CHAPTER - 1

HISTORICAL BACKGROUND AND CONSTITUTIONAL FOUNDATION OF JUDICIAL REVIEW IN INDIA

1.1 An Overview

Judicial review is the power of the courts to determine the constitutionality of legislative act. It determines the ultravires or intravires of the Act challenged before it. In the words of Smith and Zurcher, "The examination or review by the courts in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written constitution or are in excess of powers granted by it and if so, to declare them void and of no effect."[1] The judicial review, within could act as a commanding checked on the republic in contrast to disintegrating obsessed by monocracy and give in to the rule of oppression. India has incorporated into her Constitution itself, the provision of the judicial review. To safeguard the liberty and rights of individuals, the judicial review is recognized as necessary and a basic requirement for construction up of a novel civilization, which is constructed on the perception of community and well-being morals. The powers of judicial review are vested significantly by means of the higher judiciary of states and the Supreme Court of India. The privileges of persons are sure fire in the transcription of the Constitution of India. The necessities of judicial assessment were felt necessary post-independence by the Constituent Assembly's Drafting Committee.

The creation of the Federal Court of India by the Government of India Act, 1935 was a landmark in the judicial and legal history of British India. The evolution of the courts in India under the British rule and the progressive application of the British common law to India by enactment of laws, have left their indelible mark on legal history of India during last 200 years.

Edward Conard Smith & Arnold John Zurcher , *Dictionary of American Politics*, Barnes & Nobel, New York, 1959, p. 212.

The Government of India Act, 1935 envisaged a federal form of government, with clearly defined spheres of legislation as between the federating units and the Centre. In fact of all the federal agencies envisaged under the Act, the federal court was the only one that held its abiding influence in the Indian Constitution.

In a federal constitution there is division of power between the Centre and the State and there is every possibility of dispute between the Centre and State government so in all such cases there must be a proper agency to settle all these disputes and define the exact sphere of each Government (State) and its respective authority. It is the federal judiciary, more than any other organ of the government that interprets the constitutional document. The judiciary in a federation is therefore, an unavoidable institution to interpret the Constitution and thereby to resolve the dispute that arises between the States.

The federal scheme of the Government of India act of 1935 was indeed the fore runner of the federal system of an independent India. The Supreme Court is a substantially different institution when compared to the Federal Court. Under Article 32 of the Constitution of India, the Supreme Court is made the protector of all the fundamental Rights embodied in the Constitution. And the Court has to guard these rights against every infringement at the hands of either the Union Government or the State Government by declaring the significance and operation of these rights from time to time. It protects the citizens from unconstitutional laws passed by the legislatures and arbitrary acts done by the administrative authorities.

The peculiar position of the Indian States was to be accommodated in the new set up thus to protect the inherent rights of the Indian States and to protect the cultural and religious liberty as well as political rights of the minorities the Indian Constitution had to provide a judicial machinery explicitly vested with the authority to declare ultra vires any legislation which infringe the Constitution.

Though there is no specific provision of the Judicial Review provided under Constitution of India,1950, but the Constitution of India has explicitly establishes the Doctrine of Judicial Review under various Articles 13,32,131-136,143,226,227,245,246.,372**.**

In the initial years, after independence the Supreme Court of India adopted an

approach characterised by caution and circumspection. Being steeped in the British tradition of limited judicial review, the Court generally adopted a pro-legislature stance. This is evident from the rulings such as *A.K. Gopalan's case*[2], but however it did not take long for judges to break their shackles and this led to a series of right to property cases in which the judiciary was loggerhead with the parliament. The nation witnessed a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect followed by another decision reaffirming the earlier position, and so on. The struggle between the two wings of government continued on other issues such as the power of amending the Constitution. During this era, the Legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court. At the time, an effort was made to project the Supreme Court as being concerned only with the interests of propertied classes and being insensitive to the needs of the masses. Between 1950 and 1975, the Indian Supreme Court had held a mere one hundred Union and State laws, in whole or in part, to be unconstitutional.

After the period of emergency the judiciary was on the receiving end for having delivered a series of judgment which were perceived by many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution. The Supreme Court said that any legislation is amenable to judicial review, be it mementoes amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen.

In the celebrated case of *Keshavanda Bharathi v. State of Kerala*[3], the Supreme Court of India the propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution. The Judges made no attempt to define the basic structure of the Constitution in clear terms.

The Constitutional bench in *Indira Nehru Gandhi v. Raj Narain*[4], held that Judicial Review in election disputes was not a compulsion as it is not a part of

[2]AIR 1950 SC 27
AIR 1973 SC 1461
(1975) Supp SCC 1

basic structure. In *S.P. Sampath Kumar v. Union of India*[5], P.N. Bhagwati, C.J., relying on *Minerva Mills Ltd*[6], declared that it was well settled that judicial review was a basic and essential feature of the Constitution. If the power of judicial review was absolutely taken away, the Constitution would cease to be what it was.

1.2 Meaning and Conceptual Basis of Judicial Review

Judicial review is not an expression exclusively used in our constitution. Literally, it means the revision of the decree or sentence of an inferior court by a superior court. Under general law, it works through the remedies of appeal, revision and the like, as prescribed by the procedural laws of the land, irrespective of the political system which prevails.

In common parlance, 'Review' means to view again and if we refer to literal technicality, Review means:-

> Formal examination of something so as to make changes if necessary;
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> A critical assessment of a book, play or other work;
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> A report of an event that had already happened.[7]

Thus the dictionary meaning itself indicates that 'Review' is an examination with a purpose i.e to make changes if necessary, apart from being a critical assessment of a work, situation. Thus Review is an activitating concept.

