Article 243-O and the Basic Structure of The Constitution : A Critical Analysis

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THERE is always a danger of the failure of democracy. Remember, democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy that did not commit suicide. We must realise that this is entirely true.

:John Adams

Introduction

Democracy is the basic structure of the Indian society from the ancient era. It remained present at all times at grass root level, thus the Panchayat system is well accepted throughout the society. Even much prior to creation of modern judicial systems Panchayat system was part of inherent social structure to resolve the controversial issues of the society at local level.

Ancient Panchayat system was initially part of the Constitution, but by the Constitution (seventh amendment) Act 1956, it was omitted. Though even after omission from the constitution it remains in practice in most of the states but it acquired the protection of Constitutional umbrella again by way of the Constitution (Seventy third) amendment Act 1992. Panchayat system became unified system with a given structure along with the Constitutional mandate, though earlier, it had been remained present in various forms and by the statutes of various states.

Article 243 O creates bar on the court to call in question the election of Panchayat except an election Petition. This provision creates bar on the power of judicial review, which is the basic structure of the Constitution of India. At the same time it gives unchecked powers to Election Commission/Authorities, which is alien to Indian Constitution. In the present article an effort is made to sketch a panorama of present legal status and to examine the art 243-O on the parameter of the basic Structure of the Constitution of India.

Part IX of the Constitution deals with Panchayats. Article 243B provides the Constitution of tri-level Panchayat system in every state, whereas Article 243E provides fixed term of 5 years for a Panchayat. Article 243 E (3) provides:-

(3) An Election to constitute a Panchayat shall be completed –
(a) before the expiry of its duration specified in clause (1);
(b) before the expiration of a period of six months from the date of its dissolution.

Article 243 K vests the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to the Panchayats in a State Election Commission. Election Commissioner shall not be removed from his Office except in like manner and on the like grounds as a Judge of the High Court and the Conditions of service of Chief Election Commissioner shall not be varied to his disadvantage after his appointment.

Article 243 – O provides Bar to interference by courts in electoral matters.

243 – O Bar to interference by courts in electoral matters – *Notwithstanding anything in this Constitution, -*

(a) The validity of any law relating to the delimitation of constituencies or allotment of seats to such constituencies made or purporting to be made under article 243 K, shall not be called in question in any court;
(b) *No election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the legislature of a state.*

Election process in Constitution of India

Being a democratic country free and fair election is the genesis of our Constitutional mandate. The entire scheme of the Constitution such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections. Part XV of the Constitution deals with the elections. Article 324 provide for an election Commission to conduct elections of both the houses of Parliament, Legislative Assemblies/ councils, President and Vice President of India. Article 324(5) provide service conditions of Chief Election Commissioner and specifically makes it clear that Chief Election Commissioner shall not be removed from his Office except in like manner and on the like grounds as a Judge of the Supreme Court and the Conditions of service of Chief Election Commissioner shall not be varied to his disadvantage after his appointment.

In this manner office of the election commissioner is also an example of inherent ingredient of the Constitution i.e. separation of power incorporated to ensure the independence of Election Commission free from interference of the Executive thus provide safeguards for free and fair elections.

Article 243 – O is at par with the Art 329 of the Constitution, available in Part XV of the Constitution. But the question arises that is it *pari materia* to art 329..? To be arrived at any conclusion a close observation on the article 329 is required.

329. Bar to interference by courts in electoral matters – *Notwithstanding anything in this Constitution, -*

(a) The validity of any law relating to the delimitation of constituencies or allotment of seats to such constituencies made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

(b) *No election to either house of parliament or to the house or either house of the state legislature shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the legislature.*

On conjoint reading of Art 329 and art 243 – O it clearly appears that art 243–O is simply application of Art 329 to the Panchayat Elections. Unfortunately the Constitutional validity of Art 243 – O is still to be examined, so in case of dispute it has been considered as *pari materia* to Art 329 by various Courts. Constitutional validity of Art 329 has been examined by Hon'ble Apex Court mainly in two cases and uphold its Constitutional validity.

