CHAPTER 3
NOT ON THE LORD SHIVA'S TRIDENT

SYNOPSIS

Supreme Court & The Reach of Art 12 of the Constitution

"*No question is ever settled*
Until it is settled right"

—Ella Wheeler Wilcox (1855-1919), *Settle the Questions Right.*

1. The judiciary to "the state" as defined in Art 12 of the constitution

I

No political society in the world has preserved its historical fossils in the nooks and corners of its constitutional law with higher perfection and forte than what has been done in the United Kingdom. A distinguished expert is of the view that under the modern constitutional history of England the Sovereign is still the fountain of justice and the general conservator of peace of the realm. "In the contemplation of the law the Sovereign is always present in the court…."[1] And with this goes a commandment that the Sovereign is God's regent to look after the mundane matters of the body politic. This amazing fiction generated momentous consequences. When God's vice-regent is Himself present in the superior court, how can its decision be fallible? To contradict this proposition is a sacrilege, and amounts to a constitutional solecism. It is this line of thinking which made Prof. Holdsworth to recognize the theoretical impossibility of a judgment of a superior

1. O. Hood Phillips' *Constitutional and Administrative Law* 7th ed 371.

Court being a nullity, even if it had acted *coram-non-judice*, as "there is no legal tribunal to enforce that liability." Hence a conclusion was drawn ' the total immunity of the judges of the superior Courts.' In course of its constitutional history this idea was only marginally dented when it was held that a decision could be questioned if the error went to the very jurisdiction of the court, in contradistinction to the error made in the exercise of jurisdiction. But even this change illustrated a mere Brownian motion. The wheel came full circle to the same point. If the Court felt that there was no error going to jurisdiction, the judicial *ipse dixit* was itself a divine commandment. This view is a foil to another British constitutional shibboleth: the monarch can do no wrong. It had its ancestry in such pleas as those advanced by the Attorney General in the famous *Five Knights' Case* decided in the 17th century.

In our country all the organs of our constitutional polity are the creatures of the Constitution, hence none of them can transgress the constitutional limitations. But it is interesting to find that our superior courts are greatly enamoured of the British juristic fossils. The Constitution of the U.S. was framed on rejection of thesis judicially approved in the *Five Knight's Case* decided in the heyday of absolute monarchy in Britain. We have followed the U.S. model in our comprehensively written constitution with entrenched fundamental rights. Still the glamour of the British juristic tradition casts its spell in the various judgments of our Supreme Court. The British superior courts may, because of the immanent presence of God's vice-regent, be excusably wrong (or right?) in being an organ *sui generis* in the body politic, or even in claiming that it is an institution of some other world to tend the affairs of this world so that the rules of the realm are followed.

When this author read in some of the judgments of the apex judiciary that our superior courts are not the organs of the "State" for the purposes of the enforcement of fundamental rights, he felt, in a flash, that courts which held such a view must be wrong. His mind put a question itself: "Is our superior court on the trident of Lord Shiva?" Some say that Lord Shiva is Himself ever present in Kasi, others say that Kasi is nowhere bereft of sacred Shivalingam. In fact, it is on the Trident of Lord Shiva. The decision of our Supreme Court in *Rupa Ashok Hurra v. Ashok Hurra Case*[2] provided him an opportunity to examine this legal problem of great constitutional importance. Whole of the present chapter deals with this problem, and tries to answer: whether the superior judiciary is "the State" as defined in Article 12 of the Constitution of India; because, if it is, it must conform to fundamental rights conferred by Part III of our Constitution[3].

II

In *Rupa Ashok Hurra v. Ashok Hurra* our Supreme Court formulated the prime question with a prefatory comment as to its importance: to quote—

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2. AIR 2002 SC 1771 [S. P. Bharucha, C.J.I., S. S. Mohammad Quadri, U. C. Banerjee, S. N. Variava and Shivaji V. Patil, JJ].

3. H M Seervai, *Constitutional Law of India* 4th ed p.389.

> "In these cases the following question of constitutional law of considerable significance arises for consideration: whether an aggrieved person is entitled to any relief against a final judgment/order of this Court, after dismissal of review petition, either under Article 32 of the Constitution or otherwise."

The Court drew out a succinct resume of core reasons, which it tersely stated thus:

> "Having carefully examined the historical background and the very nature of writ jurisdiction, which is a supervisory jurisdiction over inferior Courts/Tribunals, in our view, on principle a writ of *certiorari* cannot be issued to co-ordinate Courts and a fortiori to superior Courts. Thus, it follows that a High Court cannot issue a writ to another High Court; nor can one Bench of a High Court issue a writ to a different Bench of the same High Court; much less can writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. Though, the judgments/orders of High Courts are liable to be corrected by the Supreme Court in its appellate jurisdiction under Articles 132, 133 and 134 as well as under Article 136 of the Constitution, the High Courts are not constituted *as inferior Courts* in our constitutional scheme. Therefore, the Supreme Court would not issue a writ under Article 32 to a High Court. Further, neither a smaller Bench nor a larger Bench of the Supreme Court can issue a writ under Article 32 of the Constitution to any other Bench of the Supreme Court. It is pointed above that Article 32 can be invoked only for the purpose of enforcing the fundamental rights conferred in Part III and it is a settled position in law that no judicial order passed by any superior Court in judicial proceedings can be said to violate any of the fundamental rights enshrined in Part III. It may further be noted that the superior Courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution."

After analyzing a set of well-known decisions[4], the Court held:

> "On the analysis of the ratio laid down in the aforementioned cases, we reaffirm our considered view that a final judgment/order passed by this Court cannot be assailed in an application under Art. 32 of the Constitution of India by an aggrieved person whether he was a party to the case or not."

The Court held that a writ of *certiorari* under Art. 32 could not lie to challenge an earlier final judgment of the Supreme Court. It also drew support for its view from the fact that the Supreme Court and the High Courts are "superior courts" and also "the court of records".

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4. *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr.* [AIR 1967 SC 1]; *A. R. Antulay v. R. S. Nayak and Anr.* [AIR 1988 SC 1531]; *Smt. Triveniben v. State of Gujarat* (1989 (1) SCC 678), and after referring to *Krishna Swami v. Union of India and others* (1992 (4) SCC 605); *Mohd. Aslam v. Union of India* (1996 (2) SCC 749); *Khoday Distilleries Ltd. and another v. Registrar General, Supreme Court of India* (1996 (3) SCC 114); *Gurbachan Singh and another v. Union of India and another* (1996 (3) SCC 117); *Babu Singh Bains and others v. Union of India and others* (1996 (6) SCC 565) and *P. Ashokan v. Union of India and another* (1998 (3) SCC 56). AIR 1988 SC 1531 : 1988 Cri LJ 1661, and after distinguishing *Supreme Court Bar Association v. Union of India and another* (1998 (4) SCC 409), and *M. S. Ahlwat v. State of Haryana and another* (2000 (1) SCC 278).

With respect it is submitted that the view taken in *Rupa's Case* is *per incuriam* for the following reasons:

(i) first, it is so with reference to the constitutional principles; and

(ii) second, it is so on authorities and precedents.

Both principles and precedents have led this author to a considered view that *Rupa's Case* needs a re-look by the Supreme Court earliest *pro bono publico*.

The plain language of Art. 12 of the Constitution shows that the 'judiciary' is an essential organ of the "State". The Article uses the expression "includes", not "comprises"[5]. The definition is 'inclusive', not 'expansive'. Besides, even this definition is made *subject to the context* as it says: "In this Part, unless the context otherwise requires…". Glanville Williams, explaining the concept of 'context', says:

> "It is, nevertheless, difficult to reconcile the literal rule with the "context" rule. We understand the meaning of words from their context, and in ordinary life the context includes not only other words used at the same time but the whole human or social situation in which the words are used."[6]

It is submitted that viewed in socio-political perspective there are good reasons for mentioning specifically "Parliament" or "Legislature"; but for not mentioning "Judiciary." Under the British Constitution, Judiciary was always considered an integral part of the government, but Legislature, in its modern sense, was for long not a part of government. No State can exist without a government but in most part of history government has functioned in many political societies without a formal legislature. A political society can organize itself even through coherent and comprehensive homespun social norms and customs. But it has never survived without a government. Judicial power always inhered in the governmental authority. It is its structure and the operative protocol that have changed in the different phases of the constitutional history. Writing in 1651 Thomas Hobbes, in his *Leviathan*, analyzed the different organs of the State (*civitas*)[7]. Judicature was

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5. "When two words such as *include* and *comprise* have roughly the same meaning, examination will generally reveal a distinction; and distinction between the present two seems to be that *comprise* is appropriate when the content of the whole is in question, and *include* only when the admission or presence of an item is in question: good writers say *comprise* when looking at the matter from the point of view of the whole, *include* from that of the part. With *include*, there is no presumption (though it is often the fact) that all or even most of the components are mentioned: with comprise, the whole of them are understood to be in the list." *New Fowler's Modern English Usage* 3rd ed by R W Burchfield.

