

# Office of Profit under the Indian Constitution: A Judicial Perspective

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“He that hath a calling, hath an office of profit and honor”

– Benjamin Franklin

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## Abstract

The growth of every country will be determined on the basis of the pattern on which it is being governed by the concerned rulers and administrators. The governing authorities plays a very crucial and important role in developing the basic structure of governance in a very vast nation like India. Thus, in order to avoid the intricacies and ambiguities which may arise in the governing system, the Constitution of India from its very commencement clearly stated that the concerned officials in the legislative and executive wing of the government including the members of the state legislative assemblies and the members of the parliament must need to be refrained from holding any sort of office or institutions which helps to earn financial gains for them not in a purely lawful way. In pure constitutional perspective, these sorts of gaining can be considered to be the personal gains coming under the ambit of “office of profit” which is actually against the concerned law of the nation. Thus, the government and the rule making authorities should need to be refrained from all sort of activities which is not permissible by law in order for the smooth running and functioning of the Indian governing system including all forms of executive, legislative and administrative wings of the government. Thus, it is actually one of the high time to revisit the laws relating to the office of profit enshrined under our Constitution because in this digital age, at certain times, the ambit of office of profit is also being misused in one way or other by certain group of people in order to attain their ulterior and malicious political intentions which is actually against the law of the nation.

**KEYWORDS:** Office of Profit, Member of Parliament, Member of Legislative Assemblies, Constitution of India, Separation of Powers

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Date of Submission: 05-07-2023

Date of Acceptance: 16-07-2023

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## I. INTRODUCTION

As we all know, India has crossed its 75<sup>th</sup> year of independence last year but we are still not yet been full free from corruption and related illegal activities. The main key players of corruption to an extent are the politicians and the political parties itself. The various ruling governments who keep on changing from time to time make and implement laws in order to protect their ideologies and members and not for the common people. Thus, we can say that corruption is a way which negatively influence the corresponding officials who is in power. But do you think that corruption is the only way in which these top officials are getting influenced. No, several other ways are there. Actually, no one should be influenced in anyway while he holds any particular legislative or administrative position because all such influences are deemed to be illegal and unlawful in the eyes of law. Thus, all the persons should need to be free from all these forms of external influences.

For the effective administration, in order to promote the accountability and transparency as well as to protect the will an interest of the general common people, one should be away from all these forms of undue and unwanted external influences.<sup>2</sup> The government can remove or put an end to these forms of external influences by making proper checks and balances in their administrative system. The concept of “office of profit” was evolved from England where they ascertain and mention certain officers and officials as those who works under the “office of profit of the Crown.” This means that, such officials should need to work for the welfare of the nation and they are directly under the control of the British Crown and they should not be influenced by anyone or any form of external agencies relating to their professional works. Since India was also being administered by

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<sup>2</sup> Bruce Ackerman, The New Separation of Powers, Harvard Law Review, Vol. 113, No. 3, The Harvard Law Review Association, pp. 633-729 (2000)

the British Monarchy, the same system was adopted in British India too and the said system is being followed even after India became an independent-republic nation while we adopt our own Constitution.<sup>3</sup>

The concept of “office of profit” in India was first adopted in the Indian Councils Act of 1909 commonly known as the “Minto-Morley Reforms.” Lord Minto played a very crucial role in order to extend the democratic participation in the council of viceroy by giving chance for the representation of Indian’s as well even if it was not a great success at that time. The role of “Constituent Assembly” is also very important because the founding father of our Constitution has the unanimous opinion in order to adopt the principle of “office of profit” in order to prevent the misuse of the legislative powers. After the Constitution of India was adopted when India became a republic nation, the term “Any office or position of emolument” was replaced by the term “office of profit.”<sup>4</sup>

## **OFFICE OF PROFIT: A CONSTITUTIONAL PERSPECTIVE**

Nowhere in the Constitution expressly mentions or defines what the term “office of profit” actually means. But the role played by the judiciary from time to time in order to interpret the same is a very crucial element while we study the various aspects of “office of profit.” The term of “office of profit” actually very much related to the election and candidates who are contesting in the election but then also the said term “office of profit” is not even mentioned under the Representation of Peoples Act, 1951 also.