First was the N.P. Ponnuswami Vs. Returning Officer[1] in which a Constitutional Bench of Hon'ble Apex Court considered various aspects. Fazl Ali j. while pronouncing his judgment for a 6 Judge bench described the word "Election" in these words:-

> ***The discussion in this passage makes it clear that the word "election" can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process. (Para 7)***

His Lordship further observed in Para 14 of the Judgment that:-

> ***I think it can be legitimately stated that if words similar to those used in Article 329 (b) have been consistently treated in England as words apt to exclude the jurisdiction of the Courts including the High Court, the same consequence must follow from the words used in Article 329 (b) of the Constitution. The words "notwithstanding anything in this Constitution" give to that article the same wide and binding effect as a statute passed by a sovereign legislature like the English Parliament.***

With utmost regard to the verdict given by his lordship, my humble submission is that Principle of Separation of Powers has no sanctity in England and Parliament is sovereign there, so question of limiting the powers of judicial review does not arise there. The same must be examined in light of the countries where Constitution are written and Sovereign, having independent Judiciary like India and incorporates Judicial Review as fundamental principle of the Constitution.

[1] AIR 1952 SC 64

Right from the beginning of the election process in modern English law, the election process has been considered beyond interference of the court especially in between. While citing view taken by Willes J. in Wolverhampton New Water Works Co. v. Hawkesford, (1859) 6 C. B. (N. S.) 336, at p. 356, and approved by the House of Lords in Nevile v. London Express Newpaper Ltd., (1919) A. C. 368 and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. 1935 A. C. 532 and Secretary of State v. Mask & Co., 44 Cal. W. N. 709; Fazl Al j. in Ponnuswami case held that when a specific remedy and its procedure is provided in a statute, either Supreme Court or High Court has no occasion to issue writ under its extra ordinary jurisdiction. Certainly representation Peoples Act provides specific remedy in the form of election Petition before duly constituted Election Tribunal, hence create specific bar of interference of the Court. So at last while summing the conclusions their lordship held:-

> ***16. The conclusions I have arrived at may be summed up briefly which are as follows:***
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> ***(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time-schedule and all controversial matters and the disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.***
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> ***(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election;" and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.***

Further in ***Durga Shankar v. Raghuraj Singh***[2] Hon'ble Supreme Court in conformity with the above dictum held "***We agree with the learned counsel that the right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution and when the Constitution provides a special remedy for enforcing that right, no other remedy by ordinary action in a court of law is available to a person in regard to election disputes***."

The decision of the Tribunal is final and conclusive as no remedy of Appeal is provided against the order of the Tribunal under the Representation of People's Act 1951. An appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself, so the part aggrieved by the Judgment of Tribunal will remain remediless. Court further clarified in ***Durga Shankar v. Raghuraj Singh***[3] that the powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in case whether the needs of justice demand interference by the Supreme Court. The Article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgment or order made by a court or tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions or for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this Article in any way.

In ***Hari Vishnu Kamath Versus Ahmad Ishaque***[4] Supreme Court considered a writ of 'certiorari' and for other reliefs against the order of Election Tribunal is maintainable under Articles 226 and 227 of the Constitution but an application under Article 226 challenging the validity of any of the acts forming part of that process would be barred. These are instances of original proceedings calling in question an election, and would be within the prohibition enacted in Article 329(b) and reaffirm the verdict in Ponnuswami Case.

The reason assigned to such a strict interpretation was that election process is the essence of Indian democratic system and must be completed within stipulated time frame and any delay may cause Constitutional crisis. Interference of high court or Supreme Court in their original Jurisdiction may lead to such crisis. Anybody may challenge the election process in between and hamper the entire election process.