6. G. Williams, *Learning Law* 11th ed p 104.

7. "NATURE (the art whereby God hath made and governs the world) is by the art of man, as in many other things, so in this also imitated, that it can make an artificial animal. For seeing life is but a motion of limbs, the beginning whereof is in some principle part within, why may we not say that all automata (engines that move themselves by springs and wheels as doth as a watch) have an artificial life? For what is the heart, but a spring; and the nerves, but so many strings; and the joints, but so many wheels, giving motion to the whole body, such as

(Footnote No. 7 Contd.)

considered an organ of the State. He did not refer to legislature as at that time it was not an organ of the State. His exposition is remarkable as it shows the accepted reach of the State in the 17th century. In his "*The Law of Free Monarchies*", James I held that judiciary and executive powers inhered in the King who was God's vice-regent on the earth. The despot could assert *"L'Etat, c'est moi"*. With the emergence of the constitutional government, whether under the sporadic charters and conventions, as in England; or through a written constitution (with a constitutional architecture divided into organs conceived and concretized on functional principles), as in the United States and India, ideas and institutions of constitutional governance underwent radical changes. The American Constitution, which provided us with a model of a written constitution with fundamental rights, was drawn up as a sub-conscious response to rejection of the Attorney-General's plea in the famous *Five Knights Case*. "Addressing the court in the *Five Knights' Case* (one of the state trials of Stuart England), the Attorney General, arguing for the Crown, asked, "Shall any say, The King cannot do this? No, we may only say, He will not do this."[8] It was precisely to ensure that in the American system one would be able to say, "The State *cannot* do this," that the people enacted a written Constitution containing basic limitations upon the powers of government."[9].

The makers of our Constitution, with the past in their mind, had every reason to refer to Parliament or the Legislature in Art. 12, but had no essential reason to refer to the 'judiciary' in the definition when it was "inclusive", and when the other constitutional provisions provided no scope for any other perception. Under the zeitgeist which shaped these ideas of our constitution-makers the traditional governmental functions of the yore had become transformed into the functions of the integral State[10] which, to say the obvious, included as its principal

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(Footnote No. 7 Contd.)

was intended by the Artificer? Art goes yet further, imitating that rational and most excellent work of Nature, man. For by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin, CIVITAS), which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defense it was intended; and in which the sovereignty is in an artificial soul, as giving life and motion to the whole body; the magistrates and other officers of judicature and execution, artificial joints; reward and punishment (by which fastened to the seat of the sovereignty, every joint and member is moved to perform his duty) are the nerves, that do the same in the body natural; the wealth and riches of all the particular members are the strength; salus populi (the peoples' safety) its business; counselors, by whom all things needful for it to know are suggested unto it, are the memory; equity and laws, an artificial reason and will; concord, health; sedition, sickness; and civil war, death. Lastly, the pacts and covenants, by which the parts of this body politic were at first made, set together, and united, resemble that fiat, or the Let us make man, pronounced by God in the Creation."

8. 3 Howell's *State Trials* 45 (1627).

9. Bernard Schwartz, *Some Makers of American Law* Tagore Law Lectures p. 37.

10. Woodrow Wilson (Jenks, Edward: *The State and the Nation* pp. 613-41) sums up the essential functions [of the State] as follows:

(1) The keeping of order and providing for the protection of persons and property from violence and robbery.

(2) The fixing of the legal relations between man and wife and between parents and children.

(Footnote No. 10 Contd.)

(Footnote No. 10 Contd.)

organ, judiciary, in charge of the administration of justice. The position of "local authorities" is different, as these have emerged in response to the political realities at grass roots of a democratic society.

The Court's observation in *Rupa's Case* that " the superior Courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution" is a mere judicial *ipse dixit* as this view, it is submitted, is unsustainable both on constitutional principles and authorities. This Hon'ble Court would have got a right answer if a right question would have been framed. The right question is "whether the Judiciary is "the State" as defined in Art. 12?" If it is so, it must conform, *ipso jure*, to fundamental right conferred by Part III of our Constitution. Dr D.D. Basu has rightly stated[11]:

> "The assumption that even when the fundamental right of an individual is affected by a judicial decision, the only remedy of the aggrieved party is by way of appeal ignores the patent fact that Art 32 is an overriding and additional constitutional remedy which takes no account of appeal or other remedies, even though appeal to the Supreme Court has been separately provided for. The right to move the Supreme Court for the enforcement of a fundamental right is *guaranteed* by Art. 32. But an appeal under Art. 136 is by special leave which is in the discretion of the Court and which cannot, therefore, be a substitute of the 'guaranteed' remedy under Art. 32. It is nowhere laid down in the Constitution that Art 136 will exclude Art 32."[12]

The reasons that Dr Basu has stated make out a good case for invoking remedy under Article 32 of the Constitution even after exhausting remedies available under Art. 136 of the Constitution. This is so because the proceedings under Art 32 and those under Art 136 are materially different on certain vital points: to state a few with utmost brevity:

(i) Art. 32 of the Constitution confers a guaranteed fundamental remedy but Art 136 or Art. 226 confers no such guaranteed rights. This state of affairs makes Art 32 a dominant and specific provision whereas Art 136 or Art. 226 are, in the context of the enforcement of the fundamental rights, clearly general and additional.

(ii) Dr Ambedkar who was at the most conscious point in the process of our constitution making, described Art 32 of the Constitution as "the very

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(3) The regulation of the holding, transmission and interchange of property, and determination of its liabilities for debt or for crime.
(4) The determination of contract rights between individuals.
(5) The definition and punishment of crime.
(6) The administration of justice in civil cases.
(7) The determination of the political duties, privileges, and relations of citizens.
(8) Dealings of the State with foreign poers; the preservation of the State from external danger or encroachment and advancement of its international interests." Quoted in Eddy Asirvatham & K.K. Mishra, *Political Theory.*

11. Basu, Commentry on *the Constitution of India* p.316 discussing Art 12.

12. *Himmatlal v. State of M.P.* (1954) S C R 1122,1128; *State of Bombay v, United Motors* (1953) SCR 1069; *Kochunni v. State of Madras* AIR 1959 SC 725, 730.

soul and the very heart of the Constitution". Art 136 that provides a discretionary remedy cannot be elevated to the point to be considered the very soul of the Constitution. The soul of the Constitution cannot be at the discretion of anybody, not even of the guardian of the Constitution or its acknowledged upholder.

(iii) The power of judicial review is derived from Art 32 of the Constitution. Our superior courts have considered Judicial Review a basic feature of the Constitution as such, even Parliament cannot curtail the reach of Article even by exercising its constituent power.

(iv) Dr Basu has aptly observed: "It is nowhere laid down in the Constitution that Art 32 will be excluded by Art. 136." No exclusion can be created; as such an exercise would be manifestly *without jurisdiction.*

(v) The Judiciary wields no constituent power to amend the Constitution as contemplated under Art. 368 of the Constitution. It is not permissible for the Supreme Court to bring about in any form a legal position which has the effect of amending Art 32: turning it into something of this sort:

> **Art. 32** *Remedies for enforcement of fundamental rights conferred by this Part.* ----The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed; however, the Supreme Court will not enforce that right if the petitioner under Art. 32(1) if he has availed of remedy provided under Art 136 or that granted under the judicially devised Curative Procedure.

H M Seervai in his *Constitutional Law of India* states the correct constitutional perspective, which can lead to a correct answer to the question under consideration[13], thus:

"We must now consider whether the Judiciary is "the State" as defined in Art. 12, because if it is, it must conform to fundamental right conferred by Part III of our Constitution. Article 14 (Right to Equality) provides: *'The State shall not deny* to any person equality before the law or *the equal protection of the laws within the territory of India."* In our Constitution, the italicized words have been borrowed from the 14th Amendment to the U.S. Constitution, which provides: "Nor shall any State…deny to any person within its jurisdiction the equal protection of the laws." Art. 14 is one Article in which our Courts have drawn most heavily on the decisions of the U.S. Sup. Ct. Our courts have adopted doctrine of "classification", evolved by the U.S. Sup. Ct. In the United States, it is well settled that the judiciary is within the prohibition of the 14th Amendment. A standard textbook[14] states the position thus:

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13. 4th ed, pp. 389-390 13th ed. p.144.
14. The Constitution of the United States of America, Analysis and Interpretation 4th ed (Congressnal Edition) p. 1462.

