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CHAPTER – II

JUDICIARY AND THE FORMAL GOVERNMENTAL STRUCTURE : INSTITUTIONAL ARRANGEMENT VIS-À-VIS – THE SOCIAL NEEDS.

A. JUDICIARY IN INDIA

"The members of the constituent Assembly – 'before framing the Judicial provision of the constitution felt that the Judiciary means, "extension of the Fundamental which the court could opt to force" the Judiciary is seen as an arm of social revolution."[1]

In the Colonial days, the Indians were not aware of the Judiciary since the entire machinery of the administration were in the hands of the British. After independence, there has been a strong debate among the Assembly members, with regard to "framing of the Judiciary". The two Controversial issues were (i) the independence of the Court and (ii) the judicial review which the members could not have accepted. According to the 1935 Act, the powers of the Courts were limited with regard to the Constitutional issues. The Constitution lays two types of Judiciary – (i) Union Judiciary – Supreme Court and (ii) Federal Court (High Courts) in the States. The judges of the Supreme Court are to be appointed by the President, with consultation with the Chief-Justice of Supreme Court. The judges of the High Court are being appointed by governor of the State. The Supreme Court has according to the constitution, the original jurisdiction under which, it settles the disputes between the Units and Union Government. Besides this Court enjoys the appellate jurisdiction on any Civil & Criminal cases with Advisory jurisdiction. The Parliament may from time to time take the opinion of the Judiciary. The Union Government decides the salaries, all awareness, and pension. According to the Nehru Report, the Supreme Court was first established along with a Federal Constitution. During the British

Rule there were three High Courts established in Calcutta, Bombay & Madras. The Privy Council looked after the matters which were not decided by the Federal Court. According to the White paper of 1933, the proposal for setting up Federal Court along with the Supreme Court, to hear the appeals from the provinces. And the Privy Council was to be replaced by the Supreme Court. The Joint Committee suggested for a Federal Court which will act as a guardian and interpreter of the Constitution and act as a tribunal to settle the disputes between the Constitutional Units. According to the Report of Sapru Committee of 1945 ... the appellate jurisdiction of the Federal Court are to enlarged. The Court has wider jurisdiction not only in protecting the civil Rights & liberties of the people but also enforce the rights of the minorities. While framing draft provisions of Supreme Court on the basis of Advisory Committee, a serious Controversy arose between the members of Constituent Assembly. The five members of the Adhoc Committee B.N. Rau, Munshi, Ayyar, B.L. Mitter and S. Varadacharis – were in favour of establishing the Federal Court. Ayyar & Munshi in a separate memoranda explained the importance of a Supreme Court. In his Draft Constitution, Munshi provided an authority which will examine the constitutionality of legislation. He suggested that the appellate jurisdiction of the Court would extend to Civil Cases involving the some of more than Rs.10,000/- and any civil & criminal cases where there is a miscarriage of justice.[2]

Ayyar has a different opinion in Judicial Review "The Judicial Review is a necessary part of written Constitution." Hence Judicial Review in America is more crucial than the Judicial review in England. The Judiciary in England is to abide by the laws of British Legal Tradition. Judiciary in England cannot declare an act of Parliament as void due to the supremacy of the parliament. From the British Judiciary the 'Rule of Law' was one of the aspect which the Federal Court can adopt under its provisions. The members of the

Union Constitution Committee considered the report of the adhoc committee and made recommendations of their own. They have submitted a report after a long debate that took place between the members of Union Constitution Committee. After the recommendation of the other committee, the powers of the Supreme Court has been extended. Till 1948, there has been a prolonged debate on 'judicial provisions of the Constitution. The jurisdiction of the court was resisted by the Act of Parliament in certain matters. According to the Draft, 'the enforcement of the Fundamental Rights". Right to move to the Supreme Court was guaranteed and the court was empowered to issue prerogative writs.[3]

There has been different opinions from Ayyar, Munshi - with regard to the appointment of the judges and the judicial review. Despite restrictions imposed open the judiciary the judiciary must be bastion of rights and justice to the members of the Constitution Assembly. Few of the members believe that after 1950, the Constitutional amendments have limitised the authority of the Courts in the property questions legislation which has extended their power to scrutinize Executive Action in Preventive Detention Cases. In certain areas, the Legislative branch of the government must be supreme. The members of the Assembly keeps the Judiciary out of politics.

The Constitution has grown out of ages. In the Constituent Assembly debates, Shri Krishna Chandra Sharma has declared that the Nehru Report reflects the Constitution in 1928. Soon after the Nehru report, Sapru Committee was formed where various revolutions of Congress was laid according to Act of 1935. Various documents were available and conclusions are drawn in the Round Table Conferences.[4] Most important factors were economic pressures & social forces. The political developments and our relations and connection and associations with the world outside to give shape to

our constitution. No written Constitution in the World can have isolated existence. While analysing the Constitution, Marshall in 1816, provides three department – executive, legislative & the judiciary. The function of the legislature is to pass laws subjected to maintain the sovereignty of the people. Legislative makes laws in the real sense of term because through the long evolution of the judicial process we have come to the conclusion that law means the will of the people. Then comes the executive. The executive consist of President and the Prime Minister to aid and advice the President. In America, Judiciary has the Supreme Power and so is the position of the Legislature in British Constitution. In America, Congress may pass laws but Supreme Court will nullify it. There has been rift between Legislature and the Judiciary and also between the President.

Executive often conflicted with judiciary with regard to the impeachment of the judges. The executive is responsible to the Legislature through the Prime Minister. Compare to the British and American Constitution, Legislature makes the Laws for the expression of the will of the People Executive is responsible to the people. We have a strong Judiciary consisting of honest, independent and efficient judges, than the Supreme Court of U.S.A. who can only mollify the will of the people. If the executive or the legislature makes some irresponsible action against the Fundamental Rights (Article 19) – through the 'reasonable restriction, the Supreme Court can question the Legislative the validity of law."[5]

In a Memorandum representing the views of the Federal Court and of the Chief Justices representing all the provincial high Court of the Union of India, the Judges of the Supreme Court and the High Court in conference held on 26th, 27th March 1948 said that the independence and integrity of the judiciary must be given utmost priority in a democratic system, the system of administrative justice established by the British Rule has played an independent rule in

protecting the rights of the individuals citizens. The Draft Constitution tried to liberalize in some respects the existing safeguards against the executive interference and to enlarge the present power.[6]

II

The position of the Supreme Court under the Constitution come up for consideration before the Constituent Assembly at a very early stage.[7] Union Constitution Committee was set up to consider the powers and organization of the Supreme Court. This Committee Consist of S. Varadachariar, Alladi Krishnaswamy Ayyar, B.L. Mitter, K.M. Munshi, B.N. Rao. The committee made the recommendations based on the provisions of Act of 1935. A Supreme Court has the jurisdiction to decide the constitutional validity of Acts and Laws. Supreme Court according to the committee must be best forum for the adjudication of all disputes between the Union and a Unit and between one Unit and another and proposed that Court should have original jurisdiction in such disputes.

The committee also recommended that the Supreme Court should have an appellate jurisdiction in cases arising out of treaties especially on the matters of extradition, between the Union and a Unit state. It would also be open to the Union Legislature to confer Judicial power in respect of any matter within its legislative competence.

The committee did not consider the proposal of the Advisory Committee, on the ground that the Fundamental rights would be protected only by the Supreme Court. The citizens can also move to the other court, for the protection of the rights.

With regard to the question of Supreme Court's Jurisdiction, there has been a debate between Advisory Committee and the Special Committee. The cases involving the Constitutional validity of Laws according to the committee,falls within the jurisdiction of the Supreme Court. In addition the committee recommended two principles (i) that

in cases involving interpretation of Laws of the Union and the Laws of Units others than the State concerned, the final decision should rest with the Supreme Court and (ii) it would be open to any Indian state to confer by special agreement, additional jurisdiction on the Supreme Court. Dealing with the organization of the Supreme Court, the Committee suggested that it should have at least two division benches – each consisting of five judges. Two methods are adopted for the appointment of puisne judge. One method (i) the President in consultation with Chief Justice ... make a nomination and such nomination would have to be confirmed by at least seven out of eleven persons in panel consisting of Chief Justice of High Court members of the Central Legislatures and some of law officers of the Union.

The second alternative method suggested that the panel should put forward three names for every vacancy, leaving the final choice to the president in consultation with the Chief Justice. The Panel so far been made would be independent and should function for a period of ten years. The committee also suggested that the qualification of judges be laid according to the judge of the federal court (Provisions of Act of 1935), the age limit might continue to be 65.

In preparing the articles on the Supreme Court the Drafting Committee, has placed discussion about the organization of Supreme Court. The Draft contains 21 articles (103-123) the Supreme Court consist of a Chief Justice and such member of other judges not less than seven persons as might be fixed by the parliament. The retiring age of the judges was fixed at 65 – no judges shall be removed from office except by an order of the President passed by after an address supported by not less than two third of members present & voting has been presented by both Houses of Parliament for such removal on the ground of proved mis-behaviour or incapacity.

The jurisdiction of the Supreme Court was approved by the Assembly. Its original jurisdiction, seeks to resolve the conflict –

a) Between the government of India and one or more states.

b) Between the government of India and any state of states on one side or one or more states on the other.

c) Between two or more states.

d) Appellate jurisdiction consist of cases involving a substantial question on law as to interpret the constitution the appeals from the High Court. The Supreme Court can bear the civil case worth Rs.20,000, but this has been subjected to High Court if necessary the appeal involving the substantial question of law. The civil cases were to be heard in the lower court before it is been sent for judgement in the Supreme Court. The Supreme Court can also deal with Cases relating to civil and criminal.[8]

The jurisdiction of the Supreme Court must be within the confinement within Indian States as preceded by the Draft Constitution.