The major objective of having the ideology of “office of profit” is to preserve the principle of separation of powers mentioned by Montesquieu. That means the three organs, that is, the legislature, executive and the judiciary must need to be independent and free from each other but they all are interdependent in nature. The office of profit specifically relates to the separation and independence among the legislative wing and the executive wing.<sup>5</sup> That is why, it is expressly stated in the Constitution that “the Members of Legislative Assemblies and the Members of Parliament cannot contest in elections if they hold any office of profit” and if they do so, they will be deemed to be disqualified and will be removed from the said position. The main objective of the implementation of the aspect of “office of profit” is to prevent the intervention of the legislative wing from that of the executive wing. This is because, a person cannot act in a dual capacity and if he manages his legislative and executive functions together, then the principle of “separation of powers” will gets violated. These MLA’s and MPs should need to be separated from the executive wing in order to avoid influence of executive interference in legislative matters. Thus, there will not be any scope of conflict between duty and self-interest.

The amount or quantity of profit which they accrued by holding such an “office of profit” is irrelevant, the only material fact is that they should not hold any such “office of profit” while being in the legislative assembly or in the parliament, and if they hold such an “office of profit” they will be disqualified and found to a person who acts illegally in the eyes of law. Thus, as per the law, no one should possess “any other office” from which any sort of “profit” derives.<sup>6</sup> The said profit includes, pecuniary gains, materials gains and any other material or immaterial gains while holding the said office.

## **OFFICE OF PROFIT: AN INDIAN SCENARIO**

The following mentioned officials cannot hold any other “office of profit” while they are in power. This is to separate the intervention of legislative and executive wing in order for the proper and effective administration of the legal system and to uphold the principle of “separation of powers” as well.<sup>7</sup> The officials who cannot hold the “office of profit” while they are holding other designated positions are as follows,

- The President of India → Article 58 (2)
- The Vice President of India → Article 64
- Member of Parliament (MP) → Article 102 (1) (a)
- Governors and Lieutenant Governors/Administrators → Article 158 (2)
- Member of Legislative Assembly (MLA) → Article 191 (1) (a)

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<sup>3</sup> Shruti Bedi, Amendment in “Office of Profit” – A Dilution of the Spirit of the Indian Constitution, *Journal of the Indian Law Institute*, Vol. 48, No. 3, Indian Law Institute, pp. 409-424 (2006)

<sup>4</sup> Erica Lee Nelson, Conflict of Interest and Parliament, *Economic and Political Weekly*, Vol. 46, No. 19, pp. 68-73 (2011)

<sup>5</sup> Krishnapriya Loomba, Digest of Cases of Constitutional and Administrative Importance, *The Indian Journal of Political Science*, Vol. 19, No. 1, Indian Political Science Association, pp. 83-89 (1958)

<sup>6</sup> S J Bailey, Trusts. Remunerated Trusteeship as an “Office of Profit”, *The Cambridge Law Journal*, Vol. 12, No. 1, Cambridge University Press on behalf of Editorial Committee of the Cambridge Law Journal, pp. 55-57 (1954)

<sup>7</sup> Rustom S Gae, Office of Profit under the Government, *Journal of the Indian Law Institute*, Vol. 48, No. 3, Indian Law Institute, pp. 400-408 (2006)

Among all these, under the fundamental rights enshrined under Part III of the Constitution, Article 18(3) and Article 18(4), clearly mentions that “no person (citizen/non-citizen) of India who holds any office of profit under the Government of India can receive any “titles” from any foreign state without consent of the President of India. Thus, “office of profit” cannot be hold by any designated officials while he/she is holding another official legislative or executive capacity. Since the term “office of profit” is not expressly mentioned and defined under the Constitution and no such laws, statutes, enactments or legislations are there to define the ambit and scope of “office of profit”, the concerned Union or the State level governments has the right to specify which all offices or departments comes under the ambit of an “office” where a person holds such and such “office of profit” if he/she is being there as the holder of the office.

## **OFFICE OF PROFIT VIS-À-VIS INDIAN JUDICIAL SYSTEM**

From time to time, the judiciary plays a very crucial role in interpreting the term “office of profit” through various case laws. The court evolved several criteria to determine whether a particular official who holds an “office” can categorized as a “holder of an office of profit.” The following are the tests to determine to decide whether that particular office comes under the ambit of “office of profit”,

- Whether appointment to such an office for the official is made by the government?
- Whether government can dismiss/suspend/remove the officer who holds the “office of profit”?
- Whether salary or remuneration to the officer is being paid by the government?
- Whether government plays a key function/role in the functioning of the office?
- Whether government has ultimate control over the office?