> "The prohibitions of the Amendment have reference to action of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers of agents by whom its powers are exerted shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State Government….denies or takes away the equal protection of the laws, violates the constitutional inhibitions; and as he acts in the name and for the State and is clothed with the States' power, his act is that of the State."

The exposition of the relationship *inter se* the State and one of its organs, the "government", was at the heart of the matter before the U.S. Supreme Court in *Poindexter v. Greenhow* [15]:

> "In the discussion of such questions the distinction between the government of a State and the State itself is important and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and the State are subject to the supremacy of the Constitution of the United States and the laws made in pursuance thereof."

The U.S Supreme Court in the above passage propounds the theory of *ultra vires*, which with appropriate modifications applies to the exercise of the State power by *all organs of the State* in all the conceivable fields. This is the inevitable consequence in a political society with a government under constitutional limitations. David M. Levitan has put it felicitously when he observed: "Government just was not thought to have any "hip-pocket" unaccountable powers". [16] Examining the concept of *Sovereignty* as operative in a modern State *Oppenheim* observes:

> "The problem of sovereignty in the 20th Century. The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power and authority, conceived as the highest, underived power within the state with exclusive competence therein".

The constitutional government implies *division of power* amongst the three main organs of government: the executive, the legislature, and judiciary. "Pre-constitutionalist governments, such as the absolute monarchies of Europe in the

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15. 114 U.S. 184 at 192.
16. *The Yale Law Journal* Vol. 55 April, 1946, No 3 p. 480.

18th century, frequently concentrated all powers in the hands of a single person"[17]

Judges of the superior British courts: "Down to the reigns of James I and Charles I, judges in England (other than the Barons of the Exchequer) usually held office *durante bene placito nostro* (during the King's pleasure). Like other Crown servants, they could be dismissed by the King at will, although they seldom were…….at last the Act of Settlement (1700), which was to come into force when the Hanoverians ascended the throne, provided "that Judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them…The statutory provisions now in force are the Supreme Court Act 1981, s. 11…"[18] 'The true position, however, is stated by Anson: "the words mean simply that if, in consequence of misbehavior in respect of his office or from any other cause, an officer of state holding on this tenure has forfeited the confidence of the two Houses, he may be removed, although the Crown would not otherwise have been disposed or entitled to remove him…."' [19] The position under the Stuarts is summed up in these words by an expert:

> "…The most common visual description of this political community was the metaphor of body politic. Like human body, government and society were organic and their parts interdependent. Each element had its special and essential tasks to perform, without which the body could not function. At the head was the king; whose rule was based upon divine right and whose conception of his role in the state came closer to personal ownership than corporate management… The monarch's claim to be God's vice-regent on earth was relatively uncontroversial…"[20]

The status of judiciary in England, in contradistinction to that conceived and erected under the U.S. Constitution, is briefly brought out by Bertrand Russell while dealing with Locke whose philosophy shaped the thinking of the framers of the U.S. Constitution:

> "It is surprising that Locke says nothing about the judiciary, although this was a burning question in his day. Until the Revolution, the king could at any moment dismiss judges; consequently they condemned his enemies and acquitted his friends. After the Revolution, they were made irremovable except by an Address from both Houses of Parliament. It was thought that this would cause their decisions to be guided by the law; in fact, involving party spirit, it has merely substituted the judges' prejudice for the king's. However that may be, wherever the principle of checks and balances prevailed the judiciary became a third independent branch of government alongside of the legislature and the executive. The most noteworthy example is the United States' Supreme Court."[21]

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17. The Encyclopedia Britannica Vol 16 p. 692.
18. O. Hood Phillips' *Constitutional and Administrative Law* 7th ed p. 387.
19. Anson, *Law and Custom of the Constitution* (4th ed. Keith) Vol. II, Party I, pp. 234.
20. The Encyclopedia Britannica Vol 29 p. 54.
21. Bertrand Russell, *History of Western Philosophy* Chapter XIV "Locke's Political Philosophy.' p. 615.

Under the U.S Constitution it was never doubted that Judiciary was an organ of the State. Chief Justice John Marshall recognized this position in *Marbury v. Madison* holding 'Judic iary' a great department of the State:

> "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that

instrument.[22]" [*italics* used in the text].

In the United Kingdom the Sovereign is "the fountain of justice". In *M.L.Sethi's case,* Mathew J, tilted towards the view of Lord Denman in *R. v Bolton* (1841) 1 Q.B. 66 (that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry). The Court overlooked the specifics of the British Constitutional history wherein, for historical reasons, the Superior Judiciary is answerable only to God and the King. In para 6 of *Rupa's case* this Hon'ble Court observed:

> "In England while issuing these writs, at least in theory, the assumption was that the King was present in the King's Court."

Its full import becomes clear when certain fundamental principles of the British Constitutional history are taken into account. Holdsworth (*History of English Law* Vol. 6 page 239) refers to the theoretical possibility of a judgment of a superior Court being a nullity if it had acted *coram-non-judice*. But who will decide that question if the infirmity stems from an act of the Highest Court itself? He writes perceptively:

> ".....it follows that a superior Court has jurisdiction to determine its own jurisdiction; and that therefore an erroneous conclusion as to the ambit of its jurisdiction is merely an abuse of its jurisdiction, and not an act outside its jurisdiction ....." "....…In the second place, it is grounded upon the fact that, while the judges of the superior Courts are answerable only to God and the King, the judges of the inferior Courts are answerable to the superior courts for any excess of jurisdiction....." "Theoretically the judge of a superior Court might be liable if he acted *coram non judice*; but there is no legal tribunal to enforce that liability. Thus both lines of reasoning led to the same conclusion—the total immunity of the judges of the superior Courts."

In England the Superior Courts are answerable, as Holdsworth says, "only to God and the King". How can He or She go wrong? The very idea that a Superior Court can be fallible is alien to the British system. The typical British pos ition,

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22. Corsi and Lippm an, *Constitutional Law: A Political Science Casebook* p. 5.

which does not accord well with the constitutional polity of India, is succinctly stated by Glanville Williams thus[23]:

> "Their lordships take it amiss if the Court of Appeal announces that a decision of the House was *per incuriam*. On one occasion when the Court of Appeal did this and a further appeal was taken to the House of Lords, their lordships expressed strong disapproval. They regarded the action of the lower court, in the words of Lord Denning (speaking subsequently in the Court of Appeal), "as a piece of *lese-majeste*. The *House of Lords never does anything per in curiam*"[24],

The constitutional history of the United Kingdom is *sui generis* as it illustrates the national rhythm in which tradition and individual talent worked in closer synergy, which enabled its judiciary to ensure the presence of the past in the present with a skill, which is a marvel of jurisprudence[25]. The fundamental constitutional principle, theoretically valid to this date, had been stated by Blackstone (1723-1780):

> "That the king can do no wrong is a necessary and fundamental principle of the English constitution."[26]

It seems time stood still after the Proverb said: 'The heart of kings is unsearchable'. In fact, Alexis de Tocqueville felt there existed no constitution in England (*elle n'existe point*) in the sense of a superior, and fundamental law[27]. Only in this sort of political society its Attorney General in *the Five Knights Case* could say: "Shall any say, The King cannot do this? No, we may only say, He will not do this."[28] The framers of the U.S Constitution made a conscious and bold departure making all organs of the State subservient to a written constitution. We have followed the U.S. precedent. Hence under our Constitution there is no King or Queen with a pretence to function as God's vice-regent. The obiter dicta or casual dicta in the British cases quoted by our Superior Courts deserve to be treated with due reservation and discretion. It is altogether a different issue that the great British Society has an enormous, perhaps matchless, creative capacity to modernize itself in a way, again *sui generis*. . It is illustrated by the decision of the House of Lords in *R. v. Shivpuri*[29]. The House had decided *Anderton v Ryan*[30]

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23. Glanville Williams, *Learning Law* 11th ed.
24. *Fwellowes & Sons v. Fisher* [1976] Q.B. 132 E.
25. "…… certainly English government is very different today from what it was under William and Mary. But most of what has come after has been merely by way of amplification of the fundamentals sonorously restated in 1689. The sovereignty of the electorate, the supremacy of law, the legal omnipotence of Parliament, the right to personal liberty--- no one of these basic principles was ever again called in question by any persons or elements of sufficient force to threaten the long-developing regime that had been achieved,…"Frederic A. Ogg & Harold Zink, Moderen Foreign Governments (Macmillan) p. 16.
26. Commentary on the Laws of England III. 17.
27. *ibid* 25.
28. 3 Howell's *State Trials* 45 (1627).
29. [1986] 2 All ER H.L. 334 Lord Hailsham of St. Marylebone L C, Lord Elwyn-Jones, Lord Scarman, Lord Bridge of Harwich and Lord Mackay of Clashfern.
30. [1985] 2 All ER 355 Lord Fraser of Tullybelton, Lord Edmund-Davies, Lord Keith of Kinkel, Lord Roskill and Lord Bridge of Harwich.

on May 19, 1985. In *R v. Shivpuri* the correctness of Anderton was questioned before a palinode composed by one of the original authors of the majority judgment in *Anderton v. Ryan*. It was Lord Bridge. Lord Hailsham of St. Marylebone L C in his concurring speech observed:

> "But there is obviously much to be said for the view about to be expressed by my noble and learned friend that "If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better". This consideration must be of all the greater force when the error is, as in the present case, to be corrected by a palinode composed by one of the original authors of the majority judgment."