(a) The High Court

The High Court as an institution has been functioning in India for nearly ninety years and built up a tradition for independence and impartiality. Before 1947, High Courts were established only three provinces. Calcutta High Court exercised its jurisdiction over Assam and Patna High Court over Orissa. The Union Provinces had two High Courts, and High Court at Allahabad and the Chief Court at Lucknow both exercising the appellate jurisdiction. After 1948, the situation has been changed a separate High Court has been established at Assam and Orissa and the Chief Court at Lucknow had been amalgamated with High Court at Allahabad. The jurisdiction and powers of the High Court rest among the provinces of enactment made

by various Legislatures in India. The Judicial independence was ensured primarily through the procedure for the appointment of judges and fixity of tenure for them. Under the British regime all permanent appointments of judges were made by the crown. The judges of the High Court were barristers of England or Ireland, members of Scottish. Faculty of Advocates and one third members of Indian Civil Services. After a prolonged decision of Constituent Assembly the Draft Constitution prepared by B.N. Rau laid down that all appointments of the High Court judges would be made by the President of India. The retirement of the judges would be at age of 65. With regard to the jurisdiction and power of the High Courts, there were some discussions by the members of Draft Committee. The original jurisdiction lies to the High Court. The Union and State Legislature can enact laws under the jurisdiction of High Court. The writ to issue habeas corpus, mandamus, prohibition, quowarranto and certiorari for any purpose, including direction, orders, writs for the enforcement of fundamental rights are exercised by the High Court. New Article 230, gave power to parliament to extend the jurisdiction of High Court to a Union Territory and new Article 231 empowered the parliament to establish a common High Court for two or more states Union Territory.[9]

(b) The Sub-ordinate Courts:-

Along with the Supreme Court and the High Court, the Subordinate Court was also considered to be an important part of the Judicial Structure. According to the Joint Committee Report – 'It is the subordinate judiciary in India who has come closer to the people. And so their independence should be placed beyond the question....' The district and session judges can exercise the powers of civil and criminal jurisdiction, they are to be appointed by the governor of the provinces, and the judges of the High Court. The civil judges lies below the district and Session Judges their, rules were provided by

the governor of each provinces in consultation with public service commission. Their posting and promotions were in the hand of High Court. In this way they were independent form the executive control. Their position was different form the District Magistrate and Subordinate magistrates were appointed by the Provincial Government. Under the provisions of Code of Criminal procedures, they cannot consult with judges of the High Court regarding the 'promotion of the officers or investing criminal matters.'

The District magistrate is the chief principle district officer, and the chief revenue officer of taluk, exercised the power of a second class magistrate. Ambedkar expressed that magistracy was intimately connected with general system of Administration. In the earlier stages of constitution making, no special attention was paid to the subordinate judiciary and neither the Draft Constitution prepared by the Constitutional Advisor in 1947 not that prepared by the Drafting Committee in 1948, contained any specific provision on the subject previously recruitment and appointment of person in Defence services or services in the Union or state in a Civil capacity was regulated by the Act of the legislature. According to the Memorandum of Judges of the Federal Court and High Court .... 'Subordinate Judiciary .... Have to depend on the provincial executive for their appointment, posting promotion of the subordinate judge. They are not free from the influence of members of the party in power and cannot be expected to act impartially independently in the discharge of their duties. Therefore the recommendation are made by the Drafting committee, so that the district judge can act independently. The two branches of justice, both civil and the criminal are to be under the direct control of the High Court. According to the new provisions of the Draft Committee, the appointments of the District Judges are to be made by the governor, in consultation with the High Court and the Public Service Commission control over district courts and courts

subordination theme to including posting, promotions and the grant of leave to district judges and all persons belonging to the subordinate judicial service was to be vested in the High Court. The committee also prepared, Article 39A the state should take steps to secure judiciary from executive in the public service in the state which has to be included in Directive Principles. The provisions regarding the subordinate judiciary came up for discussion on 16th September, 1949. Dr. B.R. Ambedkar made some changes.[10] The posting and promotions of district judges were to be made by the governor of the State in consultation of High Court. The High Court were vested with full powers of control over the subordinate court, civil as well as criminal, and all powers in regard to promotion of all members of subordinate judiciary would be confined within the power of High Court.

1. Controversy between Members of Parliament and the Judges:

During the British rule, the federal Court being the highest court of judiciary, the power to interpret the constitution and the protection of the civil rights and liberties of the people are been vested to federal court. According to the Nehru Report, the Supreme Court gained its importance, replacing the Privy Council. The Privy Council, had appointed a Judicial Committee, to hear the cases relating to the federal and provincial states. The working of Privy Council in England is different from the Privy Council of India. It acted as a fountain head of Justice. All cases relating to the 'dominions' are been tried in the Privy Council. It hears the appeals from the ecclesiastical Courts of Britain and Courts of the Channel Island. It is the final court of appeal for the colonies and Dependencies: no doubt it acted as a advisory body of the crown to use the prerogatives regarding appeals from the common wealth. But the Privy Council in India, did not gain its position as in England since the ordinary people was not aware of 'judiciary'.

The task of establishing the Supreme Court according to 'Draft Provision' was actually appeared in the Advisory Committee's Report, where the five member of the advisory Committee B.N. Rau, Munshi, Ayyar, B.L. Mitter and S. Varadachariar undertook this task.[11] Ayyar and Munshi stressed as the 'Judicial Review' empowering the Supreme Court in a separate Memoranda. While drafting the Constitution, Munshi felt that the Supreme Court should have the authority to examine the Constitutionality of Legislation. The Union Constitutional Committee has set up a special committee to implement the provisions of Federal Govt. according to 1935 Act. There has been a strong debate between the one sector consisting of politicians and other sector consisting of lawyers. K.M. Munshi stressed on the role of the judiciary in protecting the individual liberty and the social control. Since the constitution is the supreme law of the land the parliament even though power cannot be the only guiding force to ensure justice to the masses. In the words of Munshi. 'The Politicians have failed to imagine the necessity of an independent judiciary to transform the past into present and the present into future, without risking inability'. He further added that judiciary would never assert its authority over the parliament and hence there is no danger of substituting parliamentary supremacy by the judicial Supremacy, 'While analysing the independence of the judiciary, C.J. Kania, stressed 'on the power of interpreting the constitution, since the Constitution of India is a written document. The Indian Supreme Court draws its inspiration from the American Model. Thus the Judicial Provision being framed to protect the Fundamental rights and act as a 'guardian of the constitution'. The members of the Constitution Assembly considered judiciary as a 'baston' of rights and justice. The Parliament has empowered the Supreme Court ' on the right of the individuals and its jurisdiction on the criminal appeals.' The original jurisdiction in the federal matters have been somehow

made the Supreme Court – the 'Supreme guarantor of the 'Rights'. Some of the Liberals like Ayyar and B.N. Rao have opined that the Power of the Courts should be curbed to some extent in the sense, that 'The judiciary should be kept out of politics, for the maintenance of the judicial independence, for safeguarding the individual liberty .... The judiciary should work under the constitutional restraints. The courts are not at liberty to declare an act as void if it goes against the constitution. The doctrine of jurisprudence should not be raised to a level of a degree where the judiciary would act as a kind of super legislature as the Supreme Court of USA."

2. Organisation, Structure of the Supreme Court:

The judicial system is an indespensible part of liberal Democratic Country. In every political system, judicially is based on legalism. The structure of the courts and selection of the personnel, the functions of the Courts, pressure of the external on the political institutions varies from one political system to another depending on the political process. But in a liberal democratic country the attitude of the court is somehow different from the other political process. In the liberal democratic system, courts act impartially, consistency, open and stability.[12] They follow the legal procedures. But is the Communist system such characteristics are absent since the 'Courts have temporary note before the withering away of the state.' The courts could not check the executive. The 'Rule of law' is essentially a product of British and American Liberal Democratic system which is also been adapted in Indian judiciary. The Indian Judiciary has adapted Parliamentary Sovereignty of Britain and Judicial Supremacy of USA. In USA there has been separate judiciary for the Nation and Federate State. But there is integrated single, undivided centralized system of judiciary in India. Although in a federal state dual polity exist but federal judiciary does not exist always." B.R. Ambedkar while drafting the constitution gave emphasis on a federal government

without altering the judiciary. Supreme Court is the highest Court of Union Judiciary.

Article 124 and 147 of the Constitution provide that there shall be a Supreme Court of India consisting of one Chief Justice and not more than seven other judges until the parliament increases the number of judges. In 1986 the number of judges has been increased to 26. According to the Supreme Court Act of 1956, the number of ordinary judges was 10. Later in 1977 the number was increased to 17.

Appointment of the Judges:

According to Article 127(1) of the Constitution, provides the adhoc judges can also be appointed as the judge of the constitution. The judges of the Supreme Court are appointed by the president of India in consultation with Chief Justice and other judges of the High Court if necessary. The Principle of seniority is always maintained while appointing the Chief Justice and the other judges of the Supreme Court. But this principle was elevated and first practiced ... when Chief Justice S.M. Shingvi have retired in 1973. J.M. Shelwat, K.S. Hedge Judge A.N. Grover were the senior judges to be appointed as the Chief Justice of Supreme Court.[13] But the decision was superseded and Ajit Ray was appointed as the Chief Justice of Supreme Court. There was wide protest by All India Bar Association, State Bar Association by opposition leaders of the country other prominent persons.

Qualification of the Judges:

According to Article 124(3) of the Constitution provides the qualification required for the appointment of the judges of the Supreme Court (i) The person must be the citizen of India, (ii) He must be an distinguished jurist, of one or more High Court for five successive years or (iii) been an advocate of a High Court for at least

ten successive years (iv) in the eyes of the President he could be an eminent jurist.

Salary of Allowances of the Judges:

Article 125(2) of the Constitution provides the privileges, salaries and allowances of the Supreme Court. According to 54the Amendment Act of 1986, the Salary of the Chief Justice has been raised from five thousand to ten thousand and the salaries of the other judges have been raised from Rs.4000 to Rs.9000. The salaries of Judges are drawn from the consolidated fund of India. The other privileges are 'providing residence free of rent'. The provision of pension is entitled after retirement.

Tenure of the Judges:

According to Article 124, every judge of the Supreme Court held's office till the age of 65. According to the provision of the Constitution, the judge can be removed by an order of the president on the basis of an address passed in both the Houses of the Parliament and supported by the majority of not less than two-third members present and voting and absolute majority of total members of each House. The constitution guarantees to the judges 'security of services and emoluments with the intention of keeping them beyond the influence of executive and legislature.

3. Jurisdiction of Supreme Court (Article 129): –

i) Supreme Court as a Court of Records:–

The Supreme Court shall be a Court of Record and shall have powers of such court including the powers to punish for contempt of itself. The judicial proceedings which are recorded for memory are been challenged or been questioned when presented before any Court can be kept as a purpose of evidence.

Article (131) provides the Original Jurisdiction: (a) The Supreme Court hears the disputes between the government of India and one or more states.

The Supreme Court can issue different writs for the enforcement of the fundamental Rights. The writs are the mandamus, between habeas corpus, quowarranto, writ prohibition and certiorari. In Ramesh Thapar Vs State of Madras case. The Supreme Court held that Article 32 of the Constitution merely confer the powers on the Supreme Court just as in Article 226, the High Court issues writs for the enforcement of the Fundamental rights.

The Supreme Court can decide any dispute relating to the election of the President, Vice-President, according to Article 71(i). 'Changes made by 42nd Amendment to the Constitution.'

Appellate Jurisdiction of the Supreme Court (Article 133):

Appeals can be classified under three types. (a) Appeals from the High Court relating to civil matters, (b) Appeals with regard to the criminal matters, (c) Appeals relating to 'interpretation of the Constitution, (d) Appeals relating to the 'Special Leave.' Article 132 provides that Supreme Court can hear the appeals from the High Court whether is civil, criminal proceedings. Article 136(1) of the constitution, the provides that the Supreme Court may grant the special leave of Martial Court. If the cases involving the substantial question of law bearing the general importance, the Supreme Court can hear such appeals, from the High Court according to Article 133(1) of the Constitution. Before the 30th Amendment Act being passed in 1972 the civil cases, involving the value of not less than Rupees Twenty Thousand is deemed fit to be decided by the Supreme Court.