If the any of the above-mentioned criterions are fulfilled, the person who holds such an “office” is presumed to be holding an “office of profit.”<sup>8</sup> If any further dispute arises, the court will look onto the matter and proper judicial pronouncement will be given after looking the facts and circumstances of the said case. UC Raman v/s PTA Rahim Case<sup>9</sup> is considered to be one among the landmark judicial pronouncement in interpreting the ambit of “office of profit” and clearly points out whether the said alleged person in this case really holds an “office of profit” or not with back supporting evidences. Actually, Kerala is one among the southernmost state of the Union of India with a whopping population of around 3.5 crores of people with an average population density of 859 persons per sq.km. Most of the people in Kerala are politically spirited and ardent follower of one party or the another. Kerala’s political structure has two main political parties, the United Democratic Front (UDF) is the Indian National Congress (INC) allied parties and the Left Democratic Front (LDF) of allied Left-Wing political parties include Communist Party of India (CPI) and Communist Party of India (Marxist) [CPI(M)]. The NDA-BJP alliance is not strong in Kerala and only once till the formation of the state, one seat was being occupied by them out of the 140 seats in the Kerala Legislative Assembly at its capital city, Trivandrum.

Moving onto the facts of the case, in the year 2011, the 13th Kerala Legislative Assembly Election taken place. UDF allied with Indian National Congress (INC) won and Shri. Oommen Chandy became the Chief Minister of Kerala. At that time, out of 140 seats, 73 seats were won by UDF. The said issue of or case was taken place at Kunnamangalam Assembly Constituency which comes under the Kozhikode (Lok Sabha Constituency).<sup>10</sup> Over there, Shri. PTA Rahim, Member of Indian National League (INL), an allied party of LDF won against the Congress allied candidate Shri. UC Raman (IUML) for 3269 votes. PTA Rahim is having a huge follower in his constituency and he was being elected consequently for four terms (2006 to present), that is, continuously for more than 17 years, he is the MLA of the said constancy. Actually, the problem arises when Shri. UC Raman of UDF challenged the 2011 Election (13<sup>th</sup> May 2011) of PTA Rahim on the ground that PTA Rahim is the Chairperson of the Haj Committee and thus he holds an “office of profit.”

As we all know, the law clearly stated that no one contest in election if he/she holds any office of profit. Thus, the problem arise over there was whether the designation of Chairperson of Haj Committee is deemed to be the holder of an office of profit or not. UC Raman filed this case in order to nullify candidature of PTA Rahim and to again contest the election.<sup>11</sup> The stages of the case are very clear that the 13th Kerala Legislative Assembly Election was held on 13th May 2011, Friday and from Kunnamangalam Constituency, PTA Rahim of LDF was won against the opposite candidate UC Raman. Shri. UC Raman then makes a complaint to the Election Commission of India (ECI) and also filed a petition to High Court of Kerala raising the problem of “office of

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<sup>8</sup> MM Semwal and Sunil Khosla, Judicial Activism, The Indian Journal of Political Science, Vol. 69, No. 1, Indian Political Science Association, pp. 113-126 (2008)

<sup>9</sup> AIR 2014 SC 3477

<sup>10</sup> Walekar Dasharath, Changing Equation between Indian Parliament & Judiciary, The Indian Journal of Political Science, Vol. 71, No. 1, Indian Political Science Association, pp. 163-167 (2010)

<sup>11</sup> Holden Furber, Constitution-Making in India, Far Eastern Survey, Vol. 18, No. 8, Institute of Pacific Relations, pp. 86-89 (1949)

profit” which is being there with the alleged party PTA Rahm. The High Court dismissed the petition of UC Raman and upheld the election results of PTA Rahim as the winner.

Since, UC Raman was not satisfied with the judgment, he filed an appeal to the Supreme Court on the said matter. The Supreme Court retreated (again stated) the ruling of Kerala High Court’s decision as a valid one and upheld the winning of PTA Rahim in election. The Supreme Court further stated that the Chairperson of Haj Committee does not hold any office of profit. The petition filed by UC Raman was dismissed by the Supreme Court and the decision of Kerala High Court was upheld. Thus, PTA Rahim is eligible to continue as MLA of Kunnamangalam Constituency and his candidature does not violates any of the provision mentioned under Article 191 and Article 191(1)(a) of the Constitution. According to the findings of the Supreme Court, he cannot be disqualified from the election because “PTA Rahim holds an “office” under the state government but does not hold any “office of profit.”