In legal parlance, judicial review is a legal activation of people's life. In *Parduman Singh v. State of Punjab*[8], the court held that Review means a judicial re-examination of the case in certain specified and prescribed circumstances.

Judicial Review in its most widely accepted meaning is the power of the courts, to consider the constitutionality of acts of other organs of Government when the issue of constitutionality is germane to the disposition of law suits properly pending before the courts. This power to consider constitutionality in appropriate

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[5](1987) 1 SCC 124 at 128
(1980) 3 SCC 625

AIR 1958 Punj 63

cases includes the courts' authority acts they find to be unconstitutional.[9] Thus Judicial Review is not to be construed as a 'procession tinkering' but a substantial switch over to justice process. Its play and operation is not confined to procedural law domain only but also extends to substantial law domain

Judicial review means overseeing by the judiciary of the exercise of power by other co- ordinate organs of government with a view to ensuring that they remain confined to the limits drawn upon their powers by the Constitution.[10] The power to judicially review any decision is an extraordinary power vested in a superior Court for checking the exercise of power of public authorities, whether they are statutory, quasi-judicial or administrative. It is only available for exercise when a person who is aggrieved by such a decision brings it before the Court. It is common knowledge that while discharging administrative functions, public authorities take exercise of discretion. It is keeping this in mind that, by and large it is only the decision making process that is actually subjected to judicial review.

The concept of judicial review has technical significance in public law, particularly in countries having written constitutions. In such countries it means that courts have the power of testing the validity of the legislative as well as other governmental actions. The necessity of empowering the courts to declare a statute unconstitutional arise not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on the one hand and the judiciary on the other and vice versa. The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the Constitution and make a declaration accordingly.[11] Judicial review means the revision of a degree or sentence of an inferior Court, but these days the concept has undergone great

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Encyclopedia of American Constitution, Vol.3 ,New York ,1986, P.1054.
S.P.Sathe, *Judicial Activism in India*, 2nd. Edition-,Oxford India Paper Backs, P.1.
A.S.Anand, *Judicial Review-Judicial Activism-Need for caution*, JILI Vol.42, P.149.

changes and the literal meaning of judicial review is longer valid.

Judicial review is the power of an independent judiciary, or courts of law, to determine whether the acts of other components of the government are in accordance with the constitution. Any action that conflicts with the constitution is declared unconstitutional and therefore nullified. Thus, the judicial department of government may check or limit the legislative and executive departments by preventing them from exceeding the limits set by the constitution. The concept of judicial review was created during the founding of the United States and specifically included in the Constitution. Judicial review is not mentioned in the U.S. Constitution, but most constitutional experts claim that it is implied in Articles III and VI of the document. Article III says that the federal judiciary has power to make judgments in all cases pertaining to the Constitution, statutes, and treaties of the United States. Article VI implies that the judicial power of the federal courts of law must be used to protect and defend the supreme authority of the Constitution against acts in government that violate or contradict it.

The distribution of legislative powers, which is the hall-mark of a federal constitution, quite often presents an important question as to who is to decide in case of a dispute as to whether the law made by the state legislative encroaches upon there as assigned to the central legislature or vice versa. For the purpose of resolving such disputes, the power is given to the courts and they are vested with the power of judicial review, as to the validity of the laws made by the legislature. The power of judicial review is not limited to enquiring about whether the power belongs to the particular legislature under the constitution. It extends also as to whether the laws are made in conformity with and not in violation of other provisions of the constitutions.

The interpretative function of the courts is referred to as 'Judicial Review 'which can be direct as well as indirect. The direct judicial review involves the court to declare a legislation enactment or an executive act as null and void because it is unconstitutional[12]. The concept of judicial review has its foundation on the doctrine that the constitution is the supreme law. It has been so ordained by the

[12].M.P. Jain, *Indian constitutional Law*, LexisNexis, Nagpur, 1974, P.755.

people, and in the American conception, it is the ultimate source of all political authority. The constitution confers only limited source powers on the legislature. If the legislature consciously or unconsciously oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to indicate and presence inviolate the will of the people as expressed in the constitution[13]. In the democratic state the court is the essential organ for maintaining the fundamental object of the constitution and for keeping the legislature within the limits assigned to its authority by the constitution for saving the people from the dangers of democratic tyranny and for materializing the aim of the constitution of establishing a harmonious and cohesive society based on ideal common morality.

In England, since there is no written constitution and Parliament is supreme, there is no judicial review of legislation enacted by Parliament. An English court cannot declare an act of Parliament ultra vires. This theoretical position remains unchanged even after the enactment of the European Communities Act, 1972, which makes the community law directly enforceable in the United Kingdom, and the Human Rights Act, 1998, which requires the English courts to point out that an act of Parliament is not compatible with the European Charter on Human Rights. The courts, however, cannot declare an act of Parliament unconstitutional.[14]

Britain, however, extended the practice of judicial review of legislation to colonies such as India whose constituent acts enacted by British Parliament laid down the limits of the legislative power vested in the colonial legislatures. India therefore experienced judicial review of legislations as well as executive acts since the days of British rules. Since there was no bill of rights in the constituent acts, the scope of judicial review was limited. The judicial attitude in countries ruled by Britain was to interfere with legislative acts only if they clearly transgressed the limits drawn upon their powers. They interpreted the constituent acts in the same manner as they interpreted the ordinary statutes. Judicial attitude was influenced by the theory of parliamentary supremacy and the courts denied that they had anything to do with policy or principles beyond what was clearly

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[13]*Rocco J. Tresolim, American Constitutional Law, The Macmillan Co. , New York, 1965,p.63.*

[14]*Supra n.10.*

laid down by the words. The judges in India were brought up in the British tradition of parliamentary supremacy and therefore rarely questioned the validity of the legislative action except on the ground of its being ultra vires. Such occasions used to be few. The courts, however, scrutinized the acts of the executive with vigilance and held them invalid where they went beyond the powers given to it[15].