Appeals relating to the Criminal Matters: (Article 134)

Article 134(1) laws down that an appeal shall lie to the Supreme Court from any judgement final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court has (a) an appeal reversed an order of acquittal of an accused person and sentenced him to death or (b) has with drawn for trial before itself from any court subordinate to its authority and has in such trial convicted the accused person an sentenced him to death, (c) that the case is a fit one for appeal to the Supreme Court. Provided that an appeal under Sub-Clause (c) shall lie subject to such provision as may be made in that behalf under Clauses (1) of the Article 145 and to such conditions as the High Court may establish or require. Under Article 136, the Supreme Court may grant leave to appeal against any judgements, decree etc. passed by any Court or tribunal other than any courts or tribunals constituted under the land, relating the Armed Forces. Article 136 has enlarged the appellate jurisdiction of the Supreme Court.

The Parliament may also confer power to the Supreme Court to entertain and hear the appeals from any judgement the final order of sentence in ordinary proceedings of a High Court in the territory of India subjected to such conditions and limitations as specified in law.[14]

iii) Advisory Jurisdiction of the Supreme Court Article 143 of the Constitution, provides the advisory jurisdiction of the Supreme Court. Under this article, the President may approach to the Supreme Court, on any matters relating to 'question of law' or of public importance, which may likely to arise or has arisen. Besides, this the president can refer any dispute of advice of an kind to the Supreme Court.

iv) Jurisdiction to issue Directions, Orders and Writs:

In order to enforce the fundamental Rights of the citizen, the Supreme Court issue the writs or directions in the form of Habeaus corpus, Mandamus, prohibition, Quowarranto and Certiorari (Article 32). At the time of emergency the writs are suspended. According to 44th Amendment Act 1978, Article 21 and the Fundamental Rights under Article 21 and 22 of the Constitution cannot be suspended.

Enforcement of Decrees and Orders:

Article 141 provides that all Courts are to obey the Supreme Court. The Supreme Court can pass decrees or issues orders if necessary or to meet the ends of justice with regard to the cases pending before it. Article 143 states that it is imperative for all authorities, civil and judicial to assist and aid the court in executing such order. Thus, an order or a decree is to be enforceable throughout the country.

4. Comparison between role of Supreme Court of USA with Supreme Court of India:

As compared to the Supreme Court of USA, the Supreme Court of India is considered to be the most powerful court of the world, having largest jurisdiction. In Britain the Courts do not have the power to interpret.[15] Unlike the US Supreme Court or the House of Lords in England or the highest courts in Canada or Australia, the SC of India can review even a Constitutional Amendment and strike it down if it undermines the constitution but the Supreme Court of India has the power to interpret the Constitution in which basic structure of the constitution is considered to be final. The Constitution of USA does not specifically confer upon the Supreme Court the right of interpreting the Constitution since the judgement on the validity of the Constitution is based on State Act or the Federal Act. The American Supreme Court has the appellate jurisdiction which is

confined to the cases arising out of the federal relationship or those relating to the constitutions validity of law and treaties. But our Supreme Court is only a federal court and a guardian of the Constitution but also the highest court of appeal in the land relating to the interpretation of the constitution. The Supreme Court of India can entertain appeals in the constitution, civil and the criminal matters. Appeals are limited to the constitutional cases in which the highest court of state has given the decision against the validity of the statutes or treaty in violation of American Constitution, laws and treaties. Both the Supreme Court of USA and India possess the power of judicial review. They can declare 'unconstitutional or utravires the laws passed by the state legislations. However the scope of judicial review in India is limited as the constitution of India has divided the legislative power between the union and the states in an elaborating manner. The Supreme Court of India can declare any law as ultra vires which is not written, the legislative competence of Parliament or a State Legislative. In the United States, in addition to his Power the Supreme Court can declare a law unconstitutional on the ground that it does not satisfy the requirements of the due process of law'. In India Constitution, the word 'procedure' established by law is used. The 'due process of law' means 'standards of natural justice', inherient goodness or badness.[16] If the law is violable Supreme Court can declare unconstitutional. The American Supreme Court is the arbiter of Social Policy in United States. It acts a super legislative. The Chief Justice Hughes has remarked, "we are under a Constitution the Constitution is what the judges say it is". But the Supreme Court of India has no such power since the "Constitution is considered to be Supreme Law of the land. On the other hand the Supreme Court of India has ordinary jurisdiction arising opinion in many cases which is referred to by the President but the Supreme Court of America does not advise the President or the Senate." With regard to the Original

jurisdiction the Supreme Court of India enjoys more powers than the Supreme Court of USA. In addition to the settlement of disputes among the units of federation in the United States. The American Supreme Court can try the Cases relating to the ambassadors, Consuls, ministers, naval forces and maritime matters.

5. Conflict between Parliament and the Judiciary in certain aspects:

Regarding 'Property Rights Jurisprudence':

Parliament and the Supreme Court confronted on their interpretations of the provisions with the right to property. Though the Constituent Assembly had taken utmost care to avoid any judicial interference in the Economic reforms programmes, the Congress Party could not resist the Court in 'declaring a law with regard to property Rights.[17] In Kameshwar Singh Vs State of Bihar case the High Court of Patna with held, the objection, that the rate of compensation should be according to the value of land. According to the land reform legislation, the rate of compensation varies and such the violation of right of property was challenged on the ground of right of equality (as in Article 74). In fact, the High Court gave verdict in favour of the landlords whose compensation of the land was given at the low cost than the market value.

According to the First Amendment of the Constitution in 1951, Parliament through the amendment procedure (Article 368) inserted Articles-31A and Article 31-B to include the judicial review of the Supreme Court – on the legislative matters. The right to property as contained in 31-A is being abolished on the ground that it violates the Fundamental Rights under Article 14.

Article 31-B has conferred 'a law in the Ninth Schedule' which would not pose a challenge to any of the Fundamental Rights as guaranteed in Part III of the Constitution. Secondly the Supreme

Court In State of West Bengal Vs Bella Banerjee's case, held that the compensation payable against the acquisition of the property must be equivalent to the market value of the property. But in Subodh Gopal Vs State of West Bengal case, the Supreme Court held that the compensation was payable even when the property does not vest to the state. According to Forth Amendment Act of 1954, 'the determination of the compensation remain outside the purview of the Court, whether in the law provides for the transfer of the ownership of the right to possession of any property to the state or a corporation owned, it shall not be deemed to provide for compulsory acquisition or requisitioning of property notwithstanding that it deprives any person of his property.

In K.K. Kochuni Vs Madras and Keral case, the Supreme Court held that any law causing deprivation of property must be tested under clause (5) of article 19, if only reasonable restrictions to be imposed on the right to hold, possess and disposes of the property.[18] A law causing deprivation of property could not be challenged under Article 19. The decision taken in Subodh Gopal did not survive after the Fourth Amendment. In Vajravelu Majumder Vs Sp. Deputy Commissioner, the Supreme Court held that 'adequacy of compensation' was not justifiable according to the Fourth Amendment. In the words, Compensation 'was not equal to value of the property gained? The judicial decision was forbaded due to the constitutional provisions.

The Twenty Fifth Amendment Act of 1971deleted the word compensation and the word 'Amount which meant the fair return of the value of the property acquired by the State. 'Certain types of land tenures were included in Estates, which is protected under Article 31(A) and same Constitutional enactments been made under Nineth Schedule which cannot be challenged on the ground of violation of Fundamental Rights which can under Article 31-B. Thus Parliament

through its power of Constitutional Amendment has limitised the judicial review of the Court. Justice K. Subha Rao said that both the legislators and the judges have given different opinions on the right to property. Both wanted to protect right to property but the legislature sacrificed .... since they do not want to 'disobey the rule of law."

Conflict regarding Economic Regulation:

Article 19(1), (g) of the Constitution provides the citizen, the right to carry on any trade, business and profession but this right is been subjected under certain 'law' which would serve the interest of the public.

In Ram Krishna Dalmia Vs Justice Tendulkar[19] the Court argued that if any statute or law resist the right to freedom of trade or business and if such law is against the interest of general public, than the Court may take legislative judgement regarding the necessity and desirability of such restriction, if the state feel for the welfare of the people. In Saghir Ahmed Vs U.P.[20] the Court held that unreasonable restriction on the freedom to carry on trade and business should be abolished. If it serves the need of the people, Clause (6) of the constitution was awarded in order to provide 'a law which would nationalise the monopoly trade.' In Akadari Vs Orissa case, the Court also held that state can have monopoly on any trade but a reasonable restriction imposed so that it does not harm the interest of the general public in carrying out the trade and business. Thus, the judiciary has to work on certain restrains with regard to the economic affairs.

Power of Constitutional Amendments:

Article 368 of the Constitution provides the 'Amendment of the Constitution'. The Constitution can be amended by Parliament of bill for such amendment is passed in each of the two houses, with the support of two-third of its members present and voting and absolute majority of the total membership of that home. Since the constitution

posses federal structure, it can be only be amended by it or can be amended only when an amendment bill being passed by both houses of the Parliament and is rectified by at least half of the legislatures of the states. The makers of the constitution provided a flexible process of constitutional amendment.[21]

AMENDMENT OF THE CONSTITUTION

Power of Parliament to amend the Constitution and the procedure there of notwithstanding any thing in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal away provision of this constitution in accordance with procedure laid down in the Article (368). An amendment of the constitution may be initiated only by the introduction of a Bill, for the purpose in either House of Parliament and when the Bill is passed in each house by a majority of the total membership of that House and by majority of not less than two third of the members of House present and voting. It shall be presented to the President, who shall give the assent of the Bill and thereupon constitution shall stand amended in accordance with the terms of the Bill. In USA, amendment of the Constitution may be proposed by the Congress, with the approval of two third majority of both the Houses or a Convention summoned on an application from 2/3rd of the members of both houses. The proposed amendments must subsequently be notified by at least three-fourths of the total number of States legislatures or by conventions in the fourths of the total number of states. In Switzerland, no alteration of the constitution can be affected without resorting to a referendum. In Australia, the Constitution can be altered only by an Act passed by an absolute majority in both Houses or in case on House refuses to pass it, by an Act passed by an absolute majority in either House for the second time, after an interval of three months. But in either case, the Act must be subjected to a referendum in each state. If in a majority of

the State, majority of the voters approve the amendment and it shall be presented to the Governor General for the Royal assent.