But that the judiciary is functionally an organ of the State is well recognized. This approach conditions the very definition of 'law' as given by Salmond[31]:

> "The law may be defined as the body of principles recognized and applied by the State in the administration of justice."

By and large we share the common law tradition. In *Att-Gen v BBC* [1980] 3 All ER 161 at 181 Lord Scarman recognizes that under the common law tradition, whether in the U.K. (with an unwritten constitution) or Australia (with a written constitution) the judicial power is a species of sovereign power [of the State]:

> '…. Though the United Kingdom has no written constitution comparable with that of Australia, both are common law countries, and in both judicial powers is an exercise of sovereign power I would identify a court in (or 'of') law, i.e. a court of judicature, as a body established by law to exercise either generally or subject to defined limits, the judicial power of the state…".

The judiciary exercises the judicial power of the State. Art 144 of the Constitution of India directs all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court.

In England the Superior Courts are answerable, as Holdsworth says, "only to God and the King", but under the Constitution of India there is no King or Queen. Then, to whom are our superior courts answerable? Our Constitution that we have given to ourselves contemplates no Grand Mughal. Our superior courts are answerable to the high institution of Judiciary itself. When a gross miscarriage of justice is brought to the notice of the same Court, the same is examined by it with detachment and objective reasonableness: Justice being the sole guiding star. Hence, in India miscarriage of justice can be remedied only under a system of institutional accountability in which the steadfast quest for justice is both common and constant. Superior Courts are answerable to themselves as institutions, *bound* by the very inherent logic of their existence to do complete justice.

There is no irrebuttable presumption that the Hon'ble Judges can never act unreasonably or arbitrarily. To hold this as an axiom would go against Part IVA

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31. *Jurisprudence* 11th ed p.41.

of the Constitution, which wants us to develop "scientific temper" which cannot be evolved without a spirit of inquiry. Freud would dismiss the notion of absolute rationality of anybody as a mere figment of delight, and absolute trust in any authority a sure road to disaster. Our literature provides us a suggestive story from which much wisdom can be derived. It is nuanced in the epic to turn into an expanded metaphor of deep import. The *Valmikya Ramayana*, in its Kishkindhakand (the Part dealing with what happened in Kishkindha), tells us a lot about Bali's guilt which invited the divine curial justice. Sugriva was the victim of his wrath. Lord Rama came to help him. He struck Bali with a fatal arrow from a hide. Bali was furious, and he charged the Lord in scathing words. His charges were well reasoned. The poet devoted a full canto to set them forth, succeeded by a canto wherein the Lord replies in his defence quoting authorities. He made it clear that even He was working under constitutional limitations. Tulsidas has laconically described Bali's charges in these two celebrated lines of the *Ramacharitmanasa:*

Dharma hetu avatarhu gosayin, mara mohi byadh ki nayi.

Main veri Sugriva piyara karan kawan nath mohi mara.

[O Lord! you came to ensure the triumph of *dharma*, but you have killed me behaving as an ordinary hunter. Tell me the reasons why have you discriminated me from Sugriva.]

Bali charged Rama invoking his Fundamental Right to Equality. Lord Rama neither lost temper nor brushed him off in the huff. He explained to Bali his cognizable faults. He explained his fundamental duties, which left him no alternative but to kill him. He does not silence Bali with any ex cathedra assertion. He justified his conduct with reference to binding authorities. He refers to the duties of king as mandated by the tradition and the *Manusmriti*. He suggested that even he was bound by dharma, which even he *cannot* break! Under our tradition even God is questioned. It is not so in the Bible. God was severely questioned by Job in the Book of Job in the Old Testament of the *Bible*. But God's answer was in a tone of commandment to make Job feel that it was foolish on his part to question or doubt the ways of God because He is infallible, and His ways are above the comprehension of the ordinary mortals. The Attorney General must have got his cue from this while arguing in the *Five Knights' Case* that it was atrocious to think of the King ever erring in his realm. This led the British jurists to erect a doctrine under their constitutional law that as the Sovereign was God's vice-regent ever present in the court, it was inconceivable to think that the superior court could ever go wrong inviting the operation of the prerogative writ for its correction. It is great that the judicial sensibility in modern democratic ethos has struck a new note. There is a good example of judicial responsiveness to the challenges of the day when Lord Bridge L.J. in *Goldsmith v. Sperrings Ltd*[32] expressed that there was no reason for the superior courts not to stand the test of

32. (1977) 1 W.L.R. 487: [1977] 2 All ER 720 C.A.

scrutiny to which is subjected the inferior courts: "Hence there is a breach of the rule of *audi alteram partem* which applies alike to issues of law as to issues of fact. *In a court of inferior jurisdiction this would be ground for certiorari; and I do not think that this Court should adopt in its own procedure any lower standards than those it prescribes for others.*"[33] (Italics supplied). To hold that the superior courts are not to be weighed and measured, but the other tribunals can be weighed and measured, is unfair. This accords well with what Lord Bridge has said.

All the standard textbooks on Political Science state that the elements of "State" are broadly four: (1) Territory, (2) Population, (3) Government, and (4) Sovereignty. The protocol of 'Government" is structured in accordance with the system of polity adopted by a political society." Judiciary" as an organ of government may be, *inter se* other organs, superior, co-ordinate, or even subordinate. But under no system judiciary can be conceived as existing outside the frontiers of the " State".

Ours is a written constitution, detailed and eclectic. Two broad features are noteworthy for the present discussion: these are---

(a) We have incorporated in Part III of our Constitution a set of Fundamental Rights by adopting many key provisions of the Bill of Rights under the U.S. Constitution. Explaining this feature H M Seervai writes[34]:

> "The incorporation of a Bill of Rights [35] was feature of the U.S. Constitution which the British Parliament consistently eschewed in the Constitution Acts enacted for Canada, Australia and India. As was to be expected this feature of the U.S. Constitution was adopted by the framers of our Constitution; By enacting Art.32 the Constitution created a new fundamental right, namely, the right to move the Sup. Ct by appropriate proceedings for the enforcement of the rights conferred by Part III entitled "Fundamental Rights".

(b) We, under our Constitution, have set up the *machinery of government* following "in essentials the British, and not the American model"[36]. Ours is a form of responsible government under which the executive is directly responsible to the Legislature, whereas the position is otherwise under the U.S. Constitution.

Our Supreme Court has committed, it is submitted, a fallacy of *petition principii* when it observed in *Rupa's Case*: "…. it is a *settled position* in law that no judicial order passed by any superior Court in judicial proceedings can be said to violate any of the fundamental rights enshrined in Part III" It is submitted with great respect that 'the settled position' is what emerges from what H. M. Seervai has stated succinctly:

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33. *Ibid* p.508.
34. *Constitutional Law of India* 4th ed. P. 159.
35. The first ten Amendments and the 14th Amendment to the Constitution.
36. Seervai, *Constitutional Law of India* 4th ed. P. 159.

> "It is difficult to understand why the possibility of a judge violating the prohibition of Art. 14 should be brushed aside by our Sup. Ct. as fanciful speculation---eminent judges in the United States have not considered the violation by the judiciary of equality clause of the Fourteenth Amendment to be fanciful, and have repeatedly asserted that the equality clause binds the judiciary as it binds the legislature and the executive. Violation of Art. 14 by a judge may be difficult to prove, but if proved it must be condemned under Art. 32…"[37].

Another noted jurist Dr D.D. Basu strikes the same note:

> "An analogous assumption that a court has the jurisdiction to decide right or wrong is an obsession following from the English notions about the status and functions of the courts. But the position must have changed after the adoption of the written constitution with a Bill of Rights."[38]

This passionate commitment to preserve and protect Fundamental Rights from acts of all authorities is felicitously expressed by the U.S Supreme Court in *Poindexter v. Greenhow*[39]:

> "Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle field and the scaffold, if their limitations and restraints upon power may be over passed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple and naked; and of communism, which is its twin; the double progeny of the same evil birth."