Judicial review of legislation became the most significant aspect of American constitutional law. Although the Constitution nowhere mentions that the Supreme Court of the United States has the power to invalidate acts of Congress if they are contrary to the provisions of the Constitution, Chief justice Marshall held in *Marbury v. Madison*[16] that such power was implied in a written constitution.

Although the assertion of the power of judicial review by the US Supreme Court became controversial, over a period of time, its legitimacy as well as desirability came to be accepted. Judicial review of legislative acts has been acknowledged as a product of American constitutional law.[17]

Unlike in the United States, judicial review in India, was provided for expressly in the constitution. Article 13, clause (1) of the Constitution of India, says that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions containing the fundamental rights, shall, to the extent of such inconsistency, be void. Clause of that article further says that the State shall not make any law made in contravention of the above mandate shall, to the extent of the contravention, be void.

The Constitution was criticized by some members of the Constituent Assembly for being a potential lawyers' paradise. Dr. B. R. Ambedkar defended the provisions of judicial review as being absolutely necessary and rejected the above criticism.[18] According to him, the provisions for judicial review and particularly

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[15] *Ibid.*

(1803) 5 US (1 Cranch) 137

[17] Westel Woodbury Willoughby, *The constitutional law of the United States,* vol. I, 2nd ed. , Baker, Voortur and Co., 1929,p.1

CAD Vol. 7, p. 700 (Official Report reprinted by the Lok Sabha Secretariat, New Delhi).

for the writ jurisdiction that gave quick relief against the abridgement of fundamental rights constituted the heart of the Constitution, the very soul of it.[19]

Several constitutional democracies, such as the Netherlands and Great Britain, do not practice judicial review. The rule of law is maintained in these countries through the democratic political process, especially elections, whereby the government is held accountable to the people. However, judicial review or constitutional review seems to be an especially strong means to protect the rights of minorities against the threat of oppression by a tyrannical majority of the people acting through its representatives in the government.

1.3 Theoretical Basis and Justification of Judicial Review

As the concept of judicial review referred as part of natural justice by some jurists, thus it is very important to know views of certain natural law jurists and also Kelsen's view to understand the justification of the power of judicial review provided under constitutions of various countries.

1.3.1 Natural Law: Jurists view in Application on Judicial Review

Most modern commentators agree that the American founders were firm believers in natural law and sought to craft a constitution that would conform to its requirements, as they understood them, and embody its basic principles for the design of a just political order. The framers of the Constitution sought to create institutions and procedures that would afford respect and protection to those basic rights ("natural rights") that people possess, not as privileges or opportunities granted by the state, but as principles of natural law which it is the moral duty of the state to respect and protect. Throughout the Twentieth century, however, a lively debate has existed regarding the question of whether the Constitution incorporates natural law in such a way as to make it a source of judicially enforceable, albeit unwritten, constitutional rights and other guarantees[20]. In my remarks this evening, I will discuss two significant "moments" in this debate: (1) the exchange between majority and dissenting Justices in the 1965 Supreme

CAD vol. 7, p. 953. .

[20]. For a valuable summary of, and important contribution to, the debate, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907 (1993).

Court case of *Griswold v. Connecticut*[21] and (2) an important effort by a distinguished constitutional law scholar, the late Edward S. Corwin of Princeton University, to specify, and draw out the implications of, the rootedness of American constitutional law in natural law concepts.

In 1965, the Supreme Court of the United States, by a vote of seven to two, invalidated a Connecticut anti-contraception law on the ground that it violated a fundamental right of marital privacy that, though nowhere mentioned or plainly implied in the text of the constitution, was to be found in "penumbras, formed by emanations ' from various "specific guarantees in the Bill of Rights."[22] Writing in dissent, Justice Hugo Black accused the majority of indulging in "the natural law due process philosophy"[23] of judging. Although critics would later heap ridicule on the majority's metaphysics of "penumbras formed by emanations," Black was content on this score to merely record his view that we "get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions."[24] His focus, rather, was on unmasking what he judged to be an implicit revival by the majority of the long discredited "natural law" doctrine. As far as Black was concerned, bringing to light the "natural law" basis of the Griswold decision was sufficient to establish the incorrectness of the ruling and the unsoundness of the reasoning set forth in Justice William 0. Douglas' opinion for the Court. Black assumed that Douglas would not dare to defend the proposition that judges are somehow authorized to enforce an unwritten "natural law," or invalidate legislation that allegedly violated unwritten "natural rights" or substantive due process." He was correct in this assumption. Douglas emphatically denied that the majority was resurrecting the jurisprudential doctrine under which the Court had earlier in the century struck down worker protection laws and other forms of economic regulation and social welfare legislation as violations of unwritten natural rights (above all the right to freedom of contract) allegedly protected by the due process clauses of the Fifth and Fourteenth Amendments.