Amendment of the Fundamental Rights:

The question whether an amendment of fundamental rights guaranteed by Part III of the Constitution is permissible under the procedure prescribed by Article 368 came before the Supreme Court as early as in 1951 in Shankari Prasad Vs Union of India [AIR 1951 SC-458, 1952 SCR-89][22]. In that case the court held that the power to amend the constitution including the fundamental rights was contained in Article 368 and that the word law in Article 13(2) did not include an amendment of the constitution which was made in exercise of constituent and not legislative power. Shakari Prasad case concerned the validity of the constitution (First Amendment Act 1951). After the Court's decision several amendments was made in the constitution of which Fourth and Seventh Amendments related to Part III of the constitution. The seventeenth Amendment which added several legislations to the Ninth Schedule making them immune from attack on the ground of violation of fundamental rights were challenged in Sajjan Singh Vs State of Rajasthan [AIR-1965, SC 845]. Though three out of five judges C.J. Gajendragadkar Wanchoo & Dayal J in that can has fully approved Sankari Prasad Case, two of them Justice Hidayatullah and J.J. Madholkar in the separate judgements, said that whether fundamental rights had created no limitation on the power of amendment.

In Golak Nath Vs State of Punjab the Supreme Court by a majority of 6 to 5 judges dissented the view that in the earlier case, the fundamental rights were kept the amendment process the 9th Schedule has been challenged since 17th Amendment was included, the first and fourth Amendment abridged the Fundamental Right hence it is unconstitutional. In the Sankari Prasad case and Sajjan

Singh case conceded the power of amendment over, Part III of the Constitution since Article 13(2) and Article 368 was not considered as good law. The judgement so far given has been preceded due to following reasons:-

a) The constitution incorporates an implied limitation that the Fundamental Right are out of reach of the parliament.[23] The laws which are infringing the fundamental rights are considered as void. The constitution has presented the fundamental rights. Article 13 merely in corporate the reservation. Whatever Part III of the constitution declares protected within the ambit of the freedom.

b) Article 368 does not contain the power to amend, but merely provides the procedure for amending the constitution. The power to amend the constitution is a legislative progress and is included in the plenary legislative power of parliament.

c) The power to amend the constitution should be formed in the plenary legislative power of parliament as is clear from Article 245, 246 and 248 and Entry 97 of List 1 of the Seventh Schedule, the residuary power of the legislation is vested in parliament. The residuary power of parliament certainly takes in the power to amend the constitution. Article 4 and 169 and Para 7 of the Fifth Schedule and Para 21 of the Sixth Schedule have expressly conferred such power. There is therefore, no inherient inconsistency between the legislative power and the amending process. Whether in the field of constitutional law or statutory Law amendment can be brought about only by law.

d) Amendments to the constitution under Article 368 are made by the parliament, by following the legislative process or by making other laws. The word 'law' in Article 13(2) includes the constitutional amendments 'Golak Nath Vs State of Punjab, AIR

1967 SC 1943' Case and therefore the fundamental rights are outside the powers of amendment given to parliament under Article 368, if such an amendment seeks to abridge or take away any of the fundamental rights. The effect of Golak Nath Case added Clause (4) to Article 13 which provides that nothing in Article 13 shall apply to any amendment of the constitution made under Article 368. According to Article 368, Parliament may in the exercise of constituent power amend by way of (a) addition (b) variation or repeal any provision of the constitution in accordance with the procedure laid down in the article.[24] Parliament is empowered to awed any provision of the constitution including the Fundamental Right.

India since its independence, has undergone a turmoil situation when the framers of the constitution felt that along with the liberation of the country, social revolution would be the much needed task of the nation. So they were inclined to frame the constitution, which would be considered as the supreme law of the land. The basic philosophy of the constitution has been reflected in the preamble through which the ultimate goal of the social revolution can be achieved. Barring all restrictions the makers of the constitution had borrowed some of the principles like parliamentary system of government and the fundamental rights from the British Model and the federal character, like decentralisation of power and supremacy of the judiciary from the American Constitution. Yet the constitution makers feel that the Constitution of India has certain peculiarities of its own.

The members of the constituent Assembly needed for the supremacy of the Parliament. Sovereign will of the Parliament has become much debated issue between the executive and the judiciary. The Parliament was never been given such supremacy by the framers of the Constituent Assembly. Instead the constitution was destined to be supreme. Here lies the difference between the British Constitution

and ours. Nevertheless the Indian Constitution, being written, possessing quasi federal character of its own. The importance of the Supreme Court (judiciary) first found its expression in Nehru Report when there was a long debate, going on in the Constituent Assembly, K.M. Munshi supported with a view that judiciary would never assert its authority over the parliament, house, there would be no danger of substitution of Parliamentary supremacy by the judicial supremacy. Some judges were of the view that judiciary should be considered as "an arm of Social Revolution" and "Extension of Rights". But justice P.B. Mukherjee felt, that the 'judiciary prevents the disruptive forces, both stationary and behaviouralistic in state and society and thus help in continuity of life, habit, and structure. Of the three organs of the government the legislature, executive and judiciary, the executive is more diehard, judiciary is the most conservative and the legislature is the most precipitous. The judiciary is an indispendsble postulate for a legally ordered society. Inspite of this, the judiciary has been subjected to number of criticism. Nevertheless the judicial review as an instrument of judicial policy making was prevented by the members of the Constituent Assembly. It was considered at an explicitly part of the judicial process. Judiciary has to work under many restraints. Lets have a look on some of the leading cases of A.K. Gopalan Vs State of Madras.[25] Golaknath Vs State of Punjab,[26] R.C. Cooper Vs Union of India[27] and Keshavananda Bharati Vs State of Kerala[28] where the doctrine of Judicial Review has been looked from different angles.

The judicial interpretation of Article 21 was first illustrated in the famous Gopalan Vs State of Madras Case. In this case, the Fundamental Right to Freedom and Personal Liberty should be protected by the Court. The two different opinions were passed by the majority judges – Article 21 considered as procedural rights while Art 19(1) guaranteed as substantial rights. Article 19 provides that the

citizen shall have the various rights which can be curtailed by the sate – by imposing law of restriction or reasonable while Article 21 and 22 considers the positive liberty of the individual which may have the interest of the society. Article 19(1)D prevent the Art.21 the freedom of movement by imposing the reasonableness of law of preventive detention. The court decided that in respect of fundamental rights of life and personal liberty no person in India has any remedy against legislative action. Legislature is competent to pass laws and no other constitutional provision stand in the way, it can enact any law authorizing the deprivation of personal liberty. The object of Art.21 is to put a restraint upon the Executive. So that it may not proceed against life, liberty of the individuals saved under the authority of law.

Critics of Gopalan Decision:

The court has deliberately used the "procedure established by law" instead of "due process of law" of American Supreme Court. The Court rendered as powerless to interference with a law – depriving citizen's right to personal liberty. Similar decisions were taken also in cases namely state of Bombay Vs Ahmaram Sridhar,[29] Baid; Ram Singh Vs State of Delhi[30], Makhan Singh Vs State of Punjab[31]. In the K.K. Kochuni Case Vs State of Madras[32] Justice Subha Rao, opposed the decision taken in the Gopalan Case.

Golaknath Case Vs State of Punjab:

In 1967, the Supreme Court worked in faith for the logical and legal positivism in I.C. Golaknath Vs State of Punjab. So for as the Right to Property was concerned it was considered that the Constitution (First Amendment Act, 1951, 4th Amendment Act 1955, 17th Amendment Act 1964, Abridged the scope of Fundamental right and hence invalid. Filling the writ petition under Article 32, the petitioners contended that "Surplus lands is a non amendable character of Fundamental Rights and hence the amendments so for

been made has infringed the fundamental right of the petitioner. Article 368 only lays down the procedure of amendment but the power to amend is the legislative power conferred on parliament under Article 245, 246 and 248 of the constitution. The law under Article 13(2) of the constitution does not exclude amendment and have an amendment that infringes the Fundamental Right should be declared as wide. The 17th Amendment (1964) Act which amended article 31-A which include 9th schedule of the constitution was challenged by the petitioners. On the ground "State of Punjab and Mysore Vs Punjab Security of Land Tenure Act and Mysore Land Reform Act".

Contents of 9th Schedule:

In the present Parliament's tendency to put controversial law in the 9th schedule of the constitution and thus outside the judicial review has been a bone of contention between Legislature and the judiciary. Now the Supreme Court has reduced the scope of its misuse. On January 11, 2007, the unanimous milestone verdict by the nine judges constitutional bench led by Chief Justice Y.K. Sabharwal asserted that the Court's role as the final arbiter at the expense of the notions of Parliamentary Supremacy, expanding the functions of judicial review. This landmark judgement of the apex court has clearly reinforced the predominance of the constitution by making it clear that the law in the ninth schedule of the constitution do not enjoy absolute immunity from judicial review. This landmark judgement of the apex court was envisaged by the legislature, rather provisions of any Act put in the 9th Schedule after April 24, 1973 (when the basic structure was propounded in the Keshavananda) case by the constitutional amendment would open to challenge on the ground that it destroys and damage the 'basic structure' doctrine of the constitution by eroding the fundamental rights that pertains the basic structure.

It, virtually earned out the 'fundamental' of fundamental rights that form the basic structure of the constitution and hence declare inviolable. The court took the extended interpretations of the fundamental rights as our integral parts of the constitution by saying that right to equality (Act. 14,15,16) right to freedom of speech and expression (Act 19) and right to life (Act 21) with all their extended interpretation from the case of the constitution, could be no means be violated by parliament's amending power. The nineth schedule was drafted by Nehru Govt. in 1951. It is a constitutional provisions granting parliament the power, to insulate any law from judicial review. This schedule was not envisaged by our founding fathers of the constitution at all. In fact it owes its birth to ideological battles in nascent republic between progressive executive and the legislature on the one hand and the judiciary on the other. The Amendment enacted in 1951 introduced the 9th Schedule through article 31(51). According to the provisions none of the laws specified in the schedule shall be declared to be void or even to become void on the ground that it was inconsistent. With only of the fundamental right, notwithstanding any judgement, decree or order of any court or tribunal to the contrary. The justification offered by the Nehru Govt. in 1951 was that the court should not be allowed to get in the way of socialist pattern such as land reforms. According to all, the 13 laws that were put in the schedule in the first instance that were put in the year 1951, pertained to land reforms in the various status. Thereafter all the successive government have conferred with 9th schedule to the protector on variety of law chosen on consideration of political expediency.

Present State of the Doctrine of the Basic Structure:

Keshavananda Vs State of Kerala

The situation got changed with the passage of time on 24th April 1973, when supreme court delivered its landmark judgement in the famous Keshavananda Vs State of Kerala where by introducing the doctrine of basic features. The apex court for the first time exercised the power of judicial review. Thereafter 24 April 1973 has been considered as the dividing point for validating or invalidating any Act pointed in the Ninth Schedule. The Act added to the 9th Schedule have got protected by Article 31(B) from judicial review on the other hand, the amendment of 9th Schedule were left open to challenge in the courts as the doctrine of basic structure. The Article 31(B) was also added to the Constitution by Sec.(5) of the constitution. The Article extends to Jammu & Kashmir also. The Amendment is retrospective and validates the Act included in the 9th Schedule. Since Act 31(B) states that the effect of the inclusion of any but in the 9th Schedule : that such Act shall be deemed never to have become void on the ground of contravention of the fundamental right, the result of inclusion of an Act which has already been declared void on this ground by the court ceases to have effect and included Act, get validity with retrospective operate from the date of its enactment. Therefore all laws have been added to 9th Schedule got protected by Article 31(B).