Section 37 of the Haj Committee Act, 2002 clearly states that the members of the said Haj Committee do not hold any office of profit and these members includes the Chairperson and the vice chairperson as mentioned under Section 2 of the said Act.<sup>12</sup> The Court also added that PTA Rahim only holds Travelling Allowance (TA) and Daily Allowance (DA) from that Haj Committee and the same does not constitute to an “office of profit.” In the said case, the Supreme Court clearly interpreted the ambit of “office of profit” by stating that Travelling Allowance (TA) and Daily Allowance (DA) are mere Compensatory Allowance and it does not come under the ambit of “office of profit.”<sup>13</sup> Shri. PTA Rahim does not hold any “office of profit” because,

- He did not receive any salary, pay, emoluments, remuneration from the Haj Committee
- The reasonable tests that I mentioned in my earlier session to identify whether he holds an office of profit or not cannot be proved in this instant case
- There is no conflict between duty and self-interest for PTA Rahim in this case since he does not hold any “office of profit”
- The Haj Committee Act, 2002 clearly specifies “Chairperson, Vice-Chairperson and other members” will not constitute office of profit

Thus, PTA Rahim Can continue as the MLA of Kunnamangalam Legislative Constituency. This can be considered as one of the landmark judgments to determine the ambit of office of profit since it reflects how the term “office of profit” plays a very crucial role in matters relating to contesting of elections. The law which states that “no person can contest in election if he holds any office of profit” is well established here but in the said case, PTA Rahim cannot be disqualified since he does not hold any “office of profit.” Here, we can identify the prominent role played by the Supreme Court in interpreting the ambit of “office of profit” here.<sup>14</sup>

## **INDIAN JUDICIARY: A GUARDIAN TO CONSTITUTIONAL VALUES**

If we are deeply analyzing the landmark decision made by the Hon’ble Supreme Court in *Satrucharla Chandrasekhar Raju v/s Vyricherla Pradeep Kumar Dev*,<sup>15</sup> it can also consider as one among the landmark judicial pronouncement in interpreting the ambit of “office of profit” and clearly points out whether the said alleged person in this case really holds an “office of profit” or not with proper reasoning from the side of the judiciary. The case revolves around whether a primary school teacher in a school registered under the Societies Registration Act, 1860 holds an office of profit or not.

The main problem in the said case arises when a primary school teacher who is working under a school setup by the Integrated Tribal Development Agency (ITDA) contests in the national general election from the Vizianagaram Constituency of Andra Pradesh in the year 1989. Here the said teacher was the appellant and he was duly elected from the said Constituency. After the declaration of the election results, the respondents challenged the validity of appellant to contest in election by stating that the appellant holds an “office of profit” as being a primary school teacher.

In reality, the appellant was actually a Single Teacher in a primary school run by Integrated Tribal Development Agency (ITDA) who functions under the control of the concerned state governments. The main objective of this ITDA is to deliver the public goods and services to the tribal people and Scheduled Tribes those who are really in need of the same. The appellant primary school teacher was appointed by the District Collector,

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<sup>12</sup> As’ad Ghanem, *Palestinian Nationalism: An Overview*, Israel Studies, Vol. 18, No. 2, Shared Narratives—A Palestinian-Israeli Dialogue, Indiana University Press, pp. 11-29 (2013)

<sup>13</sup> Michael Christopher Low, *Empire and the Hajj: Pilgrims, Plagues, and Pan-Islam under British Surveillance, 1865-1908*, International Journal of Middle East Studies, Vol. 40, No. 2, Cambridge University Press, pp. 269-290 (2008)

<sup>14</sup> Special Correspondent, Cong. makes all-out bid to wrest Kunnamangalam, THE HINDU, <https://www.thehindu.com/news/cities/kozhikode/cong-makes-allout-bid-to-wrest-kunnamangalam/article8582948.ece> (May. 11, 2016 12:00 am IST)

<sup>15</sup> AIR 1992 SC 1959

that is, he himself is the concerned project officer of ITDA. The appellant thereafter his appointment worked as a primary school teacher in this school run by ITDA.<sup>16</sup> The said school was located in “Jiyammavalasa Mandal” in which is actually located in the Vizianagaram Constituency of Andhra Pradesh from where he was elected as the MP thereafter. His appointment as the single primary school teacher was on January 1988 and after seven months, that is, on August 1988, he was being suspended from his job by the Tribal Welfare Officer after his inspection to the school where he found some irregularities with that of the appellant teacher’s functioning and administration. So, he was suspended on 23rd August 1988, Tuesday.