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[2] AIR 1954 SC 520 (B)
[3] Ibid
[4] AIR 1955 (SC) 233 : 1955 (1) SCR 1104

Since above decisions were at very early stage and the Indian system was more or less growing under the shade of British system, and the concept of rule of law was on its way, though it was always essence of our constitutional system, courts required some time to elaborate it. Their lordship in his verdict found that article 329 (b) creates absolute bar on the powers of High Courts and Supreme Court under article 226 and art 32 leaving no scope for interference in the election process even in any situation, but the same required to be reconsidered. Some demarcation of use of powers in the election process was necessary. Ambit and scope of art 324 was also required to examine in light of alleged misuse of powers by the Election Commission. After Ponnuswami, the court had no power to interfere in the process of election in any condition and any irregularity, irrespective to its severity, could be examined only after completion of election by way of election Petition before appropriate Tribunal. Most of the time election Petition takes a long period and till the decision it become virtually *in fructuous*. In such a situation the candidates elected in violation of rule of law or principle of natural justice or even clear case of mala fide action of the authorities have been enjoyed the fruits of illegal actions of the authorities. Thus creates a question mark on the concept of free and fair election.

Supreme Court while explaining Art 329 (b) clarified the limitations of the court in its original Jurisdiction, but certain things required judicial appreciation and attention to ascertain the future of the Indian democratic system. Up to what extent Election commission is free from the application of the principle of natural justice ..? In case of violation of Constitutional provisions by the election commission during the election, whether the Court shall remain silent spectator …? Certainly, this situation warrants immediate intervention of the court.

Up to what extent Election commission is free from the application of the principle of natural justice ..?

Initially it was presumed that all the constitutional authorities shall act according to their jurisdiction and shall act to strengthen the very concept of the Constitution, so, though, check and balance was incorporated as inherent component of the Constitution, but the same was not done for the election commission. Such presumption was felt under threat after the case of Golaknath[5] and 24th Constitutional amendment. In Keshavanand Bharti[6] Hon'ble Supreme Court evolved the concept of basic structure of the constitution and created certain parameters and deadlines to limit the Constitutional authorities. In fact the court played the assigned role of the guardian of the Constitution. The effect of dictum in Keshvanand Bharti was felt on every aspect of judicial system.

The application of the principle of natural justice in the action of Election Commission was also denied by the apex Court in the case of Ponnuswami and the view taken therein was further affirmed in ***Durga Shankar*** and ***Harivishnu Kamath***. In ***Mohinder Singh Gill*** the concept of natural justice was accepted in its wider sense and it was held that the Election Commission is also bound with the principle of naturall justice in its action. Krishna Iyer J. while deciding the ***Mohinder Singh Gill's*** Case held:-

> ***"(56) NORMALLY, natural justice involves the irritating inconvenience for men in authority, of having to hear both sides since notice and opportunity are its very marrow. And this principle is so integral to good government, the onus is on him who urges exclusion to make out why. Lord Denning expressed the paramount policy consideration behind this rule of public law (while dealing with the nemo judex aspect) with expressiveness: "Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking 'the judge was biased'." We may adapt it to the audi atteram situation by the altered statement: "Justice must be felt to be just by the community if democratic legality is to animate the rule of law. And if the invisible audience sees a man's case disposed of unheard, a chorus of 'no-confidence' will be heard to say, 'that man had no chance to defend his stance'." That is why Tucker LJ in Russel v. Duke of Norfolk emphasised that 'whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case'. What is reasonable in given circumstances is in the domain of practicability; not formalised rigidity. Lord Upjohn in Fernatndo observed that 'while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable'. It is untenable heresy, in our view, to lockjaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is selfevident. Even in such cases a remedial hearing as soon as***

[5] I.C. **Golaknath** v. State of Punjab; AIR 1967 SC 1643

[6] **His Holiness Kesavananda Bharati** Sripadagalvaru and Ors. v. State of Kerala and Anr. AIR 1973 SC 1461)

> ***urgent action has been taken is the next best. Our objection is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural precondition of fair hearing, however minimal, even postdecisional, has relevance to administrative and judicial gentlemanliness. The Election Commission is an institution of central importance and enjoy far reaching powers and the greater the power to affect others' right or liabilities the more necessary the need to hear."***