In the Golaknath case, it has been emphatically pointed out that parliament will have no power to amend only provisions of Part III of the constitution so as to take away on abridge the fundamental rights enshrined in. In the state of Madras Vs Champakam Dorairajan "The court delivered the same judgement, the chapter of Fundamental Rights should be sacrosanct and can not be abridged by any Executive or Legislative order. But decision taken by Court was slightly different from the earlier two cases. In Shankari Prasad Vs

Union of India the question was raised whether the Amendment Act passed in 1951 – which inserted Article 31(A) and 31(B) in the constitution of India served to be void or constitutional. The petitioners felt they the First Amendment Act has prevented the provisions laid in Article 13(2) of the constitution. This created serious issue between the Parliament and the Court. The phrase "state" includes parliament and 'law' also includes the amendment made by the parliament. The court clearly demarcated an ordinary law and the constitutional law. So that Article 13(2) does not effect the amendments made under Article 368.

In Sajjan Singh Vs State of Rajasthan (1965)

Despite the amendment Act (4th) 1955 being passed, giving some legislative measures to the different states with regard to the Land Reforms. They were been challenged in the courts. In lieu of this parliament was forced to enact the constitution (17 Amendment Act) according to which the Acts previously made would be safeguarded. Article 31(A) was amended justice Hidayatullah, pointed out that the "definition of 'law' in article 13(2) does not seek to exclude, constitutional amendments" and there is a clear provisions for amendments. Sajjan Singh case shows that judicial discretion of the Court. Chief Justice Gajendragadhar held on behalf of the majority of three judges including himself that a constitutional amendment was not covered by the prohibition of article 13(2) while justice Hidayatullah J– expressed the serious reservation about that interpretation. He also pointed out the fundamental rights were to be fundamental, so the power of constitutional amendment may come under judicial scrutiny.

Keshavananda Case:

It was 24th Amendment Bill in 1971 which sought to empower parliament, to amend any part of the constitution so as to include the

provisions of Part III within the scope of amending power. In fact the Bill intended to overcome the results of the judgement of Supreme Court in the "Golaknath Case". The bill further sought to amend Article 368 and Article 13. "Can a sovereign body created by a written constitution be supreme in every sphere or be subjected to implied limitations? This was essentially what Keshavananda Case was about. It was ethical, problem raised before the court by the parliament. There was an assumption that there is no distribution between a constituent power and legislative power. (a) If there is no distinction between a legislative and a constituent power then an "amendment" to the constitution passed under the plenary powers will be just like any enactments passed through a different procedures. (b) In the context of Indian Constitution, the amendment would be invalid if it violated, one of the Fundamental rights guaranteed in Part III of the constitution, since it would a 'law' within Article 13(2) of that part. In should be noted that both these arguments were accepted in Golaknath but in Keshavananda, the judges merely overruled that part of Golaknath accepting the second argument (a) without properly considering the broad implications of the first amendment and another argument can be that power of amendment far from being a constituent power is in fact a delegated power, derived from the people, or from the constituent Assembly which drafted the constitution.

C.J. Sikri – spoke for certain reservation. In this opinion, the substance of right to property under article 31 consist of 3 things – (1) The property shall be acquired by or under a valid law, (2) It shall be acquired for a public purpose, (3) The person whose property has been acquired shall be given an amount in lives there of which is not arbitrary, illusory to the judicial conscience. The second part of Article 31(C) was declared as invalid by Seven Judges. Justice Khanna argued the power of the state to amend the constitution would create a 'seed

of national disintegration. While Hedge and J.J. Mukherjee, thought that power conferred under Article 31(C) was an arbitrary power and so it can take a very area of human activities.

Abortive attempt to review Keshavananda

In 1975, the Supreme Court had the opportunity to interpret in Indira Gandhi Vs Raj Naran Case. After the reaffirmation and the extension of the doctrine of basic features of basic structure the court once again tried the "effective Keshavananda Case" decision in Mrs. Gandhi Vs Raj Nairan Case. While delivering judgements in Keshavananda case, most of the judges regarded as "basic structure" of the constitution can be amended by the parliament. The basic structure include the supremacy of the constitution, democratic republican form of government, separation of powers among the legislature, executive and the judiciary, the federal character of the constituted, rule of law, judicial review, federalism, dignity of the individual, the concept of social justice.

Effective access to justice (Present Context):

For the first time Article 15, 16 of the constitution, on reservation, in educational institution and government jobs respectively are held to be the part of basic structure of the constitution by its recent judgement dated 11th January, 2007. This judgement emphasized forcefully the value of fundamental right and the court's readiness to protect them and in any sense will be determined by constitutional device of the parliament.

B. JUDICIARY IN U.K.

1. The position of judiciary in relation to executive and legislative

Under the English Constitution, Parliament is supreme and can do everything that is not naturally impossible. "The courts in England cannot nullify any Act of Parliament on any ground whatsoever. In Britain, partly because of the lack of the written constitution and partly because of doctrine of parliamentary sovereignty, the role of the court is limited, the English judiciary does not possess the power of judicial review, and hence, the court can interpret Acts of the Parliament but they cannot declare a Parliamentary statute invalid because it contradicts the provisions of Magna Carta, the petition of Right, the Habeaus Corpus, Bill of Rights etc. Before we enter into the relation between the parliament and the judiciary lets have a look into the historical background of framing the constitution. Before the framing of the constitution there has been institution of kingship which developed in England during the Anglo-Saxon Period. The people of England were weak and defendless due to interval warfare among the tribes and the aggressors. The three kingdoms of Northumbria, Mercia fell to the Danes, Wessex rose to supremacy in the 9th century and the English Nation was formed. The institution of kingship was strong from the time of Alfred (1871) till the Norman Conquest of 1066. The 'Council of Ministers – Wiseman' who were known as wit exagen of elected the king. The witan usually exercised large powers of the king. They acted as chief-advisers of the king. In modern times, the function of a witan is similar to the Administrative body. Though the king presided meetings, conducted the business, of enactment of laws, levying of taxes for public services, but his powers were been checked by the witans. How far the king was bound to follow the advice of his counsellors depend upon the personality of the king. During the Norman-Angevian period the rulers exercised

absolute powers. Curia Regis could not impose any check on their sovereign powers. But the kings can seek the advice of the 'Council' during the time of war and peace, and "passing of the laws". The constitutional development, grew out of the usages, and customs which the English people tried to preserve. The authority of the king was absolute but he sought the advice of powerful personages of his realm and sometimes followed it. The English Parliament grew out of the Plenary sessions of the Great Council; the Privy Council (the cabinet) the exchequer (the treasury) and the High courts of justice arose out of the Curia Regis.[33] Henry-II, who was William's grandson, founded the Angevin or Plantagenet dynasty, marked the great advance in English Government, Anarchy, during the reign of Stephen (1135-54) had almost wrecked the entire system of government so admirably established and strengthened by the conquest or. With the coming of Henry II, all what had been lost was recovered. He waged a relentless war both against the rebellious nobility and independent elergy. He was successful in his efforts and brought administration on a stranger footing.

According to Great Charter of 1215 .... King John, protected the civil rights of the English people. Magan Carta was the first written document of Fundamental Rights. This means that "the effective restraints have been imposed upon political authority which is the very basis of Constitutionalism. The petition of rights, and Bill of Rights constitute the bible of the English Constitution. According to the 39th Article of Magna Carta – "No free man shall be taken on imprisoned or disseised or outlaws or in any way be destroyed except by the lawful judgement of his peers or the law of the land". This means that the ordinary citizen is not bound to obey the legal orders of the authority. Out of the social conventions, the English law has been formed. The traditional usages and customs were obeyed by the English people. The ordinary law or the customary law, protect the

rights and duties of the citizens. Under the reign of Henry II (1154-1189) the jurisdiction of the court was limited. Matters of political importance was determined by the king in his court or by the Council of advisers. The royal exchequers, the king's bench and the chancery were the first set of institutions who played deliberately the role of administration and justice. The judges and the baron formed a part of the Institutions. It was in 1254, Henry III, felt the need of two knights from each country in supplying the money wars in Gascony. The Great council acted vigorously at this time for a new institutions, which is known to be the 'Parliament'. The Parliament consist of members of three estates namely, nobels, elergy and the commoners. By the middle of the thirteenth century the parliament has acquired its importance. The higher elergy who consider themselves to be the great nobles, and the barons who had their own interests, with the right, were placed in the higher order of the council. The knights and the commoners were placed in the secondary strata. Later in the fourteenth century, this system was changed. The two houses were formed – (1) House of Lords consisting of great barons and ecclesiastical magnets and the other house of commons (consisting of gentry and the wealthier class of shires and boroughs). The royal estates were headed by the commons. Parliament was royal creation which, deliberately advised the king in running the business. The legislative powers were given to the parliament. It was at the end of fifteenth century, the power of the king collapsed and the parliament regained its strength. But it did not last long. King Henry VII and Henry VIII, through their own effort were able to lead the nation. The absolute powers were given to the king and the parliament was servant of the king. The parliament had no control over the royal exchequer, the king acted in his own discretion. He was advised by primary council – the members of which were appointed by the king. During the reign of Tudor, the conflict began between the Monarch

and the Roman Catholic Church. The experience of tyranny was felt by Queen Elizabeth and opted to reconstruct the parliament for the restoration of power.

The parliament did its noble work "of ending the breach between the church and the monarch". Soon after the death of Queen Elizabeth, parliament looses its prestige and its power has been reduced by the James Stuart of Scotland, England. The Divine Right of Kings were recognized by his successor Charles I. The monarchy was turned into absolute tyranny due to inefficiency of the king. The councillors turned to be disloyal, selfish and unwise. Chaos, confusion, and disorder prevailed till 1628. The king imposed heavy levies (on the parliament) with act the sanction of the parliament. This had reached to a conflict between the king and the parliament. In 1649 Charles was defeated and executed. In the same year, monarchy and the house of lords were abolished and the parliament under the leadership of Oliver Cromwell proclaimed the "Common Wealth". In order to remove all sorts of trouble with the parliament. Cromwell stood as a protector of lords.

2. Supremacy of the Parliament:

After glorious revolution of 1688, the powers of the Monarch was restored. The Famous Bill of Rights "Consisting rules and principles of the constitution" enabling the parliament to assume the powers of the Monarch. The Bill has no doubt limitized the powers of the king. This is known to be "the constitutional struggle between the Parliament and the Monarch". Besides this the Act of settlement of 1701 further limited the powers of the king thereby establishing the authority of the parliament. The Bill of Right of 1689, marked the culminating point shifting the powers from the crown to the parliament. Thus parliament became a matured institution of a Popular Government. Magna Curta had curtailed the king's power

over the barons. The struggle between Cromwell and Charles once again gave birth to a new democratic institution.