Under the U.S. Constitution, it is well settled that the judiciary is within the prohibition of the 14th Amendment. Two cases are referred as illustrations of this approach: *Ex p. Virginia*[40], and *Shelley v. Kraemer*[41]:

(a) The U.S. Supreme Court dealt with in *Shelley v. Kraemer* an important constitutional question invoking the Fourteenth Amendment: whether the state judicial enforcement of private restrictive covenants amounted to state action. "The Court concluded that, but for the act of intervention of the state courts, the restrictive covenants could not have been enforced to prohibit the purchase of homes by willing minority buyers."

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37. *Ibid* p. 394.
38. D.D.Basu, *Commentry on the Constitution of India* Vol A/1.
39. 114 U.S. 184 at 192.
40. (1880) 100 US 339, 346-47.
41. 334 US 1 C (1948).

The Court held[42] that the act of judicial intervention of the state courts led to the enforcement of the restrictive covenants in breach of the 14th Amendment. The judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan were reversed. At the outset Chief Justice Vinson, delivering the opinion of the Court, articulated the central issue in these words:

> "These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or colour from the ownership or occupancy of real property."

(b) It deserves to be noted that the Supreme Court of Missouri under Art V section 4(1) of the Missouri Constitution is a "Superior Court". It is also a Court of Record under Art. V. Section 12 of the Constitution. Article VI of the Constitution of Virginia declares its Supreme Court a Court of Record. A *court not of record* is an *inferior* tribunal. In *Ex p. Virginia* where a country court judge was indicted for excluding blacks from jury service. The Court observed: ' *Whoever …..acts in the name and for the State, is clothed with the State's power, his act is that of the State."* [Italics supplied].

Many Articles in Part III of the Constitution are clearly binding on the judiciary also. These are obviously Articles 20, 21, and 22 of our Constitution in which freedoms are declared in absolute terms. Article 14, after having been pragmatized by the doctrine of "classification", and humanized by the activist magnitude under the "New Doctrine" of the Right to Equality, remains the unswerving mandate to all the elements of the State. Discretion in issuing writs, orders etc. is counterbalanced by the constitutional duties. If the judiciary commits an unjust discrimination, its action is *ultra vires*. It is not inconceivable that the superior judiciary can violate, or prevent the violation of Art 20 of the Constitution.

In *Budhan Choudhry v. Bihar*[43] Das J.held that the inhibition of Art. 14 extends to all action of any one of the three limbs of State; but observed, quoting *Snowden v. Hughes*[44], that the Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of the State unless it is shown that there was "any element of intentional and purposeful discrimination". H M Seervai is correct in observing in his *Constitutional Law of India* that Das J. extracted one passage from the judgment of

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42. "….Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States… *These are the cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements…*"[Italics supplied].

43. AIR 1955 SC 191.

44. (1944) 321 U.S. 1, 88 L. ED. 497.

Frankfurter J. in *Snowden v. Hughes*[45], but missed another passage which is directly relevant:

> "And if the highest Court of a State should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situation, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws?"[46]

Our Supreme Court in *Budhan Choudhry Case* overlooked the import of these pregnant words just quoted. The rhetorical question framed by Justice Frankfurter is pregnant with much wholesome suggestion.

There are copious internal pointers in the Constitution itself that amply suggest that our Constitution has structured the Court under a set of clear limitations. Freedoms declared by Art. 20, 21and 22 were in terms absolute and were not liable to be tested on the touchstone of reasonableness[47]. Following matters appear to be excluded from the original jurisdiction of the Supreme Court, and are vested in other tribunals:

(i) Certain Disputes specified in the Constitution. Complaints as to interference with inter-State water supplies, referred to the statutory tribunal mentioned in Art. 262 read with s. 11 of the interstate water disputes Act (33 of 1956)

(ii) matters referred to the Finance Commission (Article 280)

(iii) Adjustment of certain expense as between the Union and the States (Article 290)

(iv) A reference to the Supreme Court under Article 143 (2) read with the proviso to Article 131.

After examining the point at issue H.M.Seervai comments:

> "Therefore if a writ of *certiorari* lies under Art. 32 for the enforcement of fundamental rights, it must follow that there are some fundamental rights, which can be violated by a judge acting judicially in a court *stricto sensu*. The referring judgment of Venkatarama Aiyar J. records that it was conceded, and it is submitted rightly, that there were certain Articles of the Constitution specifically directed against the judiciary, e.g. Art. 20 and that a violation by a court of Art. 20 would attract the writ of *certiorari* under Art. 32."[48]

Not even on the point of Public Policy the Hon'ble Court's view, that "it is a settled position in law that no judicial order passed by any superior Court in judicial proceedings can be said to violate any of the fundamental rights enshrined

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45. (1944) 321 U.S. 1, 88 L. ED. 497.
46. (1944) 321 U.S. 1, 88 L. ED. 497 citing *A. Baques Jr & Sons v. Fort Street Union Depot Co* 169 U.S. 567.
47. AIR 1967 SC 1, 38.
48. Seervai, *Constitutional Law* Vol I p. 394.

in Part III", can be considered sound. An examination of this judicial dictum from the point of Public Policy would show that public interest would not be promoted by making an organ of the State a law unto itself. We must have a forum to question every exercise of sovereign power even if it were by the apex judiciary. It would be good for our Republic not to romanticize any department of the State. With history in the marrow of our bones, it will be unwise to discount the wisdom, which Freud [49] stated in these ringing and suggestive words:

> "There is something to be said, however, in criticism of his disappointment. Strictly speaking it is not justified, for it consists in the destruction of an illusion. We welcome illusions because they spare us un-pleasurable feelings, and enable us to enjoy satisfaction instead. We must not complain, then, if now and again they come into collusion with some portion of reality, and are shattered against it".
>
> "In reality our fellow-citizens have not sunk so low as we feared, because they had never risen so high as we believed".

That this author is of considered view that our Supreme Court patently erred in *Rupa's Case* in answering the key question: whether the Judiciary is "the State" as defined in Art. 12. The Court rightly thought that if the Judiciary came within the meaning of the term in Art. 12 of the Constitution, it must not transgress the fundamental right conferred by Part III of our Constitution. And for the enforcement of such fundamental rights it would have no option but to exercise power under Art. 32 of the Constitution {unless it decides to draw on that source which Chief Justice John Marshall tapped with forte and finish in *Marbury v. Madison*[50]*)*. The Supreme Court mentions in *Rupa' Case:*

> "Having carefully examined the historical background and the very nature of writ jurisdiction, which is a supervisory jurisdiction over inferior Courts/Tribunals, in our view, on principle a writ of *certiorari* cannot be issued to co-ordinate Courts and a fortiori to superior Courts"

It appears that in making the afore-quoted observation, our Supreme Court erred both in history and at law. The reasons which have led me to this view are set forth, in brief, as follows:

(i) The "historical background" is neither correct nor comprehensive as the Court missed an immanent feature of British constitutional history that it always devises effective remedies to respond to the challenges of changing times. Lord Roskill aptly observed:

> "In short the orthodox view was at that time that the remedy for abuse of the prerogative lay in the political and not in the judicial field. But, fascinating, as it is to explore this mainstream of our legal history, to do so in connection with the present appeal has an air of unreality. To speak today of the acts of the sovereign as 'irresistible' and absolute' when modern

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49. Freud's Thoughts for the Times on War and Death, and Civiliz ation and its Discontent.
50. (1803) 1 Cranch 137, 177-79, 2 L ed. 60.

constitutional convention requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the continual development of our administrative law by harking back to what Lord Atkin once called, albeit in a different context, the clanking of medieval chains of the ghosts of the past; see *United Australia Ltd v Barclays Bank Ltd.* [1940] 4 ALL ER 20 at 37, [1941] AC I at 29. It is, I hope, not out of place in this connection to quote a letter written in 1896 by the great legal historian F W Maitland to Dicey himself; the only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law; see Cosgrove *The Rule of Law: Albeit Venn Dicey: Victorian Jurist* (1980) p 177. Maitland was in so stating a greater prophet than even he could have foreseen, for it is our legal history which has enabled the present generation to shape the development of our administrative law by building on but unhampered by our legal history"[51].

(ii) In *CCSU v. Minister for the Civil Service* Lord Brightman, Lord Fraser and Lord Roskill held that the contrary view, though good law in the days of Coke and Blackstone, has become 'archaic' as a result of the modern development of judicial review so succinctly explained by Lord Roskill who observed:

"Before considering the rival submissions in more detail, it will be convenient to make some general observations about the process now known as judicial review. Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed, a radical change in the scope of judicial review. That change has been described, by no means critically, as an upsurge of judicial activism. Historically the use of the old prerogative writs of *certiorari, prohibition* and *mandamus* was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals."