The question remained unanswered in Ponnuswami and subsequent judgments regarding the application of principle of Natural justice in the action of Election Commission and up to what extent the court has no role to play and when court being the guardian of the constitution will or must interfere in case of violation of constitution or the court shall remain silent spectator and watch the violation of Constitution helplessly. Whether intention of the framers of the constitution was to grant absolute liberty to the Election commission in the matters related to the elections? The Supreme Court addressed this question in ***Mohinder Singh Gill Vs. Chief Election Commissioner New Delhi***[7]. While discussing the ambit and scope of article 324 in Para 38 of the Judgment, Krishna Iyer J. held:-

> ***(38) ARTICLE 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insist that if competent legislation is enacted as visualised in Article 327 the Commission cannot shake itself free from the enacted prescriptions. After all, as Mathew, J. has observed in Indira Gandhi In the opinion of some of the judges constituting the majority in Bharati's case Rule of Law is a basic structure of the Constitution apart from democracy. The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere. And the supremacy of valid law over the Commission argues itself. No one is an*** *imperium in imperio* ***in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.***

In this manner Court clarified that the Election Commission is not free from the application of the Principle of natural justice as the rule of law is the basic structure of our Constitution apart from the democracy and no authority is beyond this.

In case of violation of Constitutional provisions by the election commission during the election, whether the Court shall remain silent spectator..?

As stated above the remedy of filing Election Petition is available only after the completion of the Election Process but when the Writ Petition was filed on the very next day of the illegal rejection of the nomination of the Petitioner and even before declaration of the result of the Election. There was no scope of Election Petition. The Extra-ordinary circumstances were arose where the returning Officer in contravention to rules rejected the Nominations of all the candidates except one, which is not an election but virtually is a selection. The action of the returning Officer was preventing an election, not promoting it and the court's review of that order facilitated the flow, not stop the stream. Hon'ble Apex Court in ***Mohinder Singh Gill*** considered this aspect and in Para 34 of its Judgment held that

> ***"(34) ……..... But what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrarywise. For example, after the President notifies the nation on the holding of elections under S. 15 and the Commissioner publishes the calendar for the poll under S. 30, if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not.***

If, an action of the Election commission defeat the very soul of the democratic process ..?

[7] AIR 1978 SC 851

What would be the consequences if, an action of the Election commission defeat the very soul of the democratic process ..? The Election commission stop the flaw and not in support of the stream, like cancels all the nominations on one or other illegal grounds except of one candidate and declares him elected unopposed or election commission rejects nominations of the candidates of main opposition party on all the seats, or rejects nominations of candidates of all parties except one party on all constituencies are certainly the situations warrants immediate intervention of the court as the Apex Court in ***Mohinder Singh Gill***[8] held:-

> ***Because the Commissioner is preventing an election, not promoting it and the court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation," means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all."***

Krishna Iyer J. while pronouncing the judgment and upholding the Constitutional validity of Article 329-B in Para 79 of the Judgment further clarified that:-

> ***(79) WE have projected the panorama of administrative law at this length so that the area may not be befogged at the trial before the Election Court and for action in future by the Election Commission. We have held that Article 329 (b) is a bar for intermediate legal proceedings calling in question the steps in the election outside the machinery for deciding election disputes. We have further held that Article 226 also suffers such eclipse. Before the notification under S. 14 and beyond the declaration under Rule 64 of Conduct of Election Rules, 1961, are not forbidden ground. In between is, provided, the step challenged is taken in furtherance of, not to halt or hamper the progress of the election.***

In this manner, the rigid approach Hon'ble Supreme Court adopted in earlier cases specifically in Ponnuswami, diluted after Keshavanad Bharti [9]. Certainly at present article 329(b) has some exception or dilution, in Mohinder Singh Gill up to some extent, when the grave situation of arises and the action of the court should ***facilitate the flow, not stop the stream.*** Rejection of the nomination of all the candidates except one is the situation, when interference of Court is warranted.

