPP for *N. Ireland v Lynch*[43], and decided that the defense of duress is not available to a person charged with murder, whether as a principal or as a secondary party. In Lynch, the House of Lords had held that duress was available as a defense to a person who had participated in a murder as an aide and abettor. In Howe, their Lordships desired to restore this part of the criminal law to what it was generally understood to be prior to Lynch, even though to do so would produce the illogical result that, whilst duress is a complete defense to all crimes less serious than murder, it is not even a partial defense to a charge of murder itself. But note that in *R v Gotts*[44], the House of Lords extended the decision in Howe by holding that duress is not a defense to attempted murder. Lord Griffiths said: "We face a rising tide of violence and terrorism against which the law must stand firm recognizing that its highest duty is to protect the freedom and lives of those that live under it. The sanctity of human life lies at the root of this ideal and I would do nothing to undermine it, be it ever so slight".
4. *In R v R (Rape: marital exemption)*[45], the House of Lords abolished altogether a husband's 250 year old immunity from criminal liability for raping his wife. Their Lordships justified the decision on the basis that the case was not concerned with the creation of a new offence but with their duty to act in order to remove from the common law a fiction which had become unacceptable. Lord Keith saw the decision as an example of the ability of the common law to evolve in the light of changing social, economic and cultural developments.

Guidelines for Judicial Law-Making

In two subsequent cases, the House of Lords declined to change the law on the ground that to do so was the province of Parliament:

1. In *R v Clegg*[46], it had been argued that the House should make new law by creating a new qualified

[36] [1898] AC 375
[37] [1966] 3 All ER 77
[38] [1972] AC 877
[39] [1929] AC 358
[40] [1976] AC 443
[41] [1961] AC 1007
[42] [1987] 2 WLR 568
[43] [1975] AC 653
[44] [1992] 1 All ER 832
[45] [1991] 4 All ER 481
[46] [1995] 1 All ER 334

defense available to a soldier or police officer acting in the course of his duty of using excessive force in self-defense, or to prevent crime, or to effect a lawful arrest, which would have the effect of reducing murder to manslaughter. However, Lord Lloyd, though not averse to judicial law-making and citing *R v R* as a good recent example of it, declared that he had no doubt that they should abstain from law-making in the present case since the reduction of murder to manslaughter in a particular class of case was essentially a matter for decision by Parliament, and not for them as a court, to decide upon. That point in issue was part of the wider issue of whether the mandatory life sentence for murder should be maintained. These issues can only be decided by Parliament.

2. In *C v DPP*[47], the House referred to the anomalies and absurdities produced by the rebuttable common law presumption that a child between the ages of 10 and 14 is incapable of committing a crime. Nevertheless, their Lordships refused to abolish the presumption, preferring instead to call upon Parliament to review it. Lord Lowry gave the following guidelines for judicial law-making:
    1. judges should beware of imposing a remedy where the solution to a problem is doubtful;
    2. they should be cautious about making changes if Parliament has rejected opportunities of dealing with a known problem or has legislated while leaving the problem untouched;
    3. they are more suited to dealing with purely legal problems than disputed matters of social policy;
    4. fundamental legal doctrines should not lightly be set aside; and
    5. Judges should not change the law unless they can achieve finality and certainty.

On the issue of the treatment and punishment of child offenders Lord Lowry concluded that this was a classic case for parliamentary investigation, deliberation and legislation.