It is true that natural law thinkers held (and hold) that the constitutive power of

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[21].381 U.S. 479 (1965)
[22]. *Id.* at 484.
[23]. *Id*,at 524 (Black, J., dissenting).
[24]. *Id*,at 509-10 (Black, J., dissenting).

humanly posited law to create (or reinforce existing) moral obligations depends on the substantive justice ("reasonableness") of the law, and not merely on the jurisdictional authority of the person or institution purporting to promulgate it. But, again, this is true whether that person or institution in question is a judge (or court) or a legislature. Either way, valid law is the fruit (or, as traditional natural law theorists would put it, "an act") of both reason and will.[25]

Corwin suggests that an important strand of the English legal tradition conceives the common law as enjoying a certain superiority to acts of Parliament. He gives significant weight to the "famous 'dictum,' so-called [of Lord Coke] in which reads: 'And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void .... " In this "dictum," according to Corwin, we have a jurisprudential notion which, when allied later (as it would be) with John Locke's conception of substantive ("inherent and inalienable") rights of the individual, provides the foundation for American-style judicial review." [26]He notes that "the dictum had won repeated recognition in various legal in abridgements and digests before the outbreak of the American Revolution," and cites various invocations of the substance of the dictum by American lawyers and political figures in the years leading up to the Revolution.[27]

A central feature of Corwin's account is his claim that "judicial review initially had nothing to do with a written constitution."[28] He asserts that the idea of judicial review appeared in America some twenty years before the first written constitution, and that judicial review was practiced "in a relationship of semi-independence of the written constitution on the basis of 'common right and reason,' Natural Law, natural rights, and kindred postulates throughout the first third of the Nineteenth Century."[29] He argues that the "competing conception of

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[25].See John Finnis, *The Truth in Legal Positivism, in The Autonomy of Law: Essays on Legal Positivism,* Robert P. George (ed.), 1996,p.195.
[26]. Corwin, *The Debt of American Constitutional Law*, 258 [quoting what is citied by Crowin as 8 Rep. 113b 77 Eng.Rep.646 (1610)]
[27].*Id* at 263.
[28]. *Id* at 266 (emphasis in original).
[29]*Id* at 262.

judicial review as something anchored to the written constitution had been in the process of formulation in answer to Blackstone's doctrine that in every [s]tate there is a supreme, absolute power, and that this power is vested in the legislature."[30]It was one thing, according to Corwin, for Blackstone to reject the idea of judicial review, as he did, in the context of a system in which the supreme will was embodied in the legislature; it is another thing altogether, however, where the supreme will is understood to be that of the people themselves as expressed in their constitution. In the latter case, as American authorities such as Alexander Hamilton[31] and John Marshall[32] recognized, the duty of courts facing a conflict between legislation (considered as the act of mere agents of the people) and the constitution (considered as the act of the people themselves), was plainly to give effect to the constitution.

Robert Bork, perhaps the leading contemporary critic of "natural law" jurisprudence, explains his position: "I am far from denying that there is a natural law, but I do deny both that we have given judges authority to enforce it and that judges have any greater access to that law than do the rest of us".[33] Of course, Bork's view of the scope of judicial authority under the Constitution might or might not be correct. A proposition may be logically sound yet substantively false. Perhaps the Constitution, properly interpreted, does, in fact, confer upon judges the power to enforce their views of natural law and natural rights, even in the absence of textual or historical warrant for their views.

What matters for purposes of the current analysis is that the issue is itself textual and historical. If judges do, as Ronald Dworkin, for example, claims, legitimately enjoy the constitutional authority to invalidate legislation precisely on the ground that it violates abstract constitutional principles understood in light of the judges' own best judgments of natural law (viz., moral truth), then, as Dworkin himself acknowledges, that is because this power is conferred on courts by the positive law of the Constitution, not by the natural law itself.[34] Any argument seeking to

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[30].*Id. (emphasis in original).*
[31].*Id. (citing The Federalist No. 78 Alexander Hamilton).*
[32]. *Id. at 267 [citing Marbury v. Madison, 5 U.S. (1 Cranch) 137]*
Robert H. Bork, *The Tempting of America: The Political Seduction of the Law,* BYU L. Rev.665 (1990).
[34]See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution,* Harvard University Press, Introduction (1996).

establish the authority of courts to invalidate legislation by appeal to natural law and natural rights ungrounded in the constitutional text or history, therefore, will itself have to appeal to the constitutional text and history. This is by no means to suggest that there is anything self-contradictory or necessarily illicit about such arguments. Further, Robert P. George, said, that there is no reason in principle why a Constitution cannot, expressly or by more or less clear implication, confer such authority on Courts. It is merely to indicate that the question whether a particular constitution in fact confers it is, one of positive, not natural, law.

1.3.2 Kelsen's View on Judicial Review

Kelsen was the architect of the centralized (or concentrated) model of legislative review, which consisted in creating a special Tribunal, a Constitutional Court, who is the unique body empowered to guarantee the constitutionality of legislation. Kelsen obviously realizes that there can be Parliaments which enact statutes apparently contrary to the Constitution and, for this reason, considers that the best constitutional guarantee is to confer the power to declare null and void the statutes containing unconstitutional provisions.[35] He considers also that conferring this power to the same Parliament will be inefficient, and one extreme case of violation of the maxim: 'Nemo iudex in causa sua'. Therefore, it is appropriate to provide legal mechanisms which entrust either the judiciary in general or a specific Court. Judges and Courts, specific or not, are independent from the legislator.[36] In fact, this argument is very similar to the argument in favour of the judicial review in the famous book of The Federalist by A. Hamilton[37]:

> *Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing*.[38]

And Hamilton's reason for this trust in the judiciary is again similar to

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Hans Kelsen,*Pure Theory of Law. Legality and Legitimacy*, Oxford: Oxford University Press, 2007, p. 88.