This Hypothetical situation presumed by the Supreme Court came before it in the matter of **K. Venkatachalam vs. A. Swamickan[10]. In this matter** a person was elected for Tamilnadu Assembly from Lalguda Constituency and after one year of his election his election was challenged before High Court under Article 226 of the Constitution of India, on the ground that his name was not included in the electoral list of the Constituency. A Division Bench of High Court in Writ Appeal declared his election void being disqualification for being a member of state Assembly as contemplated under Article 173 of the Constitution read with Section 5 of the Representation of People's Act, which mandated that a person to be elected from an Assembly constituency has to be elector of that constituency. While deciding the Appeal Hon'ble Supreme Court held that in such a situation when no other remedy remains as the fact of the non inclusion of the name of the elected Candidate in the list of electorate, came into the knowledge of the Petitioner after one years of the completion of election process over, Bar under Article 329-B doesn't create any bar from applying writ Jurisdiction under Article 226. Wadhwa J. while pronouncing the judgment for division bench observed that:-

> ***Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?***

In this manner the Court diluted the law laid down in Ponnuswami Case and further affirmed in various judgments and even in Mohinder Singh Gill's Case, though left a leeway, finally held that Jurisdiction of High Court under Article 226 extends to entertain the Petition related with the election process.

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[8] Supra

[9] *Supra*

[10] 1999 AIR(SC) 1723

But above discussion is related with the Article 329 (b). Application of those decisions in the matters of Panchayat elections have been considered largely based on the principle of *pari materia* cases. Certainly Article 243 O is simply application of article 329 (b) in Panchayat Election Matters, but it create a huge difference in between, prevents to consider it as *pari materia* case.

Whether Art 243-O is *pari materia* to art 329 …?

It may be argued that Article 243-O is *pari materia* to article 329 but it is in fact not *pari materia* to article 329. The major difference between the provisions stands on a solid ground that article 243-O was inserted vide Constitution (seventy third amendment) Act 1992, enforced w.e.f. 24-4-1993, whereas the article 329 was the part of the original Constitution. In light of the dictum in Keshavanad Bharti and principle of basic structure of the Constitution, though article 329 also fails to pass the acid test, but it stand in safe zone, as it cannot be examined for the basic structure principle being part of original Constitution as adopted on November 26, 1949 and enforced w.e.f. January 26, 1950, but article 243-O has no such privilege.

In Keshavanad Bharti Case Hon'ble Apex Court derived the Principle of basic Structure of the Constitution. It was held that the Power of legislature to amend the Constitution is not absolute, but subject to the basic structure of the Constitution. **Hon'ble Sikri CJ** in Para 492 of the Judgment held that:-

492. To summarize, I hold that:

(a) Golak Nath's case, (1967) 2 SCR 762 = (AIR 1967 SC 1643), declared that a Constitutional amendment would be bad if it infringed Article 13 (2), as this applied not only to ordinary legislation but also to an amendment of the Constitution.

(b) ……..

(c) The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.

(d) ……..

(e) Article 368 does not enable Parliament in its constituent capacity to delegate its function of amending the Constitution to another legislature or to itself in its ordinary legislative capacity.

……..……..

Shelat and Grover JJ in Para 599 of this Judgment explained the concept of basic Structure and clarified that:

"599. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated).

1. The supremacy of the Constitution.

2. Republican and Democratic form of Government and sovereignty of the country.

3. Secular and federal character of the Constitution.

4. Demarcation of power between the legislature, the executive and the judiciary.

5. The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

6. The unity and the integrity of the nation"

Ray Cj, in his Judgment in Indira Nehru Gandhi Vs. Rajnarayan[11] held in Para 60 that:-

"(60) IT is true that no express mention is made in our Constitution of vesting the Judiciary the judicial power as is to be found in the American Constitution. But a division of the three main functions of government is recognised in our Constitution. Judicial power in the sense of the judicial power of the State is vested in the Judiciary. Similarly, the Executive and the Legislature are vested with powers in their spheres. Judicial power has lain in the hands of the Judiciary prior to the Constitution and also since the Constitution. It is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature or that the powers of the Legislature or the Executive should pass to or be shared by the Judiciary."