Recent Examples Of Judicial Law-Making

1. *In Gillick v W. Norfolk Area Health Authority*[48], the House of Lords was asked to consider whether a girl under sixteen needed her parents' consent before she could be given contraceptive services. One side claimed that teenage pregnancies would increase if the courts ruled that parental consent was necessary, and the other side claimed that the judges would be encouraging under-age sex if they did not. The House of Lords held, by a majority of three to two, that a girl under sixteen did not have to have parental consent if she was mature enough to make up her own mind. (Note: since Parliament had given no lead, the House of Lords had no option but to make a decision one way or the other.)
2. *In Re S (Adult: refusal of medical treatment)*[49], a health authority applied for a declaration to authorize the staff of a hospital to carry out an emergency Caesarian section operation upon a seriously ill 30 year old woman patient. She was six days overdue beyond the expected date of birth and had refused, on religious grounds, to the operation. The evidence of the surgeon in charge of the patient was that the operation was the only means of saving the patient's life and that her baby would not be born alive if the operation was not carried out. Stephen Brown P, made the declaration sought, in the knowledge that there was no English authority directly on the point. There was however, some American authority which suggested that if this case was heard in the American courts the answer would likely have been in favour of granting a declaration in these circumstances.
3. *In Pepper (Inspector of Taxes) v Hart*[50], the House of Lords allowed the use of Hansard as an extrinsic aid to the interpretation of statutes (subject to certain conditions). In doing so their Lordships declined to follow dicta in three of their earlier decisions.
4. *In Airedale NHS Trust v Bland*[51], the House of Lords considered the fate of a football supporter left in a coma after the Hillsborough stadium disaster. The court had to decide whether it was lawful to stop supplying the drugs and artificial feeding that were keeping the patient alive, even though it was known that doing so would mean his death soon afterwards. Several Law Lords made it plain that they felt that cases raising "wholly new moral and social issues" should be decided by Parliament, the judges role being to "apply the principles which society, through the democratic process, adopts, not to impose their standards on society". Nevertheless the courts had no option but to make a decision one way or the

[47] [1995] 2 All ER 43
[48] [1985] 3 All ER 402
[49] [1992] 4 All ER 671
[50] [1993] 1 All ER 42
[51] [1993] 1 All ER 821

other, and they decided that the action was lawful in the circumstances, because it was in the patient's best interests.

JUDICIAL PROCESS IN INDIA

Ancient India:-

The Policy of self-restraint was the governing principle in ancient India, which was based on norms of righteous conduct named Dharma[52]. There was no sanction and People used to follow Dharma on their own, because of its intrinsic merit[53]. However this ideal stateless society didn't last for a long time as some person out of, selfish worldly desires, began to flout dharma and created a situation of 'Matsyanyaya' (big fish devouring small fish). This situation forced the law abiding people to search for a remedy, which resulted in creation of the institution of kingship[54] and formulation of "Raja dharma" (law governing kings), which was the synthesis of all Dharma's[55]. The object of Raja dharma was to assist and support the achievement by individuals of the threefold ideal (Trivarga[56]), and to ensure that they secure wealth (Artha) and fulfil their desires (Kama) in conformity with Dharma and do not transgress Dharma. Dharma had a very wide connotation[57] involving social, moral[58], legal religious aspect. Since Dharma was entirely dependent upon the effective implementation of Raja dharma it was considered as supreme dharma.

Dicey regarded supremacy of law is an essential of the "rule of law" in 1885. This supremacy of Law has long before found prominence in the principles of Raja dharma, the constitutional law of ancient India.[59] Raja dharma is a classic example of trans-personalized power system which did not allow any personalized or depersonalized power to take over the requirements of justice.

[52] Ihering, R. Von, "LAW AS MEANS TO AN END".
[53] Kelson, H, "THE PURE THEORY OF LAW", University of California.
[54] Maine, Sir Hehry, "ANCIENT LAW", Oxford University Press.
[55] Maritain, J, "MAN AND THE STATE", University of Chicago Press.
[56] Rawls, J, "A THEORY OF JUSTICE", Oxford University Press, 1972.
[57] Dhavan, Rajiv, "LAW AS STRUGGLE: PUBLIC INTERST LAW MOVEMENT IN INDIA", Vol 36, 1991, Journal of the Indian Law Institute, pp. 302-338.
[58] Dhavan, Rajiv and Nariman, Fali, S, "THE SUPRME COURT AND GROUP LIFE: RELEGIOUS FREEDOM, MINORITY GROUPS AND DISADVATAGED COMMUNITES"(ed B. N. Kripal), Supreme but not infallible, Oxford University Press Delhi, 2001.
[59] Dhavan, Rajiv, "THE SUPREME COURT OF INDIA: A SOCIO LEGAL ANALYSIS OF ITS JURISTIC TECHNIQUES", N. M, Tripathi, Bombay, 1997.