Hans Kelsen, '*La garantie jurisdictionnelle de la Constitution'*, Laval : Impr. Barneoud , Paris , p.223.

Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, New York: Buccaneer Books, 1999, p. 395.

[38]*Ibid*

Kelsen's[39]: There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. And as it is well-known this is also the doctrine which opens the practice of judicial review in American constitutional history.[40]

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void.

Kelsen suggested, the establishment of a Constitutional Court that was in a position to continually preserve legislation according to the Constitution and the protection of minorities in democracy is also guaranteed by this Court, then we would achieve a fine justification of the constitutional review of legislation.

1.4 Evolution of the Concept of Judicial Review

The genesis of the process of judicial review can be traced back to the American case of *Marbury v. Madison*[41].But the seeds of this doctrine were sowed by the natural law theory propounded in *Dr. Bonham's*[42]case in England, in which it was held that 'man made law was susceptible to correction and invalidation by reference to a higher law.' In 1610, Lord Chief Justice Coke of England applied this natural law doctrine in *Dr. Bonham's case*[43] while declaring an Act of the Parliament, which had put is seal on the Charter of the Royal College of Physics, as void. He asserted, "*When an Act of Parliament is against common law right*

Ibid
[40]*Marbury v. Madison*, Supra n. 16.
[41]*Ibid.*
[42](1610)8Coke'sReports1136;77ER646
[43]*Ibid.*

and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void".[44]

But the natural law doctrine failed to operate later, when the judges sided with Parliament in the conflict between the Parliament and the Crown. Thus the theory of Parliamentary Sovereignty was accepted as a norm, and the supremacy of the Parliament emerged as the hallmark of the unwritten Constitution of the United Kingdom after the English Revolution of 1688. But the English Courts applied the doctrine in relation to the legislation of overseas colonies. The theoretical foundation of the process of judicial review, that*, "in case of a conflict between the Constitution and a legislative statute, the Court will follow the former, which is superior of the two laws, and declare the latter to be unconstitutional,"* was laid down by the epoch making judgment of Chief Justice Marshall of the United States Supreme Court in 1803, in *Marbury v. Madison*[45].

In 1800, the Federalists lost the election and in February 1801, the outgoing President John Adams appointed Marbury, along with forty one others, as Justices of Peace for a period of five years, under the Judiciary Act of 1789. It is true that Marbury's eleventh hour appointment was part of the Federalist Party's strategy to transform the Judiciary into a Federalist stronghold and this action gave them the name '*John Adams*' *midnight judges*.' Even though the warrant of appointment was signed and sealed, it could not be delivered. At the instance of the new president Thomas Jefferson, who took charge in March 1801, the Secretary of State, James Madison, declined to deliver the warrant of appointment. Marbury sought a writ of mandamusfrom the Supreme Court against the Secretary for the delivery of warrants. Justice Marshall, appointed by the outgoing President faced the imminent prospect of the Government not obeying the judicial fiat, if the claim of Marbury was to be upheld. He faced a risk greater than ridicule and there was also a possible fear of being impeached as the Federalist District Judge John Pickering was impeached and removed, and action against Justice Chase of the Supreme Court was also contemplated[46] Asserting the power of the Court to review the actions of the Congress and

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[44]*Ibid.*
[45]*Supra n.*16.
[46]Lavis Fisher & Neal Devins, *Political Dynamics of Constitutional Law,*1996, p. 11 & 29.

Executive, Chief Justice Marshall declined the relief on the ground that Section 13 of the Judiciary Act of 1789, which was the foundation for the claim made by Marbury, was unconstitutional, since it conferred original jurisdiction on the Supreme Court to issue a writ of mandamus, which was violative of the American Constitution.

Needless to say, Justice Marshall was between the devil and the deep sea, and in that perplexing situation, his challenge was to deliver an opinion that would uphold the judicial supremacy over the elected branches as well as to avoid a confrontation between the Judiciary and the Executive. Thus, the scrutiny of the political backgrounds underlined in *Marbury's case*[47] leads to the conclusion that the decision rendered by Justice Marshall was to protect the Court, the Federalist Judiciary, from the hostile Jeffersonian. But this decision still stands as the beacon of the judicial authority, which established the Judiciary's power to declare unconstitutional, any Act of the Legislature, the Executive or the State Government. .

The constitutions of Canada, Australia and U.S.A. do not contain any provisions for direct judicial review, but it has become an integral part of the constitutional law of these countries. It is realized that mere are not suffice to check abuse of power; these "a dependence on the people", Medison says in the content of USA "is, no doubt, the Government, but experience has taught mankind the necessity of auxiliary precaution.[48]

The decision of the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America. Judicial review in its broadest context is the self-assured right of the court to pass upon the constitutionality of legislative acts.

The United States Constitution does not explicitly establish the power of judicial review. Rather, the power of judicial review has been inferred from the structure, provisions, and history of the Constitution. The United States Supreme court established the power of judicial review in the landmark decision of *Marbury v.*

[47] *Supra* n.16.

[48] Bernard Schwartz, *The powers of Government*, Volume I, The Macmillan Company New York, 1963,P. 19.