(iii) There is a good example of judicial responsiveness when Lord Bridge L.J. in *Goldsmith v. Perrings Ltd*[52] expressed that there was no reason for the superior courts not to stand the test of scrutiny to which it subjects other tribunals in course of the proper administration of justice.

Even this Hon'ble Court in *National Textiles-Workers' Union v. P.R. Ramakrishnan*, held that a judgment by any court in violation of natural justice was a nullity. Bhagwati J observed: "The *audi alteram partem* rule which mandates that no

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51. *CCSU v. Minister for the Civil Service* [1984] 3 All ER 935 at 955 H.
52. (1977) 1 W.L.R. 487.

one shall be condemned unheard is one of the basic principles of natural justice and if this rule has been held to be applicable in a quasi-judicial or even in an administrative proceeding involving adverse civil consequences, it would, *a fortiori*, apply in a judicial proceeding such as a petition for winding up of a company." Chinnappa Reddy J. adopted the same view by observing: "Courts even more than the administrators must observe natural justice."[53] Under the U.S jurisprudence this rule of justice expresses itself in the view that a conviction without granting an opportunity of being heard is contrary to "the immutable principles of justice"[54], and amounts, in effect, to an impermissible 'judicial usurpation'[55].

(iv) In the United Kingdom itself many technicalities pertaining the writs have been done away with. "Writs ceased to be issued in the name of the Crown after June 3, 1980: R.S.C. (Writ and Appearance) 1979 (S.I 1716). The reform was said to make writs less obscure and to ensure that they presented no obstacle to national susceptibilities when served outside the jurisdiction."[56] Hence in our country there is no reason why the technical rules of the writs should rule us from the grave. In fact, this point was in a way noted by our Supreme Court in *T. C. Basappa v. T. Nagappa*[57] where Mukharji J. said:

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases of English Judges. We can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

Explaining this observation H M Seervai writes:

> "With his usual perceptiveness Mukharji J, realized that the common law in England was constantly adjusting itself to new situations, and at times rediscovering powers which has remained unused. However, the "broad and fundamental principles", require to be placed in their proper setting, if the part which the prerogative writs played in English when our Constitution came into force, and the part which it plays today, is to be fully understood."

(v) It is well settled that the courts exercise supervisory jurisdiction in issuing the writ of *certiorari*. And the supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise. In such writs three elements are conspicuous:

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53. AIR 1983 SC 75, 90.
54. *Holden v. Hardy* (1898) 169 U.S, 366, 389.
55. *Galpin v. Page* (1873) 18 Wall. 350, 369.
56. Hood Phillips' *Const & Adm. Law* 7th ed p. 372.
57. AIR 1954 SC 440.

(a) the technicalities of procedure,

(b) the content and the reach of the writ, and

(c) the target of operation of the writ.

The account of the writ of *certiorar*i given in *Rupa's Case* is inapt in the context of our Constitution as there is no need to attach importance to (a) and (c) *supra* when these do not fetter the superior courts even in the United Kingdom. It is well settled that the technical rules of the Law of Evidence do not apply in the income-tax proceedings but the principles of evidence essential for the fair administration of law are always operative.

(vi) Our courts, which have made a plenty of judicial innovations by departing from the British practice, should make a creative response of the sort Lord Bridge L.J. made in *Goldsmith v. Perrings Ltd*[58] vide point (iii) *supra*. To illustrate this it is worthwhile to refer to A *R. Antulay v. R. S. Nayak*[59] wherein Sabyasachi Mukharji, J., speaking for the majority, said:

> "The principle in England that the size of the Bench does not matter is clearly brought out in the decision of Evershed M.R. in the case of *Morelle v. Wakeling*, (1955 (1) All ER 708) (supra). The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here, where larger Benches overrule smaller Benches…".

The "division of courts into superior and inferior courts for other purposes is not relevant to the issue of the writ of *certiorari* or prohibition. One of the lines dividing superior courts from inferior courts is that nothing is outside the jurisdiction of a superior court unless it is shown to be so, and nothing is within the jurisdiction of an inferior court unless it clearly appears. But this definition is irrelevant to the issue of a writ of *prohibition*, and it is submitted, also to the writ of *certiorari*."[60]

2. The irrelevance of the factor of a court being "superior" or "inferior"

The High Court or a smaller Bench of the Supreme Court is surely not a *subordinate* court vis-à-vis the others but must be treated "inferior" for the purpose of judicial control in appropriate cases. The whole confusion emanates from focusing more on the secondary meaning of the word "inferior" rather than its primary meaning. The *New Shorter Oxford Dictionary* would show that "subordination" is its tertiary sense. "It is submitted that the correct question to ask is whether the High Courts are inferior courts vis-à-vis the Supreme Court for the purpose of issuing writs of *certiorari* and other appropriate writs under Article 32. That the

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58. (1977) 1 W.L.R. 487.
59. AIR 1988 SC 1531.
60. H M Seervai, *Constitutional Law of India* 4th ed p. 397.

Supreme Court and the High Courts are not co-ordinate courts is clear from the fact that an appeal in all civil and criminal matters lies to the Supreme Court and even where no appeals are provided; the Supreme Court has power under Art. 136 to entertain an appeal from any determination by the High Courts at any stage."[61] In the context of this our Supreme Court states in *Triveniben v. State of Gujarat*[62] *per Shetty J.*:

> "This is undoubtedly a salutary Rule, but it appears to have only a limited operation. It apparently governs the procedure of a smaller bench when it disagrees with the decision of a larger bench. If the bench in the course of hearing of any matter considers that a larger bench should deal with the matter it shall refer the matter to the Chief Justice. The Chief Justice shall then constitute a larger bench for disposal of the matter. This exercise seems to be unnecessary when a larger bench considers that a decision of a smaller bench is incorrect unless a constitutional question arises. The practice over the years has been that a larger bench straightway considers the correctness of and if necessary overrules the view of a smaller bench. This practice has been held to be a crystallised rule of law in a recent decision by a Special Bench of seven learned Judges."

The Court relied on A. *R. Antulay v. R. S. Nayak*[63] wherein Sabyasachi Mukharji, J., speaking for the majority, said that under our practice the structure of the Court is hierarchic. The Court made out the following two points:

(a) In our Supreme Court the structure that has evolved is hierarchic where under " larger Benches overrule smaller Benches". The concept of "hierarchy within the Court itself" is one of seminal importance, as disobedience to this binding norm would render the decision in breach of the norm clearly without jurisdiction, hence *non est.*

(b) "This is the practice followed by this Court and now it is crystallized into a rule of law." *Crystallization* as a rule of law means the emergence of a binding rule of substantive law. In effect, the view is derived from the well-known maxim *Cursus Curlaef Est Luxe Curiae* (The practice of the Court is the law of the Court).

Thus it is admitted that as a superior court it has power to consider whether any matter falls within its jurisdiction or not. But two points deserve to be considered in this context:

(a) as an apex judicial body it is under a duty to itself and to the people to hold itself under constant self-introspection and criticism with ever readiness to swerve to the right course wherever it perceives this prudent to do;

(b) as an apex judicial body it should be in the best position to realize, as Lord Bridge did in *Shivpuri*[64] that the right perspective demands that:

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61. *Ibid* 398.
62. AIR 1989 SC 465.
63. AIR 1988 SC 1531.
64. [1986] 2 All ER 334.

> "If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better."

3. The irrelevance of the factor of a court being "the Court of Record"

Our Supreme Court erred in considering that the fact of a court being the Court of Record has any relevance to the exercise of power to issue the writ of *certiorari*. H M Seervai , after a detailed examination of this issue, writes:

> "Nor is it relevant to consider whether the court is a court of record or not, because the county courts in England are by statute constituted courts of record, and …Writs of *certiorari* lie to them"[65]

Black's Law Dictionary states that "the court of record " is "a court that is required to keep a record of its proceedings and that may fine and imprison people for contempt". The main features of the Court of Record are: (1) keeps a record of the proceedings, and (2) power to fine or imprison for contempt. But from the fact that it is a court of record nothing follows, directly or by implication, to support the judicial reasoning under examination.

4. Errors in *ratio* analysis of precedents cited

Our Supreme Court in *Rupa's Case, answered* the question it has posed before itself in these words:

> "On the analysis of the *ratio* laid down in the aforementioned cases, we reaffirm our considered view that a final judgment/order passed by this Court cannot be assailed in an application under Art. 32 of the Constitution of India by an aggrieved person whether he was a party to the case or not."