ATTRIBUTES OF ANCIENT LEGAL SYSTEM

The main attributes of ancient Indian legal system as derived from social and legal literatures can be summarised as below:

- there was rule of law. Unlike western kings whose command constituted the imperative law, in ancient India Dharma (law) was a command even to the king and was superior to the king. Rules of Dharma were not alterable according to the whims and fancies of the king. The prevalent doctrine was that 'the law is the king of kings'. The doctrine that 'the king can do no wrong' was never accepted in our ancient constitutional system. If the king violated the Raja dharma the punishment prescribed for him was one thousand times more penalty than what would be inflicted on an ordinary citizen.
- Sources of laws (Dharmas) were based on following priority orders – Vedas/Shrutis, Dharmasastras, The Smrities, Mimansa, Nibandas or commentaries. Customs and sadhachars were also were also applied if they were in conformity to the Dharma's.
- there was separation of power. King had no legislative power; it was vested in a sabha (committee) of wise people. King had only corrective power, thus he could invalidate any custom if it was inconsistent with the Dharma but can't create a new law (Dharma). Though the court presided by the king was the highest court he had no direct role in judicial process where an elaborate system of judiciary consisting of royal courts[60] and people's tribunal was operational. King was required to exercise his judicial authority in accordance with the opinion of the judicial officers of the court who were under a clear mandate not to connive with the King when he acted unjustly. The judges were under an obligation to protect the Dharma even if their decisions were against the wishes of the King. Thus in ancient India there was independent judiciary and independent legislature.
- Access to justice was very easy. Raja dharma envisaged a mechanism wherein the mere fact of information of violation of one's right was enough to set the law into motion. The King,

[60] Baxi, Upendra, "THE INDIAN SUPREME COURT AND POLITICS", Eastern Book Company, Luck now, 1980.Dhavan, Rajiv, "JUDGES AND INDIAN DEMOCRACY: THE LESSOR EVIL" (ed Francine Frankel) Transforming India: SOCIAL AND POLITICAL DYNAMICS OF DEMOCRACY, Oxford University Press, Delhi, 2000.

under the codes of Raja dharma was bound to take cognizance, and therefore bringing a matter to his notice was enough to render it fit for judicial proceeding, to redress the grievances. Thus the king was supposed to restore the stolen property to its owner and if he failed in performance of his duties he had to pay the owner the actual cost of the stolen property.

- Procedures were not allowed to defeat the justice. Emphasis was on substance not on form. The method of inquiry was of inquisitorial nature where judge played an active role in bringing the truth and limited aliens (like modern advocates) were allowed so that parity of power can be maintained.,
- The principle of "the greatest good of the greatest number", according to which, in order to secure the good of a large number of persons, injustice could be caused to a small number of persons no application in Ancient India. The ideal laid down was that all the people should be happy (Sarve Janah Sukhino Bhavantu).

PARITY OF POWERS AND CRATOLOGICAL ANALYSIS OF ANCIENT INDIAN LEGAL SYSTEM (JUDICIAL PROCESS)

"Law is the king of the kings; nothing is superior to the law; the law aided by the power of the king enables the weak to prevail over the strong."[61]

The beauty of this verse is that it emphasis on the parity of power between the parties and if there is no parity of power than it is the duty of the king i.e., executive to provide help to the disadvantaged so as effectuate the equality principle. It also shows that the law was recognised as a mighty instrument for the protection of the individual rights and liberties. Whenever the right or liberty of an individual was encroached upon by another, the injured individual could seek protection from the law with the assistance of the king, however, powerful the opponent (wrong doer) might be. Thus there was parity of powers between the individuals to seek the equal protection of laws.