Madison[49]where it held "It is empathically the province and duty of the Judicial Department to say what the law is". Any piece of legislation or administrative action can be reviewed by the courts. In England, unlike other jurisdictions, Parliament is supreme.[50] Hence only the actions and decisions of public authorities can be reviewed by the judiciary.[51] The laws passed by the Parliament cannot be reviewed by the judiciary, except in circumstances where it is contrary to the law of European Union. Though India follows the Parliamentary form of democracy, it is the constitution which is supreme. Therefore, not just legislation, but even a constitutional amendment which seeks to change the "basic structure" of the constitution can be called in question (for review) before the courts[52]. The Constitutional ensures that an administrative action is subject to judicial review by providing for a comprehensive scheme of judicial control over the administration under Article 32, 136, 226, and 227.

Judicial review as a mechanism for the protection of rights and liberties seems to have gained acceptance in other Commonwealth countries also. In New Zealand, the courts defer to parliamentary intention if there is no possibility of interpreting a statute consistently with the bill of rights and in Canada, although courts can invalidate a primary legislation if it is inconsistent with any of the rights given by the bill of rights legislation, Parliament can insulate a legislation by specifying that its provisions shall apply notwithstanding any contrary decision. However, experience shows that it has been difficult for the Canadian Parliament to respond to judicial decisions in this way.[53]This has increasingly shown that legislative supremacy is no longer the only democratic value and that judicial review is no longer considered to be undemocratic. In democratizing societies, judicial review can contribute towards the deepening of the commitment to constitutional values.

1.5 Origin of the Doctrine of Judicial Review in India

India achieved independence from Britain in 1947. Shortly afterwards, India's

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[49]*Supra* n.16.
[50]*Doctrine of parliamentary sovereignty.*
[51].*Anisminic Ltd vs. Foreign Compensation Commission*, (1969) 2 AC 147
Kesavananda Bharati vs. The State of Kerala and Others, Supra n.3.
[53]P.N. Hogg, *'The Charter Dialogue between Courts and Legislatures',* 15 Oosgoode Hall L.J., 75-124 (Spring 1997).

leaders crafted the Constitution of India, which came into effect on January 26, 1950. Authored by Dr. B.R. Ambedkar, it is the longest written constitution in the world.[54] As with most constitutions, all laws passed by the legislative branch must conform to its provisions.[55]

In England, since there is no written constitution and Parliament is supreme, there is no judicial review of legislation enacted by Parliament. An English court cannot declare an act of Parliament ultra vires. This theoretical position remains unchanged even after the enactment of the European Communities Act, 1972, which makes the community law directly enforceable in the United Kingdom, and the Human Rights Act, 1998, which requires the English courts to point out that an act of Parliament is not compatible with the European Charter on Human Rights. The courts, however, cannot declare an act of Parliament unconstitutional.[56]

Britain, however, extended the practice of judicial review of legislation to colonies such as India whose constituent acts enacted by British Parliament laid down the limits of the legislative power vested in the colonial legislatures. India therefore experienced judicial review of legislations as well as executive acts since the days of British rules. Since there was no bill of rights in the constituent acts, the scope of judicial review was limited. The judicial attitude in countries ruled by Britain was to interfere with legislative acts only if they clearly transgressed the limits drawn upon their powers. They interpreted the constituent acts in the same manner as they interpreted the ordinary statutes. Judicial attitude was influenced by the theory of parliamentary supremacy and the courts denied that they had anything to do with policy or principles beyond what was clearly laid down by the words. The judges in India were brought up in the British tradition of parliamentary supremacy and therefore rarely questioned the validity of the legislative action except on the ground of its being ultra vires.[57]

The Indians demanded that their constitution should contain a declaration of

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[54]Soli J. Sorabjee, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* ,Louis Henkin & Albert Rosenthal (eds.), 1990,p.97.

[55]*Supreme Court of India, Constitution of Supreme Court of India*, http://supreme courtofindia.nic.in/news/constitution.htm (last visited on 2/7/17).

[56]*Supra* n.10

Ibid.

fundamental rights but that demand was not conceded by the British government till the passing of the Government of India Act, 1935. The traditional British distrust of such declarations was behind the rejection of such a demand. It was believed that such a bill of rights would merely serve as a string of platitudes. Such distrust of a bill of rights as a restriction on the supremacy of the legislature, however, does not seem to have survived since the United Kingdom has accepted the European Convention on Human Rights and the jurisdiction of the European Court on Human Rights and has of late also enacted the Bill of Rights Act, 1998[58].

Unlike the Constitution of the United States, which gave rights in unqualified terms and left it to the courts to define their limits and legitimatize restrictions on them, the Constitution of India enumerated the rights as well as the restrictions. The makers of the Indian Constitution were apprehensive of the wider role assumed by the Supreme Court of the United States through interpretation of the 'due process' clause of the Fifth Amendment to the constitution of the United States. They purposely avoided the use of the words 'due process of law' so as not to allow the courts to invalidate laws that might be disliked by the judges. The debates in the Constituent Assembly show that the maker's admirers of the Westminster model of democracy and wanted the courts in India to interpret the Constitution so as to cause minimum interference with the legislature.

The Supreme Court of India started off as a technocratic court in the 1950s but slowly started acquiring more power through constitutional interpretation. Its transformation into an activist court has been gradual and imperceptible. In fact the roots of judicial activism are to be seen in the Court's early asserted that its power of judicial review was inherent in the very nature of the written constitution. Article 13 of the Constitution said that the States hall make no law that takes away or exists at the commencement of the Constitution, it shall be void. Referring to this article, which provided for judicial review in explicit terms, the Court said[59]: "The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if

[58]. Nicholas Bamforth, '*The Application of the Human Rights Act, 1998 to Public Authorities and Private Bodies'*, 58 Cam. L.J., 159-70 (1999).