The supremacy of the parliament as said by Dicey – from the legal point of view – assumes dominant characteristic of our political institution. "The Parliament has the right ot make and unmake any law whatever, no person or body is recognized by the law of England as having a right to override and set aside the legislation of Parliament".

(1) Parliament can repeal or argued by law in ordinary process of legislation. For instance, Parliament Act of 1911 and 1949 curtailed the veto power of the house of Lords. (2) Parliament's power is considered to be the supreme and unlimited. The embraces a huge tie including making of laws, levying of taxes the sanction for declaring of war and making of peace. It controls and supervises all governmental machinery. Moreover it can dethrone kings, it can elect kings, it can abolish the kingship.

Sir Edward Coke says, the power and jurisdiction of parliament is "so transcendent and absolute as it cannot be confined either for persons on causes within any bounds."[34] In England there is no distinction between constitutional law and common law. Parliament enacts the law and the courts can interpret them. A major portion of law in England consisting common land. Though equity and common law were the oldest and most fundamental to the English Constitution, neither equity or the common law can overrule the laws enacted by the parliament. Thus, the supremacy of the Parliament ensures the status of certain fundamental and historical documents – "like Magna Charta, the Petition of Rights, the Bill of rights, the Habeans Corpus Act. The several Acts dealing with suffrage etc.... can constitute the sources of constitution. Parliament is both constituent assembly and legislative body. Dicey says, that law is a law whether it

is moral or not and legislation passed by the parliament may not have any reference to the moral aspect. Parliament cannot pass the law which is against the facts of nature or against the established codes of public and private morality.[35] Similarly, it dare not pass legislation against the established customs of the country. The "Rule of Laws" as propounded by Dicey – had given importance to the sovereignty of parliament. Though parliament and the court assumes their authority from the king. The rule of law means that ordinary law of the land is of universal application, that there is no exercise of arbitrary authority and there is no separate system of laws. The ordinary law – protects the rights and liberties of the citizens. Even though parliament could override the courts and the statute laws superseded the common law in by land the parliament and court, work in alliance.

The court denotes the "Administrative Law. Previously the common law obtained a high authority since it has originated from the king's court of Justice.

3. Balance between the Parliament and the Court:

Along with the parliamentary sovereignty, A.V. Dicey has defined the rule of law, an another pillar of the British Constitution. The Dicey exposed three principle, in his phrase "Rule of Law". These are (1) absence of arbitrary power. This means that no person is punishable or can be lawfully made to suffer in body or goods except in the case of a distinct breach of law. According to Dicey in England, there is the absolute supremacy of regular law. The government does not exercise arbitrary or discretionary power for any breach of law, it must be established before the ordinary courts.

(2) Equality of all persons in the eye of law. No person is above the law, all are equal before the law and all disputes are decided in ordinary courts.

3) Constitution in the result of the ordinary law of the land. The third principle of the rule of law means that the principles of the British Constitution, especially the legal rights of the citizen, are not secured by guarantees in the constitutional documents. The rights of the individual precede and do not derive from the constitution. The courts determine the rights of persons in cases brought before. Dicey said – "our constitution is a judge made constitution". It is the result of ordinary law of the land.

Dicey's three principles, were criticised by Ivor Jenning. It is second principle – which states that equality of all persons before the law – be the citizens or officials, rich or poor has a double meaning, the practice of inequality is done in a capitalist society where the priviledges of the wealthy classes were safeguarded and the welfare of the poor classes left neglected. It shows that everybody is not subject to the ordinary court. Both the houses of Parliament can be punished due to breach of priviledges. Dicey's third principle has also been challenged on the ground that the concept of Rule of Law is logically incompatible with that of Parliamentary Sovereignty. The parliament case enact the laws encroaching upon the common law rights of the individuals such as landlord, the tenant law-curbing the private landlords, some of the Acts such as Race relation Act, Sex Determination Act 1975, Equal Pay Act 1970, comes under the rule of Law.[36] These are sometimes been threatened by the enactments of the parliament. In the British Constitution, since there is no authority above the parliament, the Judiciary can not override its supremacy. The judges made law through the "Common Law". The judges applied the laws to the disputed facts. Sometimes, precedents and statutes helped to settle cases which were complex in nature. The doctrine of the statute laws gave the position of the judges. The English Common Law recognizes no distinction between the Acts of Government officials and ordinary citizens. All can be amended to the same ordinary courts

and to the same law. Though the system of administrative adjudication is inevitably developing. The promptness of justice independence of the judiciary though recognized by the constitution, the judges are appointed by the Crown and can be removed by the joint address of both houses of the parliament. The judges and the courts were the custodian of the liberties of the Citizen. The liberties of the individual were been guaranteed due to the existence of Rule of Law. There is no existence of the Judicial Review in England so the political role of jurists were limited. Comparing British Parliament with the India Parliament, it is seen that the Parliament of India is not sovereign as the British Parliament. Since our constitution in written, the Parliament derives its powers from the constitution. It's powers are been limited. Since India possess federal character powers have been distributed between the union and the state governments – under the union and the state lists.

The parliament has to act on a limited boundary it has the power to legislation the state lists. Though it has no power to amend the constitution.

The Indian Parliament cannot enjoy the sovereignty as such, due to presence of Judicial Review of the Supreme Court which has the power to interpret and examine the laws enacted by the legislature. If any part of the laws is enacted against the provision of the constitution, then Supreme Court can declare unconstitutional.

The incorporation of Fundamental Rights in the constitution is another factor which limitised the sovereignty of the Parliament. In England there has been the administrative Tribunals, who tried the delegated legislation and administrative adjudication.

(C) Need for structural changes in the Indian Parliamentary Model:

At the time of framing "the constitutions, the policy maker had a choice of adopting two systems of the governments viz. parliamentary system as prevalent in United Kingdom and the presidential system as operating in the United State of America. The constituent Assembly – deliberately opted for a West Minister Model" for the independent India. Munshi explained in the Constituent Assembly that since India has been administered by the British Parliament, so it has to draw the traditional principles of British Constitutional law.[37] Most of the provinces have also adopted the British model. The Dominion Government of India is functioning as a full fledged Parliamentary Government. Apart from continuing the parliamentary system, the framers also thought of "Presidential form of Government". As the presidential model has adopted separation of powers, the executive and legislative work in two separate spheres, they are not responsible to each other. Hence there is a less possibility of a stable government. There has been a strong debate between the policy makers – which drafting the constitution. K.T. Shah demanded for a "Presidential system of government. K. Santharam, felt that adopting Presidential model would create a deadlock. Since under a democratic system, the risk of feud or conflict – would likely to arise between the legislature and the executive. In an underdeveloped country, democracy has to carry on the task of economic reconstruction alleviating the mass poverty and overall national development. Alladi Krishnaswami Ayyar said –

The Presidential system was started in America – due to rebellion between the Executive and the legislative, which provoked Montesquieu and other political leaders to utilize the separation of powers – between the legislative and the executive. The Indian leaders felt the need of parliamentary model since this model, through

legislative and executive afford, the political and social economic problems would be eradicated.

1. Choice of Adopting Parliamentary and Presidential System in India:

Some of the countries like Afro-Asian and Latin American countries advocated for the Presidential Model in this Governmental system. But the effect of Presidential Model makes the government dictator. They became less democratic and more autocratic since executive, is much stronger than the legislative. Often conflict arise between executive and legislative. Defection within the ministry, is always day to day affairs – they are less responsible to the executive. The Presidential system, if it is adopted in India, the direct election of the president will not have to depend upon the legislature for his continued existence and he can rule better than a prime minister. The minister in Presidential system, being not be members of the legislature would not be responsible to the organ and hence they would work in their own discretion. Earl of Balfour has said that under the Presidential system, the effective head of the National Government is elected for a fixed term. He cannot be renowened even he is proved to be in efficient, unpopular. The President is all powerful. All his cabinet colleagues are appointed by the President. The Presidential model in United State persist due to adaptation of "Separation of Powers" – between the executive and the legislature.

The Indian leaders needs a responsible government. According to them, the Parliamentary Model would be best system for India. Since the legislature and the executive would jointly work in harmony for the developing society. Since the work of Parliament is so vast and complicated that the members of Executive finds it difficulty to carry out the work of the legislature. The Parliamentary executive has to maintain a close lia son with the legislature for the better functioning

of the Government. The representative character of the legislatives makes the executive more responsible. Indian masses have been under the British Rule, they demanded for a responsible self government in the Parliamentary system, the people's representatives share and control the powers of the executive. Each legislator can pull up the executive if any wrong is done to the people of the country or his constituency. In other words, the people through their legislators, have almost linked the day to day administrative affairs of the country. Thus the parliamentary executive is much closer to the people's than Presidential executive can ever be – The Parliamentary model has its own weaknesses though it is widely practised in the United Kingdom, Australia, Canada.

President they do not indulge in the politicking. Though nothing prevents the president to have sycophantic and mediocre cabinet colleagues the features has tremendous possibility of improving the quality of the executive. At the same time there is no prohibition in the Indian Parliamentary model. The anti-defection laws has helped to curb the evil of defection with which Indian Politics was been identified. The instability of the government in the model has, therefore, been minimised to a great extent.

The Indian Judiciary and Separation of Powers:

India has unified judiciary with the Supreme Court at the apex. It is the custodian of individual rights and freedom, with powers of judicial review of legislation to determine its validity. It is the fine arbitrator of the meaning of the constitution and the laws. The Indian parliament's power of legislation is subject to judicial review, unlike that of the British Parliament. Even the power to amend the constitution is subject to judicial review on the limited ground of the indestructible "basic structure".

The real supremacy in India is of the constitution and not of any organ that is a creator of the constitution. The constitution has delineated the boundaries of each organ indicating the complementary between them to serve the constitutional purpose. Rajendra Prasad, as the Chairman of the Constituent Assembly – said the country will be administered according to the rulers who had to abide "The rule of law". Since the rule of law is the bedrock of the democracy and so the executive and the legislature has to act under a certain restraint. This is the guiding philosophy of the constitution.

The constitution has developed its unique feature, which is based on the historical background of the country. Unlike the British Constitution is developed through the Conventions, customs and the rule of law. The principle underlying the constitution "rests on the popular sovereignty. The representatives of the Parliament are chosen through the sovereign will of the people. The President who is the part of the Parliament – is the real head of the executive but has to act on the aid and advice of the Union Council of Ministers. The real legislative powers lies with the council of Ministers – who controls the Lok Sabha.