Thereafter, the appellant school teacher filed a petition in the Andhra Pradesh Administrative Tribunal but the said Tribunal dismissed the petition. Thereafter, the appellant submitted his resignation letter to the concerned District Collector, who is the Project Officer of ITDA. He had given his resignation letter on 26th October 1989, Thursday but the same was not accepted by the District Collector (Project Officer) by stating that the enquiry was still pending against the concerned appellant. The appellant thereafter contested in the election in Vizianagaram Constituency in the year 1989. The election took place on 22nd November 1989, Wednesday and the counting took place on 26th November 1989, Sunday. The appellant officially declared as duly elected on 27th November 1989, Monday. After, the election results were out, the opposite candidate, that is, the respondent in the said case filed petition to challenge the validity of election of the appellant.<sup>17</sup> He stated the even though the appellant gives the resignation letter as a primary school teacher, the same was not yet accepted and thus he still holds an “office of profit.” Thereafter, appellant filed a written submission contesting the election petition by stating that he does not hold any “office of profit” as of now ITDA is not a part of the government but is an independent body because the same is registered as a society under the Societies Registration Act, 1860. The stages of the case are very clear that the appellant was actually a single primary school teacher in a school run by ITDA appointed on January 1988 and he was suspended from his official capacity on August 1988 by the Tribal Welfare Officer (TBO) by founding some irregularities in his functioning. Even though, the appellant submitted a resignation letter, the same was not accepted by the concerned District Collector who is the Project Officer of ITDA after his petition was dismissed by the Andhra Pradesh Administrative Tribunal as well. Thereafter, the appellant contested in the national general election and won in the same constituency where he was working as a primary school teacher. The opposite candidate (Respondent) to him filed a petition against the appellant stating that he holds an “office of profit” but the appellant claimed that he does not possess any office of profit since ITDA is not a part of the government but only a registered society.<sup>18</sup>

The petition was filed by the Respondent in the High Court and the court found that the appellant to be liable as he is holding an “office of profit.” Being agitated by the decision, the appellant filed an appeal to the Supreme Court where the Supreme Court of India overruled the High Court decision. The court held that ITDA is a society registered under the Societies Registration Act, 1860 and is thus not part of the government and thus the appellant does not hold any “office of profit” over here. The Supreme Court held that the contesting of election by the appellant is valid since he does not possess any office of profit and can continue as an MP of his constituency. The Supreme Court also stated that ITDA cannot be considered as a part of the government since it is a registered society under the Societies Registration Act, 1860. ITDA will not become part of the government even though the government provides some funds to ITDA Schools or new posts are created in these ITDA Schools with the aid of the government.

The Court also pointed out that the District Collector, who is the Project Officer of this ITDA is having the sole power to appoint and remove teachers from these Schools.<sup>19</sup> Since, it is a registered society having its own Constitution, there will be no form of governmental interference. Thus, a teacher in ITDA School cannot be considered as a holder of an “office of profit.” In the said case, it is evident that the appellant contested in the election in good faith since he knows that he does not possess or holds any “office of profit” as alleged by the respondent. Thus, the contesting of election is deemed to be valid and he can continue as the elected MP of his constituency from where he is elected. Thus, he cannot be disqualified in anyway relating to the provisions of holding an “office of profit” since he does not possess the same. The Court also pointed out the fact that the appellant does not receive any salary, emoluments, remuneration after he was suspended from School and his resignation letter was also not being approved by the District Collector who is the Project Officer of ITDA.