Whereas **Mathew J.** in the same subject held in Para 340 of the same Judgment that:-

"(340) IF it is contrary to the rule of law that discretionary authority should be given to government departments or public officers, then there is no rule of law in any modern State. A judge who passes a sentence has no other guidance except a statute which says that the person may be sentenced to imprisonment for a term which may extend to, say, a period of ten years. He must exercise considerable discretion. The High courts and the Supreme court overrule their precedents. What previously announced rules guide them in laying down the new precedents? A court of law decides a case of first impression; no statute governs, no precedent is applicable. It is precisely because a judge cannot find a previously announced rule that he becomes a legislator to a limited extent. All these would show that it is impossible to enunciate the rule of law which has as its basis that no decision can be made unless there is a certain rule to govern the decision."

Bhagwati J. while discussing the separation of powers and power of Judicial review in ***Minerva Mils Ltd. Vs. Union of India***[12] held that:-

"(87) IT is a fundamental principle of our constitutional scheme, and I have pointed this out in the preceding paragraph, that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of government are divided; the executive, the legislature and the judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J. (as he then was) in Indira Gandhi case "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged". Take for example, a case where the executive which is in charge of administration acts to the prejudice of a citizen and a question arises as to what are the powers of the executive and whether the executive has acted within the scope of its powers. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First, the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law the legislature has acted outside the area of its legislative

[11] AIR 1977 SC 69
[12] AIR 1980 SC 1789

competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore, created independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution."

In ***L. Chandra Kumar Vs. Union of India***[13] a 7 Judge bench of Hon'ble Apex Court held that:-

"(78) The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its' wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High courts and the Supreme court to test the constitutional validity of legislations can never be ousted or excluded."

The Court further held that:-

"(99) In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High courts and the Supreme court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution.

In concluding Para Hon'ble Supreme Court in ***I.R. Colho Vs. State of Tamilnadu***[14] held that:-

"In conclusion, we hold that :

[13] AIR 1997 SC 1125
[14] AIR 2007 SC 861

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in Kesavananda Bharati's case read with Indira Gandhi's case, requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. ……...

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in Indira Gandhi's case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.

(vi) Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge"

In light of the above legal proposition, Article 243-O, added by 73rd amendment is subject to judicial review on the parameter of destruction of basic structure of the Constitution.

Article 243-O brings away the Power of Constitutional Court i.e. Power of judicial review of High Court provided under Article 226 of the Constitution of India. Power to amend the basic structure lies with the sovereign i.e. the People of India, not with the Parliament, a creature of the Constitution. Article 243-O thus not valid as it hits the basic structure of the Constitution of India.

Conclusion

In India, People are sovereign and Constitution is supreme. Judicial review is very soul of the Constitution. Any Constitutional amendment which ousts the jurisdiction of Court is against the principle of basic structure of the Constitution of India as Supreme Court led down in Keshvanand Bharti. Though Article 329 also ousts the jurisdiction of the Court, but the same is the part of the original constitution, which is supposed to be protected by the Court, hence court has no jurisdiction to examine or review original provision of the Constitution.

Article 329 has been examined in Ponnuswami and Mohinder Singh Gill cases and it clearly appears that strict interpretation has been diluted in Gill's case and in certain circumstances intervention of Court was permitted whereas in K**. Venkatachalam vs. A. Swamickan** interference of court under article 226 was found appropriate.

When the original bar created by the constitution under article 329 has been diluted to enable the courts to interfere in appropriate cases, although the provision can not be examined for its validity.

Article 243 O was added by 73rd amendment and hence subject to judicial review and can be examined for its validity on the principle of basic structure. The Article fails to qualify the test of basic structure of the Constitution and deserves to be treated accordingly.