The British Parliamentary system has been adopted in India, where the Political executive controls the Parliament. The Cabinet and Council of Ministers enjoys a majority in the legislature and virtually controls both the legislature and the executive. Like the British Cabinet, it is hyphen which joins a buckle which faters the legislative part of the State to the executive part.[38]

The parliament's power to legislate its Constituent Power, its role during emergencies, and its interface with the judiciary the executive and the state legislatures and other public authorities has to work jointly. All the organs has to work under constitutional limitations which act as a cheeks and balances. Under the "Basic

structure doctrine, is the distribution of legislative powers, between the union and the states, the fundamental rights, powers of judicial review and a independent judiciary.

Laws made by the Parliament and state legislatures including constitutional amendments are subjected to judicial review which is a basic feature of the constitution. Including (77-79) article and Article 95 in the union list empowers the Parliament to legislate in respect of the matters relating to judiciary. The appointment, of the judges, their salaries, and emoluments, relating to Article 124 to 128 and 217 to 225 including the removal of the judges of the Supreme Court and High Court – provides a participatory role of legislature and the executive.

At the same time the Judiciary also has the power to adjudicate if there is a election dispute between members of the parliament and the state legislatures. Decisions of the speakers under Anti Defection Law are subject to judicial review. All the executive actions are subjected to judicial review. The separation to judiciary from the executive is mandated in article 50 of the constitution with the independence of judiciary unnecessary corollary. This has illustrated in "Chandra Mohan Vs State of UP, AIR 1966, SC, 1987".

Later the doctrine of separation of powers was elevated to the status of a basic feature of the constitution in Indira Gandhi Vs Raj Narain, AIR, 1975 SC 2299, where in it was observed that "the exercise by the legislature of what is poverty a judicial function even though there is cooperative federalism, but there is no rigid distribution of powers, which provided system of checks and balances". This is recognized as a basic structure doctrine, which is core of the constitutional scheme. This is operated in state of Bihar Vs Bal Mukund (AIR 2000, SC-1296).

Judicial Response to Social Demands – Mututal Relationship between the Parliament and Judiciary in India:

Areas of Conflict: There has been a conflict between judiciary and the other organs of the government in the context of separation of powers Lok Sabha, speaker Somnath Chatterjee, an eminent lawyer has voiced this concern in recent times. Judicial intervention is legitimate when it comes within the scope of permissible judicial review.[39]

Judicial intervention results in judicial adhocism or judicial tyranny because, of inadequate expertise in dealing with the matter like the public interest litigation which comes within the maters of the judiciary. The US Supreme Court laid a pragmatic test in Baker Vs Carr, 369 Vs 186 (1962) for judicial intervention in matters with a political hue apart from those [illegible] allocated to another branch. The political questions and policy matters do not come under the domain of judiciary. Under article 356 of the constitution, S.R. Bammai Vs Union of India, AIR 1994. SC-1918. The powers of the superior judiciary to issue 'mandamus or a suitable direction to the concerned public authority commanding performance of its legal obligation is the remedy in the case of such institutional failure.

The principles of general law must govern the exercise of judicial power even under the article 32 and 226 of the constitution because they are the constitutional remedies for the enforcement of the constitutional and other legal rights. The principles regulating the exercise of the discretionary power under the specific Relief Act and the circumstances in which the Court would decline relief must be born in mind. In Hawala case AIR 1998 SC 889, the Supreme Court developed the new concept of "Continuing mandamus" to compel the CBI to investigate the criminal charges levelled against high dignitaries because of its inaction for years which was a clear violation

of article 14. The court rejected the repeated plea for taking over the investigation and having it done by a new body under its supervision instead of CBI. The Hawala Case had a larger impact on the policy. It reinforced the need for probity in public life and of accountability of public men and affirming people's fundamental rights to corruption free governance it would and public law remedy for the enforcement of that right with accountability of public men. (It also triggered to process for systematic improvement in the quality of governance by giving autonomy to CBI in the performance of its stability function and stressing her need for similar improvement of the entire policy force and other law on enforcement agencies). The famous US Supreme Court, decision of Marshall C.H. in Marbury Vs Madison (1803) 5 US 137 asserting the Power of Judicial review without risking non compliance of its order is an example of judicial statesmanship.

In certain areas the judiciary has encroached into the executive, regarding the policy decisions. The power to issue mandamus is vested in the judiciary. Sometimes the acts of judiciary is seen as transgressing the dividing line. Instances like "allotment of particular Bungalow to a Judge. Cleaning public conveniences, levying congestion charges at peak hours at airport with heavy traffic etc. The judiciary sometime has taken over the implementation of the programme – through the non statutory committee – which relates to illegal constructions or encroachments on public lands. In fact the judiciary has no provisions of making the general lanes – particularly "Specific Relief Act .... Judicial intervention leads to tyranny. In the contrary there are few instances, which definitely had a positive impact on the protection of the environment and forest. The state is under compulsion to protect and improve the environment and safeguard the forests and wild life – which comes under Article 45. A kind of global threat, a kind of apathy forced the judicial intervention for such matters – National Environmental Tribunal is been set in to

deal with the cases relating to the forests, environment, water and air etc. Specific laws have also been enhanced to deal with such issues. The tribunals were headed by the judicial member. The areas of conflict between the judiciary and the legislature relate to the speaker's jurisdiction under the Antidefection law administration of the secretariat of the legislature the proceedings in the legislature and the privileges of the members of the parliament and the state legislature, judicial review of the proclamation under Article 366. Although the constitution inspires for mutual respect both judiciary and legislature which come under Article 121, 122, 211, 212 and 361, but the provisions, resist the members of the Parliament and the state legislation to conduct any discussion relating to the appointment and removal of the judges of the High Court and the Supreme Court. Similarly the judiciary cannot question to the state legislature of the Parliament with regard to the proceedings of the house or any irregularity to procedure nor any member is subjected to any court's jurisdiction. There has been a strong debate between the legislature and judicial powers.

Speaker's Jurisdiction under Anti Defection Law: In Kihota Hollahan, AIR 1993, SC 412, the Supreme Court struck down the provision in the Tenth Schedule of the Constitution excluding judicial review of the Speaker's decision on the issue of defection.[40] So long as the courts refrain intervening at the interim stage of the proceedings before the speaker there can be no reasonable apprehension of any conflict. A speaker's status is separated from the Chief Justice status in administrative mattes. The chief justice can review the administrative acts of the speaker or the secretariat. In one of the incident, the Manipur speaker H. Borobabu Singh, Challenged the Court with regards to administrative act of the Speaker which is considered as "the violation of the fundamental right. The speaker – refused to honour the courts order made on the judicial review. The

speaker however ignored the contempt proceedings of the court. When he was asked to appear personally in the Court. The speaker, appeared in the court and the court uphold the majesty and the rule of law promptly discharged the notice and closed the matter. In order to maintain the dignity of the speaker's office. The court closed the matter and opted mutual respect between the two organs.

In Keshav Singh's case AIR, 1965 SC 745, there is no room for ambiguity and conflict between both the branches of Executive and Legislative. They adhere to those parameter relating to judicial review of the proceedings in the legislatures. The Supreme Court is the final arbiter of any proceedings in the house.

Methods of appointment of Judges of Supreme Court play an important role in the establishment and preservation of the judicial independence. The minimum role of the executive in the appointment of the judges is considered necessary for the establishment of independent judiciary. In UK the power of appointment of judges has been vested in the executive. While in USA the judges are appointed by the executive, subject to the legislative concurrence. In India, different method has been adopted to appoint the judges. The executive and judiciary both participate in appointment of the judges. In UK the appointment to the court of appeal and the house of lords and the office of Lord chief justice, are been made by the British Crown on the advice of the Prime Minister after consultation with the Lords Chancellor. The Lord Chancellor is once been head of the Judiciary presiding officer of the House of Lords and a member of the Cabinet. Lords of Appellate Court and Judges of the Supreme Court of England and Wales are appointed by the British Crown on the recommendation of the Prime Minister. The executive plays important role in the appointment of the Judges especially of the Superior Court. However, the judiciary in UK is fully independent on account of the conscious public and the standard of conduct maintained by the

judges, advocates and politicians. The executive is fully aware of the need to the independent judiciary and it does not interfere in the exercise of the judicial functions by the court. Thus, there is a tradition called the British tradition of non interference with the judicial functions and this tradition has been maintained so far. In USA the Judges of the Supreme Court are appointed by the President but the appointment so far made by him is required to be notified by the senate. Appointments are usually made on party lines. In selecting the candidates for nomination to the Supreme Court, political and ideological views of the candidate are considered relevant and an attempt is made to give the court a representation look so that court desires the legitimacy in the eyes of the people.

In India the constitution makers were aware of the developments in USA, UK and British. They drafted the constitution of India having the peculiar Indian circumstances in their own perspectives. The view of Dr. Ambedkar state above, indicates that the constitution makers were not in favour of conferring on the executive the absolute power of appointment of the judges of the Supreme Court. They wanted the executive to play passive role in the appointment of the Judges.

2. Judicial Review in U.S.A.

In order to check the unlimited exercise of power by the executive and legislative organ, the framers of the constitution felt the necessity of judicial review by the Supreme Court. According, the Chief Justice Marshall the Doctrine of Judicial Review was established in 1803. This was first applied in the famous Marbury Vs Madison Case. The first Congress created the National judiciary by the judiciary Act of 1789 but did not "mention the Judicial Review". It was Marshall, who felt that "once the appointment is been done legally and the commission has signed and sealed. Marbury being appointed by

John Adam, as the justice of peace for the District of Columbia. No Commission was delivered and the Madison has no right to withhold this commission. Marbury approached to the Supreme Court, for the order of Mandamus – according to which the commission in which he was being entitled as a member was withheld. The Supreme Court according to Section 13 of the Judiciary Act of 1789, felt it necessary to issue writ of mandamus to the persons holding office under the authority of the United States.[41] Madison who was the secretary of the state declared that the commission to which Marbury was entitled was unconstitutional, since the Act of Federal Judiciary of 1789 was not made according to the constitution. The legislative has no power in this case to alter the decision taken by the Supreme Court. Marshall has also expressed that "Judiciary has the unlimited powers to examine the constitutionality of the laws "which is unrestrained by the Congress. Since the constitution is the fundamental law of the land, so the authority of the court should examine the judicial review. Only the original jurisdiction of the court is limited by the principles of the constitution".