CRATALOGICAL ANALYSIS OF ANCIENT JUDICIAL PROCESS

If we analyse the ancient legal system on the basis of power spectrum, we can say that all six power spectrum bands are balanced in equilibrium to give a just legal system because head count was satisfied with a very high degree, time count was also satisfied because of quick contemporary judgments, ethical count is satisfied because law (Dharma) was the shared conviction of the society having maximum social and moral values, coercion band is satisfied because Praja (people) and Prajapalak(king) both were to follow the dharma in their conduct, interest and influence count is satisfied because vesting of power was in depersonalised manner avoiding the arbitrariness and king was subordinate to the Raja dharma, besides it just upholding the interest of the public and having positive influence to mass was the rule.

JUDICIAL PROCESS IN PRESENT TIME: DEVELOPMENT AND CREATIVITY

After independence India adopted a normative constitution. The present Indian judicial process is governed by British imposed adversary system even though there is no mention of it in the constitution. Main attributes of this system can be understood under following heads:–

1. ACCESS TO JUSTICE

The term access to justice is variable according to the variation of the definition of justice, earlier access to justice meant merely the aggrieved individuals formal right to litigate or defend a claim but now it means an equal right of having recourse to an affordable, quick, satisfactory settlement of disputes from a credible forum.[62] Modern access to justice can categorize into formal and informal access to justice. The formal access to justice is basically adjudication of disputes by the courts which follow the rules of Civil and Criminal Procedure. Whereas informal access to justice includes alternative modes of dispute resolution such as Arbitration, Conciliation, Mediation, Lok adalats and Nyaya-Panchayats, which are merely of supplementary nature to the court system. They are not bound by the provisions of C.P.C and I.P.C but have to follow the principles of natural law. Informal and formal modes of justice both are against the principles of parity of law devised by Article 14 of the constitution, because in informal modes of access to justice one has to often compromise with his legal rights in interest of time, cost of money etc. which is very much against the guarantee of Article 14 and duty imposed on state therein.

2. HURDELS IN ACCESS TO JUSTICE:

Formal modes of access to justice also has many drawbacks which are discussed below-

[61] Dhavan, Rajiv, "JUDICIAL DECISION MAKING: THE CHALLENGE OF DEMOCRACY", Faculty of Law, Delhi, 1979.

[62] Dworkin, Ronald, "JUDICIAL DISCRETION" (1963) 60 Journal of Philosophy 624.

1. **Law of limitation**[63]: The aggrieved person has to satisfy first of all that his suit is not barred by the law of limitation act 1963 and if barred by law of limitation the judge may or may not entertain his suit. Thus it is absolutely denial of Article 14 which imposes unqualified duty on state to provide equal protection of laws, and is anathema to any kind of arbitrariness. Law of limitation is nothing but a restatement of exploiting British imposed law of limitation act, thus it is also hit by Article 13(2).
2. **Court fees**: With the institution of the suit a court fees is required which is determined by the court according to the provisions of the court fees act of 1870, and on failure to pay the court fees or postal charges the suit may be dismissed[64]. This high cost of court fees compels the litigants to abandon their just claims and defences. Here justice is not given but sold. Thus court fees act is unconstitutional under Article 13(2) read with Article 14, which was originally a method of raising fund and exploitation by ruler on ruled so that there can be less accountability of the state .It also does not satisfy the ethical, time and other essentials of the power spectrum[65].
3. **Advocacy:** Advocates are inseparable part of the adversarial system, wherein the role of judge is like a referee who decides the case on account of the performance of the both parties advocates. He never intends to provide the justice by bringing the truth, but to award the best competitor. Thus in this situation, the determining factor for the judicial process and justice is the competency of lawyer which depends upon the financial capacity of the party, which results in absolute denial of the parity of power guaranteed by Article 14.
4. **Procedural hurdles**: After institution of the suit the aggrieved person has to go through the procedures of C.P.C or Cr.P.C which does not reflects the values of the constitution but the values chosen by the colonial masters. The main procedural hurdles can be summarised below -

(A* the aggrieved person has to prove that legal wrong has been committed against him by the defendant.