[59].*A.K.Gopalan v. State of Madaras, Supra* n.2.

any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment; to the extent it transgresses the limits, invalid".

Not long after the enactment of the constitution, Parliament found reason to amend it. Yet, India's new constitution had guaranteed a right of property to its citizens, and therefore Nehru's grand plans for equitable redistribution of zamin (land) were soon confronted by the zamindars (landowners) in the courts.[60] As a result, Prime Minister Nehru introduced the First Amendment to the constitution of India on May 29, 1951, creating a famous scheme known as the "Ninth Schedule."[61]The First Amendment created article 31B,[62] which described the Ninth Schedule and was inserted into part III of the constitution.[63]Originally consisting of thirteen laws, the Ninth Schedule was narrowly crafted to immunize land reform laws from judicial review.[64]

From the moment of the First Amendment and the introduction of land reform laws under the Ninth Schedule, a long saga ensued in the courts[65]. Between 1951 and 1967, property owners challenged the laws and constitutional amendments that placed land reform laws within the Ninth Schedule.[66]23 Initially, the laws were challenged as violations of article 13(2) of the constitution, which provides against derogation of fundamental rights.[67] Analogizing the constitutional amendments to laws, plaintiffs creatively argued in *Sankari Prasad Singh Deo v. Union of India*[68] and *Sajjan Singh v. Rajasthan*[69]that the amendments were abridging the fundamental right to property and therefore were invalid under

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[60]See A.G. Noorani, *Ninth Schedule and the Supreme Court*, Econ. & Pol. Wkly., March 3, 2007, at 731.

[61]See Constitution (First Amendment) Act, 1951.
Article 31B reads*:* "Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force."

See Constitution (First Amendment) Act, 1951.

[64]*Supra n*.53.

[65]*Id.* at 731–33.

Id.

[67]Article 13(2) reads: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

A.I.R 1951SC 458

A.I.R 1965 SC 845

article 13(2). Nevertheless, in both decisions, the Indian Supreme Court rejected the arguments and "upheld the constitutional validity" of article 31B.[70]In 1967, however, the Supreme Court reversed itself and held, by a slim six-to-five majority, that the amendments were "laws" within the meaning of article 13.[71]This was a significant decision, for the court ruled for the first time that there were implied limitations on Parliament's power to amend the constitution. The court held that "Parliament would have no power from the date of the decision (February 27, 1967) to amend any of the provisions of part III so as to take away or abridge fundamental rights."The court further noted that, if Parliament wished to amend fundamental rights, it would have to convene a Constituent Assembly (constitutional convention).

India's experience with judicial review, starting from 1950, can be broadly classified under two eras *viz*. the pre emergency era and the post emergency era. The pre emergency era of judicial review, from 1950 to 1975, was a period of conservatism merged with judicial restraint. Though the Supreme Court went to the extent of judicial supremacy, it generally adopted a pro Legislature stance. The Supreme Court, in its beginning, adopted the British tradition of limited judicial review starting from *Gopalan's case*[72], in that decision, while approving the mutual exclusivity of Article 19 and Articles 21 and 22, the Court rejected the argument based on the 'due process of law' and refused to introduce the American doctrine into Indian Constitutional law. However, through a very cautious and restrictive approach, the Court tried to assert the power of judicial review by declaring Section 14 of the Prevention of Detention Act, 1950, as ultra vires the Constitution[73].

Between 1950 and 1960, though the Supreme Court gave a liberal interpretation to the Right to Property, its contributions to socio-economic reforms were not remarkable. The decade being a nascent period, and the Court being in its infant stage concentrated more on establishing the power of judicial review. The struggle between the Legislature and the Judiciary continued, and the nation witnessed a series of events where a Supreme Court decision was followed by a

[70]*I. C. Golak Nath v. State of Punjab* , AIR 1967 SC 1643
[71]*Ibid.*
[72]*Supra* n.2.
[73]*Id.*

nullifying legislation. In *Golaknath's case*[74], the Supreme Court held that the Parliament was not competent to amend Part III of the Constitution. This was a landmark judgement in the history of the Court, where the Court for the first time became a law maker and it had made a long step away from the initial restraint in the sphere of fundamental rights. The decision attracted criticism on the ground that the power of the Judiciary was directed to the wrong end for securing a wrong purpose, i.e., to protect and safeguard private property, and had the potentiality to curb the aspirations and sentiments of the popular organ, the Parliament.

Subsequently in 1970 in the *Bank Nationalisation case*[75], the Court held that so long as the right to property was guaranteed as a fundamental right, the right to compensation was also guaranteed. By virtue of the majority judgement in this case, the Supreme Court successfully asserted its power as a final authority in determining economic policies. Another development was that, for the first time the Indian version of the due process clause, which was rejected by the Court in *Gopalan's case*[76]as inapplicable in the field of personal liberty, was introduced and applied in the domain of property rights. But there was massive criticism that by the rigid adherence to the sanctity of right to property, the Court ignored the incompatibility of adherence to the concept of private property at the expense of social welfare and economic development. The action is also criticized as a proof for the Court's failure to realize the socio-economic realities of the country. In civil rights, the change from the limited attitude of the court in *Gopalan's case*[77]on personal liberty and on relation between Articles 19 and 21 was overruled. But *Gopanla's case*[78] on procedural law remained intact.