Theory of Separation of Powers:

This was severely criticised by the President Jefferson when Marshell has violated the theory of separation of powers. According to the theory of "Separation of Powers" each organ has to act within a certain limit. No organ can encroach upon other. The American Constitution is based on the principle of separation of powers. In order to exercise the arbitrary powers of the three organs. Justice Brandeis has said that the convention of 1787 gave importance to the doctrine of separation of powers. Article (1) of the constitution provides that all legislative powers shall be vested to the Congress. Article 2 provides that the executive powers shall be vested to the President.[42] Article 3 states that the judicial power will be vested to the Supreme Court and in such inferior Courts as the Congress may

from time to time ordain and establish. Though the system of separation of powers being practised in USA but this has been implemented with an elaborate system of "Checks and balances". In order to put an effective check on the three organs, the theory of cheeks and balances have been imposed so that none cannot enjoy the unlimited powers. For instance the Congress has the power to make laws, but those laws on which the President gives his consent, can be effective. President may either give the him assent or may sent the bill to the Congress. In this case, the President exercise two kinds of vetoes without taking any decision by the simple majority. The President can sent the bill to Congress exercising "Pocket Veto". (ii) If the Congress may pass the same again by two-third majority exercised, the bill is passed over the veto exercised by the President. The Supreme Court of USA has also the power to declare bill passed by the Congress and approved by the President as ultravires. The judges of the Supreme Court are nominated by the President and also been impeached by the senate. But these judges can restrain the powers of the Congress and President. On the other side the Congress can determine the size of the Court and in some cases, puts and effective check on the appellate jurisdiction of both Supreme Court and the inferior courts. The President can enter into the treaties but these are to be rectified by the senate. There are certain appointments made by the president which have to be confirmed by the senate. Ogg and Ray have opined that "Checks and balances being designed to promote an equilibrium between the three organs so that amelioration of the ill effects of the three organ do not surpass each, due to "doctrine of separation of powers".

Fredric Ogg writes ,"No feature of American Government, national state and or level in more characterized by "separation of powers combined "Precautionary checks and Balances". In the Marbury Vs Madism "ruling was critical in establishing the judicial

review of the Supreme Court. President Jefferson, have opined that the court has no power to impose limitations on the other two organs of the Government. Since each organ has to act on the constitutional law.

In Dred Scott case (1857), the Supreme Court has also extended its jurisdiction on the Congress on the question of abolishing slavery in the territories belonging the North. In 1819, Marshall in the case of MacCulloch Vs Mary land has established the doctrine of federal supremacy over the states and enunciating the principle of implied powers by the Congress. Marshall emphasized on the National Sovereignty in a broad perspective. The state like Mary land levied a heavy tax on the "Nationalised Bank" since it had a "fair deal" outside its territory. The Bank had abide the authority of the state. The Congress had legislated the laws, prohibiting the federal banks to work outside its sphere. On 6th March 1819, Marshall had given his judgement, declaring the laws of state as unconstitutional and Congress has no Constitutional power to control the federal banks within the state. Then he gave emphasis on the "Principal of National Supremacy", even though the state posses authority of sovereignty within its own sphere. The Congress status were dismissed. After the death of Chief Justice Marshall, President appointed Roger B. Janey as the Chief Justice in 1935. He made some changes in the union and in federal states. Through Federalism, being practised but sovereignty of the state was not recognized.

Judiciary during Roger B. Taney Era:

A Common law for criminal jurisprudence was established in the Federal Act. The Federal Court suspended its jurisdiction in Policy making and establishing a common law for the separation of trade and commerce in the Federal State. During Marshal period, there is no "common law in the federal judiciary". According to the Judiciary

Act of 1789, Sec. 34 the rules of decision of the state was taken to be the common laws or which a federal constitution, has no authority. A set of rules – was different from the common law, during Jacksonian Era. Taney felt the necessity of "Common law which would be uniformally practised both in the Nation and in the federal states and extended the expanded the jurisdiction of Federal Courts.

In 1870's the Supreme Court approached for radical changes in National Economy of the Country. In order to regularize the balance between the state, business enterprises, the Court "imposed the due process clause of the Fourteenth Amendment to interpret the Economy of the State. The doctrine of constitutional law, the right to equality, property rights, enterprenial liberty, are been practised to protect the new industries and encourage the factories of the federal states. In this situation Supreme Court examined its judicial Review resisting the State's legislation on the Economy. Since the Doctrine of "right to equality and the right to property is been operated by the Supreme Court. Right to prope rty and Right to liberty is been guaranteed, by the court, the Congress or the President has the power to seize these rights of the citizens. In this case, these rights can be associated with the "due process of land in the federal constitution. In the 1870's, the question of due process clause was amended in 14th Amendment according to which property rights and individual liberty have been safeguarded. But the 14th Amendment has been violated in the "Slaughterhouse Case of 1873" where the state laws banned the slaughter house of the city of Louisaine and protected the monopoly business of slaughter house in New Orleans. In this case, the court defined the legislation of state, declaring that private property is devoted for the public interest then it must be subjected to public welfare. Later Justice Field and Bradley hoped for a laissez fair doctrine.

The due process of law have been imposed on the statutory laws, ordinary of administrative Acts of the state, if they impose any kinds of limitations on the rights of the private property. Under Taney, the ideas of Jacksonian democracy began to work their way into the Court's opinion. The break between the Marshall and Janey Courts is often exaggerated. Taney and his colleagues were just as devoted to the protection of property as was the Marshall Court.[43] The Taney Court was concerned especially with property rights in land and slavery.

Changes in Judicial Power of Supreme Court After 1930's:

President Franklin D. Roosevelt battled with Supreme Court for a more dramatic attempt of influencing the judicial decision by the political leader. The country had undergone the economic depression. After taking the office in 4th March 1933, President passed a series of laws for the Americans, which is known to be the New Deal (The Supreme Court invalid eight out of ten measures of such programmes. In 1935 these measures were put before the Supreme Court. Eight out of ten measures were invalidated by the Court declaring them to be unconstitutional. The programme of the New Deal would not benefit the Economy of the Country. But the, president Roosevelt won the victory by an over whelming majority. On 5th February 1937, he presented to the Congress his own programme to recognize the federal judiciary. The ultimate power lies to the President in appointing the additional judges, for each member courts. The president tried to modernize the Supreme Court, but the Conservatives accused him as "dictator to subjugate judiciary at its own will. While the liberals too, viewed the proposals of the New Deal Programme to be an expedient solution of the immediate problem. Between March to June 1937, in the midst of debate over the president's proposal, the High Court upheld a state minimum wage law, the Farm Mortgage Act, the amended Railway Act, Wagner Act.... The Social Security Act. Chief

Justice Hughes and Robert, who had once voted the conservative, supported the liberals.

The Supreme Court became Super Legislature:

Between 1882 and 1937 the Supreme Court became "an aristocracy of robe and twisted the due process clause into a moat around all forms of private property".[44] The Supreme Court became a censor of legislation which in the opinion of justices unreasonably interfered into the matters of private property. Chief Justice Charles Evans Hughes – guided the Supreme Court when it collided with the New Deal Programme of Roosevelt. Roosevelt was succeeded in countering the attacks of Supreme Court and knocked down the barriers posed by the judges. Between 1937 and 1946 – the Supreme Court handed down may decisions protecting the Civil liberties of the individuals. Harlon Fiske Stoney was the Chief Justice during Roosevelt's period could not make any changes in the "Courts Doctrine".[45] The court act merely as a rubber stamp. It was under the leadership of Chief Justice Fred M. Vinson (1946-53) that the Supreme Court regularized the business of the Government. The Court detected the Civil liberties of the minority group but deferred the judgement of the Congress and the state legislatures on the question of "national security" which compels to sacrifice the civil liberties.

Warren Court:

When Eisenhower was the President, Earl Warren was appointed as the Chief Justice of the Supreme Court. The Warren Court under the leadership of Earl Warren – did not make much contribution. Its place in history was kept as a precedence but certain changes were made in the "administration of justice".[46] It struck down inquiry statutes and few congressional enactments. Some more provisions of Bill Rights were added in the "Fourteenth Amendment".

Though there was frequent conflict between the Congress and the court, the decisions taken by the Supreme Court stands to be the final, where the Government has no power to curb right to equality" or any discrimination on the basis of race.

The Supreme Court made landmark decision concerning "the Civil liberties, desegregation and freedom of Press. Separation of Church and Mute, abolishing the school program ... right to Counsel.

Thus the Judicial Review in an extra legal power of the Supreme Court, which can check the powers of the president and the Congress.

Powers of the Supreme Court of USA:

From 1789 to 1865, there have been changes regarding the Supremacy of a Nation in a federal system. There was a strong debate between the federal Government and state on the issue of the constitutional process. Jefferson and Madison inspired the Virginia and Kentucky resolutions to denounce the Seditious Acts. They initiated the state legislatures and the senators to resist the enforcement of the Federal Acts and consider them as unconstitutional if necessary. In 1814, at the Harlford Convention, New England, leaders talked of secession .... (i) Marlyland and Ohio – prevented branches of nationally chartered Bank of United State from taking any actions against the borders. In Jackson's rule Georgia defied the Supreme Court in making the Federal treaty. The Wisconsion's courts issued the writ of habeaus corpus, to the man who was convicted in the Federal Court. South California – was threatened to take any decision regarding the "tariff". In the same way, the Northern State was debarred from taking any action according to the Fugitive Slave Act of 1850. All these challenges were peacefully being settled by the president Lincoln. The issue of "slave controversy" and the issue of National Supremacy were been enforced by the National authority. In order to make the "powers" of the

national authority effective, the Chief Justice Marshall, in 1803 asked the Judges to make the law which would make the constitution and the questions relating to the constitution. In the same way, the Chief Justice Janey, enforced the "Power of Judiciary to interpret the supremacy of law". The power of judicial review was some how limitised by Andrew Jackson and Abraham Lincoln who expanded the presidents power. The scope of determining the national power and rational policy are to be settled by the Congress not by the judiciary. For Example, the Compromise of 1850, the Reconstruction Acts, the Agricultural Adjustments Fair labour standards acts of 1938 are determined by the Congress enactments.

Different attitudes are being taken by the three branches of the Government, regarding the issue of federalism. The Congress had extended the "spheres of National interests". The Chief Justice Marshall vindicated the supremacy of the Nation, and developed the "doctrine of implied powers". He resisted the state to interfere in the National sphere, considering the Acts to violate the spirits – of the constitutions and also threatened the "property rights".

In 1787, the framers of the constitution did not regulate the civil rights of the citizen. The judicial review of the Federal Courts over the state legislations was some how been subjected, over the years. According to the Fourteenth Amendment of 1868 the Protection of Negroes was first recognized by the Supreme Court. The Supreme Court considered the Civil Rights Acts as invalid.

Judicial Changes Since 1937:

The Supreme Court is the arbitrator of the federal system i.e. was realm's of activity interms of constitution power which is definitely defined in 1880. Since 1937, the judicial doctrine has recognized the emergence of a new concept of National State relations sometimes, lebeled as cooperative federalism. The Supreme Court

have delegated the powers to Congress in Article 1, Section 8 of the constitution. Court also directed the lower Federal Courts to follow the state law. The Economic Policies of the state and nation are been determined by the Supreme Court since 1937. The fourteenth Amendment has however – guaranteed the "Civil Rights" i.e. Economic and Political Rights". Under due process clause – of the 14th Amendment, the freedom of speech, press and religion have been effective against the laws made by National Government and the state. There has been a sharp contrast of decision between the Congress and the Supreme Court. The Supreme Court kept strong vigil on the Federal system.[47]

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