(B* the aggrieved person has to pay the cost of all kinds of judicial processes.[66] .

(C* Under adversarial criminal system the rule is that unless a person proved guilty beyond reasonable doubt he is innocent but these rule is violated by the courts, when court refuses to give the bail to the accused on ground of making a classification between Bail-able and non Bail-able offences under sec 436 and 437 Cr.P.C .

(D* DELAY : The aggrieved party has to face inordinate delay in getting justice due to unnecessary excess time given in filing of written statement ,counter statement, amendments in plaints, filing of unnecessary affidavit, Adjournment at every stage of the proceeding, Professional interest of the lawyer in prolonging the life of the suit, vexatious issuing of interlocutory orders, huge arrears of cases are other reasons for causing delay in getting justice Even if the aggrieved person get the decree its execution is not easy. Now justice is a generation to generation fight over one's legal right. Examples of delay can be seen in Bhopal gas tragedy case, Rudal Sah case[67], Mohini jain case[68] etc.

3. DELIVERY OF JUSTICE

Delivery of justice is basically the part and parcel of the executive branch of the government popularly identified as the access to justice through administrative authorities. Article 256 gives a supervisory power to the union over state for compliance of laws, and Article 356 read with Article 365 is the consequential result for non compliance of constitutional obligations by the state. But when the executive fails to perform his duty, the courts venture to deliver justice as a corrective measure. Article 14 casts a duty on the state which also includes judiciary to provide justice by giving equal protection of laws to all its citizens. But it has been seen that on many occasions judiciary has failed to provide the justice according to the provisions of constitution and statutes. Its analysis can be done through following

ROLE OF SUPREME COURT

By playing a vital role in the task of protecting human rights, the Supreme Court has made a positive contribution in this fertile field. In pre-*Maneka* era the

[63] Duxbury, Neil, "JURIST AND JUDGES: AN ESSAY ON INFLUENCE", Oxford, Hart Publishing, 2001.
[64] Stone,Julius, "THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC, JUSTICE AND SOCIAL CONTROL (Sydney, Maitland Publications, 1946;
[65] Joseph Raz, "PRACTICAL REASON NORMS", (London: Hutchinson, 1975).
[66] Krishna Iyer, V. R, "A CONSTITUTION MISCELLANY", Eastern Book Co, Luck now.
[67] Stone, Julius, "HUMAN LAW AND HUMAN JUSTICE", Third Indian Print, 2008, Universal law Publishing Co, Pvt, Ltd.
[68] Baxi, Upendra, "THE COLONIAL NATURE OF THE INDIAN LEGAL SYSTEM" in "THE CRISIS OF THE INDIAN LEGAL SYSTEM", New Delhi: Vkas, 1982, pp. 41-83.