On the correct analysis of the cases discussed by the Court it is seen that none of the cases discloses any *ratio* to support the Court's aforementioned view. This author is driven to this view after a most careful analysis of the cases analyzed by applying the standard technique for determining the *ratio* of a case. Salmond in his *Jurisprudence* has mentioned the two methods for conducting analysis for *ratio* determination: one as recommended by Professor Wambaugh. This method is known as the

> "The **"reversal" test** of Professor Wambaugh.[66] It suggests that we should take proposition of law put forward by the judge, reverse or negate it, and then see if its reversal would have altered the actual decision. If so, then the proposition is the ratio or part of it; if reversal would have made no difference, it is not. In other

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65. H M Seervai, *Constitutional Law of India* 4th ed p. 397.
66. Wambaugh, *Study of Cases* 2nd pp 17-18.

words the *ratio* is a general rule without which the case would have been decided otherwise.[67]"

On the other hand, Dr Goodhart stressed on the material facts of a particular case: this method of determining ratio has come to be known as the "material facts" test. The test suggested by Dr Goodhart runs as under:

> "According to this, the ratio is to be determined by ascertaining the facts treated as material by the judge together with the decision on those facts... The "**material facts" test** is also valuable in stressing that propositions of law are only authoritative in so far as they are relevant to facts in issue in a case: a judicial statement of law therefore must be read in the light of facts of the case. And of course in the light of issues raised in the pleadings."[68]

In *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr*[69] the question raised before this Hon'ble Court was: whether the judiciary was "the State" as defined in Art 12 of our Constitution. This petition was moved by certain journalists for the enforcement of their fundamental rights under Art. l9 (l) (a) and (g) as they felt that the judge's order prohibiting the reporting of one Goda's evidence had the effect of violating their rights to the freedom of speech and expression. As Hidayatullah J delivered a dissenting judgment (allowing the petitions) his judgment is to be ignored for determining the ratio of the case. This accords with the judicially established practice as is clear from what Salmond says[70]:

> "A dissenting judgment valuable and important though it may be. Cannot count as part of the *ratio*, for it played no part in the court's reaching the decision."

Both the majority judgment (by Gajendragadkar, C.J.I., Wanchoo, Mudholkar, Sikri, and V. Ramaswami, JJ.) and the concurring judgments (by Sarkar, Shah, R. S. Bachawat) dismissed the petitions expressly limiting their decisions to the violation of the rights under Art 19(1) of the Constitution. The threshold principle was very perceptively set forth in the majority judgment:

> "As this Court has frequently emphasized, in dealing with constitutional matters it is necessary that the decision of the Court should be confined to the narrow points which a particular proceeding raises before it. Often enough, in dealing with the very narrow point raised by a writ petition wider arguments are urged before the Court, but the Court should always be careful not to cover ground which is strictly not relevant for the purpose of deciding the petition before it. Obiter observations and discussion of problems not directly involved in any proceeding should be avoided by courts in dealing with all matters brought before them: but this

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67. Salmond, *Jurisprudence* 12th ed. p. 180.
68. Salmond *Jurisprudence* 12th ed. p. 181.
69. AIR 1967 SC 1 Coram : P. B. Gajendragadkar, C.J.I., A. K. Sarkar, K. N. Wanchoo, M. Hidayatullah, J. C. Shah, J. R. Mudholkar, S. M. Sikri, R. S. Bachawat and V. Ramaswami, JJ.
70. Salmond, Jurisprudence, 12th ed. p. 183.

requirement becomes almost compulsive when the Court is dealing with constitutional matters."[71]

Once this Hon'ble Court came to the conclusion that there was no violation of the fundamental rights under Art 19(1), there was no necessity to make observations as to the relevance of Art 32 of the Constitution. H.M. Seervai has accurately stated the effect of the judgments when he says:

> "The majority view that a writ did not lie, clearly obiter because the point did not call for decision on the finding that the fundamental rights were not violated. But apart from being *obiter*, these observations are unfortunate, because, the majority judgment and the concurring judgments expressly confined themselves to the violation of Art 19…"[72]

On application of the **"reversal test"** it can be seen that there is no effect on the *actual* decision even if it is accepted that the judiciary is "the State as defined by Art. 12 of the Constitution of India". Once it is found that there was no violation of Art 19(1) no question survived to be considered whether a writ of *certiorari* could issue to a judicial body. To the same conclusion one comes by applying the " **material facts test**". The "material facts" before the Court were the following:

(i) In course of hearing held in public the Bombay High Court directed that the evidence tendered by Goda be not reported

(ii) Certain journalists filed an Art 32 Writ Petition contending that the judicial order prohibiting a report of the evidence was violative of their rights to the freedom of speech and expression guaranteed by Art 19(1)(a); hence a writ be issued for quashing the order.

(iii) This Hon'ble Court found that there was no violation of Art 19(1)(a). Only if the material facts would have shown a breach of the fundamental right under Art 19(1)(a), there could have emerged any question as to the appropriate constitutional remedy under Art 32 of the Constitution.

Dr. D. D. Basu has thus brought out the fallacy of this case in these words:

> "The assertion in the concurring judgment of Sarkar, J. [(1966) S C R 744 at p.774], that "a legally valid act cannot offend a fundamental right", offends against the very foundation of constitutional jurisprudence. As I have elaborately explained in my Tagore Law Lectures on Limited Government and Judicial Review, a written Constitution with justiciable provisions rests on a theory of higher law, which stands above the ordinary law. Not merely an act done under the ordinary law, but that law itself is liable to be unconstitutional and void if it contravenes the higher law embodied in the Constitution. Hence, the plea that the Executive or the Judiciary

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71. AIR 1967 SC 1 at p. 7 para 16.
72. H M Seervai, *Constitutional Law of India* 4th ed p. 396.

has acted in conformity with the law laid down by the Legislature would be no defence if the executive action or the judicial decision violates a mandatory provision of the Constitution, such as a fundamental right."[73]

Naresh Shridhar Mirajkar Case suffers from certain miscomprehension of the the *certiorari* jurisdiction in England. The Opinion of Gajendragadkar, C.J.I. that the writ of *certiorari* does not lay against an inferior civil court is based on wrong information. The assumption is based on the observation in *Halsbury's Laws of England*, 3rd ed Vol 11, 129-130 which stands corrected in the 1965 Supplement of Halsbury. Referring to this serious error, H M Seervai perceptively writes:

'We have said that the discussion in the majority and other concurring judgments about the nature of the writ jurisdiction is not satisfactory. It is not clear whether the majority judgment ourported to propound a theory of its own as regards the writ of *certiorari*, or whether it purported to follow the English authorities which it cited "incidentally."…'[74]

Our Supreme Court, it is submitted, erred in its view of what constitutes the *ratio* in *A. R. Antulay v. R. S. Nayak and Anr*[75]. A reading of all the five majority judgments of 7-Judges Bench shows that neither on the "reversal test" nor on "the material facts test" there is any *ratio* to support the judicial reasoning in the *Rupa's Case*. The material question was thus formulated:

"The main question involved in this appeal, is whether the directions given by this Court on 16th Feb. 1984, as reported in *R.S. Nayak v. A.R. Antulay*, (1984) 2 SCR 495 at p. 557: (AIR 1984 SC 684 at p. 718) were legally proper. The next question is whether the action and the trial proceedings pursuant to those directions are legal and valid. Lastly, the third consequential question is, can those directions be recalled or set aside or annulled in these proceedings in the manner sought for by the appellant".

Dr D. D. Basu has thus stated the right perspective in his Tagore Law Lectures:

"In view of the ample powers of revision under s. 115 of the Code of Civil Procedure and under Art 227 of the Constitution, the use of *certiorari* to quash the decision of a Civil Court does not appear in any reported decision. There is no reason, however, why *certiorari* cannot be resorted to quash the decision of a Civil Court on the ground of a defect of jurisdiction or error of law apparent to the face of the record, in proper case where the superior Court may be inclined to entertain it notwithstanding the existence of an alternative remedy by way of appeal or the like."[76]

Our Supreme Court held that the directions given by it in 1984 were given without jurisdiction as the directions had the effect of violating Antulay's fundamental right under Art. 14 of the Constitution of India. The Court granted him

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73. D.D Basu, *op.cit.* pp. 316-317.
74. H M Seervai, op cit p. 396.
75. AIR 1988 SC 1531.
76. *Limited Govt. And Judicial Review* p. 193.

remedy ex *debito justitiae.* It recalled its earlier directions and directed the conduct of trials in accordance with the law. The Court made the following vital observations:

(i) "…Gajendragadkar, J. reiterated that the powers of this Court are no doubt very wide and they are intended and "will always be exercised in the interests of justice." But that is not to say that this Court can make an order, which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasized that an order which this Court could make in order to do complete justice between the parties, must, not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."[77]

(ii) "But directions given *per incuriam*, and in violation of certain constitutional limitations and in derogation of the principles of natural justice can always be remedied by the court *ex debito justitiae*."[78]

(iii) "We are correcting an irregularity committed by Court not on construction or misconstruction of a statute but on non-perception of certain provisions and certain authorities which would amount to derogation of the constitutional rights of the citizen."[79]

(iv) "The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. *Ex debito justitiae*, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied. This is a peculiar fact of this case which requires emphasis."