Thus, the approval of resignation letter solely depends upon the discretion of the District Collector, that is, the Project Officer of ITDA and it in no way relates to the government since they have no role in the matters relating to a registered society. Thus, the election results were upheld and declared as valid and the Court stated

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<sup>16</sup> Jabir Mushthari, Only 20% of Haj applicants in Kerala make it, THE HINDU, <https://www.thehindu.com/news/national/Only-20-of-Haj-applicants-in-Kerala-make-it/article16244163.ece> (Jun. 14, 2010 01:33 am IST)

<sup>17</sup> Pritam Singh, Judiciary and Constitutional Evolution in India: A Select Bibliography, *The Indian Journal of Political Science*, Vol. 34, No. 3, Indian Political Science Association, pp. 362-374 (1973)

<sup>18</sup> D. C. Chauhan, Parliamentary Sovereignty v/s Judicial Supremacy in India, *The Indian Journal of Political Science*, Vol. 74, No. 1, Indian Political Science Association, pp. 99-106 (2013)

<sup>19</sup> PN Mittal, Judiciary and the Federal System: An Appraisal of The Supreme Courts of the United States of America and India, *The Indian Journal of Political Science*, Vol. 25, No. ¾, Indian Political Science Association, pp. 210-218 (1964)

that the appellant here does not hold any “office of profit.” This can also be considered as one of the landmark judgments to determine the ambit of office of profit since it reflects how the term “office of profit” plays a very crucial role in matters relating to contesting of elections.<sup>20</sup> The law which states that “no person can contest in election if he holds any office of profit” is well established here but in the said case, the appellant cannot be disqualified since he does not hold any “office of profit.” Being ITDA is a registered society under the Societies Registration Act, 1860, the ITDA schools will not become the part of the government and the primary school teacher of ITDA schools thus will not hold any office of profit. Thus, the appellant can continue as MP of his constituency.<sup>21</sup> The role played by the Supreme Court in interpreting the ambit of “office of profit” is really remarkable and prominent in the said case.

## II. CONCLUSION

There should need to have a proper and systematic structure for governing each and every nation. Likewise, the authorities who governs the common people should also need to have such duties which shall be performed by them. proper democratic functioning of administration, the separation of powers should need to be there and thus the members of the legislative wing, that is, either the Member of Legislative Assemblies or Members of Parliament should not hold any “office of profit.” Thus, a clear separation is needed between executive and legislative wing for the efficient and good governance which in turn provides a welfare state.<sup>22</sup> Thus, no person shall hold any kind of “office of profit” if he is going to contest in election and if he is being designated and directed to serve in any other legislative wing. The government should need to take proper and adequate care in order to make the governing system without any flaws and thus the concerned authorities should not in any way misuse the powers which are vested upon them. They should need to work for the welfare of the whole citizens of the nation and should not in any way curtails or abridges the rights of the common citizens by misusing the powers which they can exercise while holding the powerful position which is entrusted with them by this democratic nation.

Thus, it is actually the high time to revisit the existing laws and regulations in order to guide the ambit of office of profit enshrined under the Indian Constitution. The laws are also subject to certain changes and modifications as time passes because the laws cannot be stringent and stagnant because if it is so, then there will not be any form of good governance since law is always connected with the society and the society is also always changing without any limits and jurisdictions.<sup>23</sup> Thus, the government should need to make proper regulations in order to guide and regulate the authorities in power and they shall also be guided by the principles enshrined under the Constitution of India without any sort of malicious intentions and they must need to focus on the welfare of the people which in turn results in the overall economic and social development of the whole nation which helps to attain the emancipation of all the people residing in our country.

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<sup>20</sup> P Sharan, Constitution of India and Judicial Review, The Indian Journal of Political Science, Vol. 39, No. 4, Indian Political Science Association, pp. 526-537 (1978)

<sup>21</sup> KH Cheluva Raju, Dr. B. R. Ambedkar and Making of the Constitution: A Case Study of Indian Federalism, The Indian Journal of Political Science, Vol. 52, No. 2, Indian Political Science Association, pp. 153-164 (1991)

<sup>22</sup> AK Ghosal, Jurisdictional Conflict between the Legislature and the Judiciary, The Indian Journal of Political Science, January—March, 1965, Vol. 26, No. 1, Indian Political Science Association, pp. 64-74 (1965)

<sup>23</sup> Phiroze K Irani, The Courts and the Legislature in India, The International and Comparative Law Quarterly, Vol. 14, No. 3, Cambridge University Press on behalf of the British Institute of International and Comparative Law, pp. 950-968 (1965)