judiciary assumed rather passive role. The turning point came in 1978 in *Maneka Gandhi's* case[69] when the Supreme Court held that any state action affecting life and liberty of a person has to be 'right, just, fair and reasonable and not arbitrary fanciful and oppressive'. Thereafter, there appeared era of progressive judicial activism for protection of human rights. In the post–*Maneka* period court's activism blossomed and flourished. A new trend was set in *Maneka Gandhi's* case. The Supreme Court, in its anxiety to protect human rights, has at times undertaken the roles of both organs of the government, the legislature and the executive. The Constitution does not confer such omnipotent power on the Judiciary. Judiciary has invented novel forms of action to provide relief to the poor, underprivileged, downtrodden sections of the society. Era of epistolary jurisdiction is emerging. Epistolary jurisdiction allows access to justice to the poor and the weaker section of the society. The court entertains a letter as writ petition ignoring all procedural norms and technicalities. The epistolary jurisdiction is a new strategy adopted by the judiciary for protection of the human rights of the vulnerable sections of the society. In O*lga Tellis v. Bombay Municipal Corporation*[70], one Journalist of Bombay claimed relief against demolition of hutments of pavement dwellers by the Municipal Corporation of Bombay. His letter to the Supreme Court was treated as writ petition and the court granted interim relief to pavement dwellers. In *Bandhua Mukti Morcha v. Union of India*[71], an organization dedicated to the cause of release of bonded labours informed the Supreme Court through a letter that there were a large number labours working in the stone-quarries situated in Faridabad District under inhuman and intolerable conditions and many of them were bonded labors. The court treated the letter as a writ petition. The court after inquiry ordered release and rehabilitation of bonded labors. In *Sunil Batra v. Delhi Administration*[72], the epistolary power had been invoked when a prisoner Sunil Batra had written a letter from Tihar Jail, Delhi to the Supreme Court informing about the torture in prison. A letter of two Law Professors of Delhi University informing the Supreme Court about inhuman and degrading conditions under which inmates of the protective home at Agra were living was treated as writ petition.[73] Directions given by the judiciary containing the manner in which protective home would be run is akin to legislative provisions and different from adjudicating of rights and duties of the parties. The judiciary is subjected to criticism like 'a post-card is more important than a fifty page affidavit'! Epistolary jurisdiction should be confined to exceptional cases of gross injustice. The people who have genuine public cause of sufficient gravity should only be permitted to utilize the precious time of the judiciary. There is no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life and personal liberty. But the judiciary has evolved a right to compensation in cases of illegal deprivation of personal liberty. *Rudal Shah v. State of Bihar*[74] is an instance of breakthrough in Human Rights Jurisprudence. The Court granted monetary compensation of Rs.35, 000 against the Bihar Government for keeping a person in illegal detention for 14 years even after his acquittal. The Court departed from the traditional approach, ignored the technicalities while granting compensation. In another case[75], a member of the Legislative Assembly of Jammu and Kashmir was arrested by the police *mala fide* and he was not produced before the Magistrate within the required time. Holding that his fundamental rights under Article 21 and 22 (1) were violated, the Court observed that when there is *mala fide* arrest, the invasion of constitutional or legal right is not washed away by his being set free and in 'appropriate cases' the Court has jurisdiction to compensate the victim by awarding suitable monetary compensation. The Court awarded Rs.50, 000 as monetary compensation by way of exemplary costs to the petitioner to compensate him. In *M.C.Mehta v. Union of India*[76], the Supreme Court held that the power of the Court under Article 32(1) is not only injunctive in nature, that is, preventing the infringement of a fundamental right, but it is also remedial in scope. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. The 'appropriate cases' are those cases where the infringement of fundamental right is gross and patent. It is considered unjust to ask the victim to go to the civil court for claiming compensation as it may take many years for the victim to get relief in a civil court. In *Nandini Satpathy v. P.L.Dani*[77], the Supreme Court observed that Article 22(1) directs that the right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be

[69] Maneka Gandhi v. U.O.I, A.I.R. 1978 S.C. 597.
[70] A.I.R. 1986 S.C. 180.
[71] A.I.R. 1984 S.C. 802.
[72] 1980 Cri.L.J. 1099.
[73] Upendra Baxi v. State of U.P., 1986 (4)SCC 106.
[74] A.I.R. 1983 S.C. 1086.
[75] Bhim Singh v. State of Jammu and Kashmir, 1985 (4) SCC 677.
[76] A.I.R. 1987 S.C. 1086.
[77] A.I.R. 1978 S.C. 1025.

denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. If an accused person expresses the wish to have his lawyer by his side when his interrogation goes on, this facility shall not be denied to him. *Nandini Satpathy's* case makes a clear departure from the literal interpretation stance of the Supreme Court taken in earlier cases. The case added an additional fortification to the right to counsel. Article 22(1) does not provide to arrested person, right to be provided with a lawyer by the State. However, in *M. H. Hoskot's* case[78] the Supreme Court did not hesitate to imply this right in Article 22(1) and Article 21 jointly while pressing into service application of a Directive Principle of State Policy under Article 39-A of Equal Justice and free legal aid. The Court observed that where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence and the ends of justice so require, assign competent counsel for the prisoner's defense, provided the party does not object to that lawyer. The State shall pay to assigned counsel such sum as the court may equitably fix. *Hussainara Khatoon's* case[79] reiterates the right of every accused person who is unable to engage a lawyer due to poverty, indigence or incommunicado situation, to have free legal services provided to him by the State for obtaining bail as well as for defense at the time of the trial. The court added a further protection to this right by holding that if free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated as contravening Article 21. The Supreme Court, while elaborating the scope of the right guaranteed under Article 21 observed in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[80] that right to life cannot be restricted to mere animal existence. It means something more than just physical survival. Right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. The Supreme Court ruled that the detent should be treated with more humanity and dignity than the under trial or a convict. He should be allowed greater freedom than allowed to an under trial or a convict as he stands on the higher rung of the ladder.

In the opinion of the Supreme Court no arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided.[81]

The judiciary, at times, is forging new tools, devising new strategies for the purpose of making fundamental rights meaningful for the large masses of the people. While treating a letter, addressed to the Supreme Court seeking release of bonded labors in the country, as a writ petition under Article 32 it was held that when the poor comes before the court, particularly for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure.[82]

In public interest litigation the court is taking affirmative action by issuing directions in cases of governmental inaction or lethargy. Scheduled caste residents of hilly area of Shimla district addressed a letter to the Chief Justice of Himachal Pradesh, High Court complaining that there was no proper road in their area. This not only affected their livelihood but also their development. They also pointed out that the sum allocated by the Government for the construction of the road was insufficient. The court treated the letter as writ petition and held that every person is entitled to life as enjoined in Article 21 and in the fact of this case read in conjunction with Article 19(1) (d) in the background of Article 38(2), right to life embraces not only physical existence but the quality of life and for residents of hilly area, access to road is access to life itself. The court also directed the Superintending Engineer of P.W.D. to proceed with the construction of the road and to complete the work assigned to it before the end of that financial year. The court further directed the Engineer to make an application to the State Government demanding an additional sum of Rs.50, 000 for the purpose and to report the progress in construction with regard to the case. The State of Himachal Pradesh filed a petition for special leave to appeal before the Supreme Court challenging the High Court's power to

[78] A.I.R. 1978 S.C. 1548.
[79] Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1377.
[80] A.I.R. 1981 S.C. 746.
[81] Joginder Kumar v. State of U.P., 1994 Cr. L. J. 1981.
[82] Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.

Regulate financial matters in the State under Article 226. The Supreme Court held that the High Court was within the limits of its jurisdiction in directing the P.W.D. authorities to complete the construction of a road in a poor and Harijan basti and also to the Government to make available an additional sum of Rs.50, 000 for the completion of the work.[83] It is submitted that the High Court in this case has exceeded its domain and taken over the functions of the executive.