In *A.R. Antulay. v. R.S. Nayak and Anr* remedy sought by the Writ Petitioner was granted by the Court as the direction given *ex debito justitiae* removed the petitioner's grievance fully. For him it hardly mattered whether his grievance was settled by resorting to a writ or order under Art. 32, or by a decision *Ex debito justitiae.*

5. On the " CONCESSION" by the counsels

In *Rupa's Case*, it is most respectfully submitted, our Supreme Court seriously misdirected itself:

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77. *Ibid* p1550 para 52.
78. *Ibid* p. 1558 para 77.
79. *Ibid* p. 1559 para 78.

(a) by basing its decision on the "concession" by counsels of both the sides having the effect of blurring the forensic focus by extinguishing the heat and light that a CONTEST inevitably generates; and

(b) by accepting their prayer that the only remedy under the circumstances should be granted is by way of Ex *debito justitiae,* which the Court delineated in *Rupa's Case* with constricted ambit, and narrow parameters.

To the extent the judicial determination in *Rupa's Case* is founded on the counsels' "concession", it cannot, on established juristic principle, be treated as an authority for the propositions formulated therein. Salmond thus states the correct legal position:

> "For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides…In course of his judgment, however, a judge may let fall various observations not precisely relevant to the issue before him…. Here of course, since the issue is not one that arises between the parties, full argument by counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to his actual decision[80]."

In *London Hospital v. I.R.C*[81]. Lord Brightman J. observed:

> "In conclusion I think it is desirable that I should make a brief reference to *Baldry v. Feintuck*. Counsel for the Medical College sought to rely on that case for the proposition that a Students Union is *prima facie* charitable. It is true that the motion proceeded on the footing that the Students' Union in that case was a charity. The contrary, however, was never argued. The point went by concession. I accepted the concession because I thought it correct. *But a case that proceeds on the basis of a proposition that is not tested by argument is not of much value as an authority for the validity of that proposition. Baldry v. Feintuck* has not, therefore, assisted me in reaching my conclusion"[italics supplied]

"Concession" is "something you agree to do or else someone else do or have, especially to end an argument or conflict."[82] An issue of great constitutional importance of the sort under judicial consideration should have been argued to full stretch. The concession by the counsels appears amazingly wrong. They failed in persuading the Court to charter the full realm of the doctrine of *Ex debito justitiae.*

Our Supreme Court, it is submitted, made a fundamental error by treating casual *obiter dicta* (it would hardly change perspective if they are treated '*considered dicta*") in *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr* and *A.R. Antulay v. R. S. Nayak and Anr as* the principles of the Cases. In *Orissa v.*

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80. Salmond, *Jurisprudence* 12th ed.
81. (1976) 1 W.L.R. 613.
82. *Collins Cobuild English Language Dictionary.*

Sudhansu Sekhar Misra[83] this Hon'ble Court cited with approval the following observations of the Earl of Halsbury L.C.:

> "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and every observation found therein nor what logically follows from the various observations made in it."

In *Ranchhoddas Atmaram v. Union*[84] this Hon'ble Court held that the observations in three of its decisions were not binding as "the question was never required to be decided in any of the cases and could not, therefore have been, or be treated as decided by this Court."

This author has not examined other decisions referred by our Supreme Court in *Rupa's Case.* As they merely follow the line of reasoning adopted in *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr* and *A.R. Antulay v. R. S. Nayak and Anr.*

This author's view set forth in this Chapter finds full support from eminent experts like H. M. Serevai and Dr D. D. Basu. Prof. V.N. Shukla is correct in writing his *Constitution of India*, (10th ed states at p. 26):

"H. M. Serervai for a forceful argument that judiciary is 'the State' even in the exercise of its judicial functions. This would also seem the view taken by Mukharji J. in *A R Antulay v. R S Nayak*[85] (1988) 2 SCC 602".

Though *Antulay* was decided on appeal under Art 136, and not under Art. 32 of the Constitution of India, the propositions formulated in the majority judgment clearly show that the Court would grant remedies under Art. 32 in an appropriate case.

6. Position under the Constitution of the Federal Republic of Germany

This author felt that his insight into the issues under consideration might be deepened by examining the constitutional position in one of the major civil law countries. Art. 1(3) of the German Constitution states:

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83. AIR 1968 SC 647 AT 651.

84. AIR 1961 SC 935.

85. "In our opinion, we are not debarred from re-opening this question and giving proper directions and correcting the error in the present appeal, when the said directions on 16th February, 1984, were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant, guaranteed by Articles 14 and 21 of the Constitution. The appellant has been treated differently from other offenders, accused of a similar offence in view of the provisions of the Act of 1952 and the High Court was not a Court competent to try the offence. It was directed to try the appellant under the directions of this Court, which was in derogation of Article 21 of the Constitution. The directions have been issued without observing the principle of *audi alteram partem*." Per Sabyasachi Mukharji J. (for himself, G. L. Oza and S. Natarajan JJ. Majority view) .

"The following basic rights are binding on legislature, executive, and judiciary as directly enforceable law."

Art. 20(2) mentions 'judiciary' as one of the specific organs of the state. It says:

'All State authority emanates from the people. It is being exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and judiciary."

Art 92 sets up a Court Organization. It vests judicial power in the Judges. Art. 97 declares the Judges independent and subject only to law. Art 98(1) provides for the legal status of judges in the Federation and the States. Art. 98(2) runs as under:

"Where a Federal Judge, in his official capacity or unofficially, infringes the principles of this Constitution or the constitutional order of a State, the Federal Constitutional Court may decide by two-thirds majority, upon the request of the House of Representatives, that the Judge be given a different office or retired. In a case of intentional infringement, his dismissal may be ordered."

7. "State" in Modern English Usage

The commonsense view that Judiciary is comprehended within the concept of 'State' is revealed in the usage of the term in the humanities in general. To illustrate: Jean Dreze and Amartya Sen state in course of their exposition of the Government, the State and the Market:

"The distinction between the state and the government may be of some significance in this context. The state is, in many ways, a broader concept, which includes the government, but also the legislature that votes on public rules, the political system that regulates elections, the role given to opposition parties, and the basic political rights that are upheld by judiciary."[86]

8. An Examination from the International Law Point of View: Judiciary is 'State'

It is a settled principle under international law that all the organs of the state, including judiciary, are bound to fulfill the state's international obligations.[87] In *Guincho Case* (1984) ILR, 78, p. 355, the European Court of Human Rights held that delays in national courts proceedings as a result of constitutional changes could only in exceptional circumstances constitute a justification for non-compliance with the state's human rights obligations.[88] After a masterly analysis *Oppenheim* mentions that even in exercise of judicial functions the judiciary is one of the organs of the state. He observes:

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86. Jean Dreze and Amartya Sen, *India; Economic Development and Social Opportunity.* p. 17.
87. *Oppenheim* p. 85.
88. *Ibid* 85.

> "… although often entirely independent of the government they are nevertheless organs of the state and their acts accordingly attributable to the state."[89]

He summarizes in the following words the relevant facts, which show that the judiciary is without doubt an organ of the state:

> "……If the courts or other appropriate tribunals of a state refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings are subject to undue delay, or if there are serious inadequacies in the administration of justice, or if there occurs an obvious and malicious act of misapplication of the law by the courts which is injurious to a foreign state or its nationals, there will be a 'denial of justice' for which the state is responsible (quite apart from the effect which such circumstances might have for the application of the local remedies rule). The state's responsibility will at least require it to take necessary action to secure proper conduct on the part of the court, and may extend to the payment of damages for the injury suffered as a result of the denial of justice."[90]

It deserves to be noted that when judiciary is considered "entirely independent of the government"; it refers to "government" *stricto sensu*, not in its generic sense. This meaning of "government" owes its existence to the constitutional history, which brought about democracy under a constitutional polity crafted under a written constitution. Chief Justice John Marshall in *Marbury v. Madison* boldly stated this:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case. This is of the very essence of the judicial duty."[91]

9. Conclusion

This Chapter, in its beginning, had formulated the following question:

> Whether the Judiciary is "the State" as defined in Article 12 of the Constitution of India, because if it is, it must conform to fundamental rights conferred by Part III of our Constitution?

The exposition made in the Chapter yields an answer in affirmative. The Judiciary comes within the concept of "State" as defined under Art. 12 of the Constitution of India: hence it must conform to fundamental rights conferred by Part III of our Constitution.

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89. *Ibid* 543.
90. Oppenheim's *International Law* 9th ed PEACE p.543-44.
91. 1 Cranch at 177-178.