In an unprecedented manner the Supreme Court, in *D.K.Basu v. State of W.B.*[84] issued 11 requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf. The requirements were held to be flowing from Articles 21 and 22(1) of the Constitution. In its anxiety to protect the interests of the arrested person, the court has exhibited an instance of judicial hyper-activism rather judicial waywardness. The case sounds death-knell to Montesquieu theory of separation of powers amongst three organs of the State. The Supreme Court arrogated to itself the constituent or at least legislative power in laying down these requirements. The Supreme Court while interpreting a provision of the Constitution may fill in the interstices but the zeal to create such interstices and then fill it should be deprecated. The judiciary should restrain from trespassing in the field of another organ under the guise of interpretation of the Constitution or doing complete justice. Though these eleven requirements comprise human rights jurisprudence and it would be in the fitness of the things, if these were law, these sweeping eleven requirements laid down by the Supreme Court, it is submitted, cannot have the status of law as its source is not legislature but judiciary. In *Chameli Singh v. State of U.P.*[85] it was held that the right to life as a human being is not ensured by meeting only the animal needs of a man. Right to live guarantee in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. Right to shelter includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all infrastructure necessary to enable them to live and develop as a human being. The Supreme Court did not hesitate to assume direct legislative function in the case of *Vishaka v. State of Rajasthan*[86]. In this case, the Supreme Court has virtually enacted a piece of legislation on the ground that there is a vacuum in the legislative field of sexual harassment of working women. There is a paragraph similar to the statement of objects and reasons. There is a definition clause and there are 12 points similar to 12 sections. The Supreme Court laid down some guidelines and norms which are directed to be treated as law.

CONCLUSION

The role of judiciary in the protection of human rights is certainly commendable. However, in the quest for socio-economic justice the judiciary seems to overstep the limits of its judicial function and trespass into the areas assigned to the executive and the legislature. The need of the hour is to properly balance the judicial activism with judicial restraint.

By playing a vital role in the task of protecting human rights, the Supreme Court has made a positive contribution in this fertile field. In pre-*Maneka* era the judiciary assumed rather passive role. The turning point came in 1978 in *Maneka Gandhi's* casei when the Supreme Court held that any state action affecting life and liberty of a person has to be 'right, just, fair and reasonable and not arbitrary fanciful and oppressive'. Thereafter, there appeared era of progressive judicial activism for protection of human rights. In the post–*Maneka* period court's activism blossomed and flourished. A new trend was set in *Maneka Gandhi's* case. The Supreme Court, in its anxiety to protect human rights, has at times undertaken the roles of both organs of the government, the legislature and the executive. The Constitution does not confer such omnipotent power on the Judiciary.

Judiciary has invented novel forms of action to provide relief to the poor, underprivileged, downtrodden sections of the society. Era of epistolary jurisdiction is emerging. Epistolary jurisdiction allows access to justice to the poor and the weaker section of the society. The court entertains a letter as writ petition ignoring all procedural norms and technicalities. The epistolary jurisdiction is a new strategy adopted by the judiciary for protection of the human rights of the vulnerable sections of the society. In O*lga Tellis v. Bombay Municipal Corporation*, one Journalist of Bombay claimed relief against demolition of hutments of pavement dwellers by the Municipal Corporation of Bombay. His letter to the Supreme Court was treated as writ petition and the court granted interim relief to pavement dwellers. In *Bandhua Mukti Morcha v. Union of India* iii, an

[83] State of H. P. v. Umed Ram Sharma, (1986) 2 SCC 68.
[84] A.I.R. 1997 S.C. 610
[85] A.I.R. 1996 S.C. 1050.
[86] 1997 (6) SCC 241.

organization dedicated to the cause of release of bonded labours informed the Supreme Court through a letter that there were a large number labours working in the stone-quarries situated in Faridabad District under inhuman and intolerable conditions and many of them were bonded labours. The court treated the letter as a writ petition. The court after inquiry ordered release and rehabilitation of bonded labours.

In *Sunil Batra v. Delhi Administration* IV, the epistolary power had been invoked when a prisoner Sunil Batra had written a letter from Tihar Jail, Delhi to the Supreme Court informing about the torture in prison. A letter of two Law Professors of Delhi University informing the Supreme Court about inhuman and degrading conditions under which inmates of the protective home at Agra were living was treated as writ petition Directions given by the judiciary containing the manner in which protective home would be run are akin to legislative provisions and different from adjudicating of rights and duties of the parties. The judiciary is subjected to criticism like 'a post-card is more important than a fifty page affidavit'! Epistolary jurisdiction should be confined to exceptional cases of gross injustice. The people who have genuine public cause of sufficient gravity should only be permitted to utilize the precious time of the judiciary.

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