The imposition of Emergency in 1975 had a negative impact on the Apex Court too. Fundamental rights under Part III of the Constitution were suspended and the amendments[79] made thereafter had two results. The imposition of Emergency became unquestionable and the draconian provisions of the Maintenance of Internal Securities Act (MISA), 1973 were immunized by including it under the

[74]*Supra* n.70.
[75]*R.C.Cooper v. U.O.I.,*AIR 1970 565
[76]*Supra* n.2.
[77]*Id.*
[78]*Id.*
[79]Constitution (38th Amendment)Act,1975 and Constitution (39th Amendment)Act,1975.

protective umbrella of the IX Schedule. The detention petitions challenging the order of the detention. In the *Habeas Corpus case*[80], it was held by the Supreme Court, by a 4:1 majority, that in the event of Emergency, no person had any locus standi to file a writ petition and, since Article 21 was suspended, no one could move any Court for any remedy. Justice H. R. Khanna in his historic dissent held that, "*even in the absence of Article 21 in the Constitution, the State had no power to deprive a person of his life and liberty without the authority of law."*[81]The majority judgment received wide criticisms .The court repeated the error in the *Detenus' Case*[82]by holding the conservative approach. The judgement in *Shukla's case*[83]and *Detenus' case*[84]was considered by critics of all times, to be the most ineffaceable blot on the pages of Indian judicial history.

In March 1977, there was a great sigh of relief as the Emergency period came to an end and the Court entered into a new phase. Emerging out of the emergency days, the Supreme Court chose a different arena, the field of civil rights instead of property rights. In the post emergency period, the dominating factor was the expansion of fundamental rights and the introduction of the Indian version of the due process clause in personal liberties. In a series of decisions starting with *Maneka Gandhi's case*[85], where due process was introduced into the field of personal liberty, the trend was to expand the scope of human rights of citizens and to make Indian law in conformity with the global trends in human rights jurisprudence. Twenty eight years after the judgment in *Gopalan's case*[86], the Apex Court in *Maneka Gandhi's case*[87] held that the procedure established by law must be 'right, just and fair' and must pass the 'test of reasonableness' and further, 'procedural conformity' with the principle of natural justice is essential.

From 1980 onwards, the Court moved beyond a mere institution and emerged as a champion of individual rights and its decisions had tremendous socio-economic and political ramifications. By the emergence of relaxed the traditional concept of *locus standi* the test underlying the concept of equality saw a transition from

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[80]*A.D.M.Jabalpur v.Shivkant Shukla,* AIR 1976 SC 1207
[81]*Id.*
[82]*U.O.I. v. Bhanu Das Krishna,* AIR 1997 SC 1027
[83]*Supra n.80.*
[84]*Supra n. 82.*
(1978) 1 SCC 248
[86]*Supra* n.2.
[87]*Supra* n.85.

the 'doctrine of classification' to the 'doctrine of non- arbitrariness.'[88]By approving judicial review as a basic feature of the Indian Constitution, the Court sought to reconcile its position with the Legislature, since the earlier period had witnessed, the Judiciary seeking to achieve supremacy by imitating the American doctrine upholding the same and the Legislature also striving to achieve a similar effect by adopting the British theory of Parliamentary Supremacy. Expanding the scope of Article 21, the Supreme Court established that right to life includes the "right to live with human dignity free from exploitation."

By rationalizing, innovating and expanding the frontiers of law, the Court through its creative and dynamic approach sowed the seeds of 'activism' in order to uplift the downtrodden and to 'wipe out the tears from some eyes.' Thus, the change from pre Emergency era to the post Emergency era and the spectrum of difference ranging from *Gopalan's case*[89]to *Maneka's case*[90] reveals that judicial review in its form that we experience today is the results of a revolutionary process of evolution. The process, which started with property rights gradually changed its arena to individual rights and culminated in the establishment of a deep rooted review power.

After adhering to the conventional wisdom for seventeen long years, the Supreme Court asserted the power of judicial review over the Amendments to the constitution in *Golaknath's case*[91]. Later in *Kesavananda Bharati's case*[92]the Court held that fundamental rights are amendable, but the process must not affect the basic structure of the Constitution. The Supreme Court even though changed its earlier position and accepted the constituent power of the Parliament, cautioned that the "constituent power was only within the framework of the Constitution." It is presumed that the radical change in the approach of the Court in 1967 in *Golaknath's case*[93]and subsequently in *Kesavananda Bharati's case*[94]points out to the 'argument of fear,' the fear of overrunning the constitution by a Legislature comprised of the new breed of politicians the practical,

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[88]See, *R.D.Shetty v. Int.Air Authority of India,* AIR 1979 SC 1628 *; Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487
[89]*Supra* n.2.
[90]*Supra* n.85.
[91]*Supra* n.70.
[92]*Supra* n.3.
Supra n.2.
[94]*Supra* n.3

professional politicians, playing the dynamic game of power politics. The unpredictability of Indian politics after the death of Nehru and the absence of other eminent leaders of the national movement promoted the Court to protect Part III of the Constitution from the immature manipulation of the Legislature comprised of the new breed. Thus, the court had won the game by not giving the unbridled power of amendment to the Legislature. The Court checked the rule of two third majorities with the doctrine of basic structure. The 'argument of fear' later changed into 'save the court motto' in *Indira Nehru Gandhi's case*[95]and the Court tried to shield the 'save the Court' notion by successfully projecting the image that 'the Court is deciding the matter in accordance with the settled law.' If the argument of fear resulted in the amenability of Part III of the Constitution, the image of 'in accordance with the law' resulted in satisfying both the ruling as well as the opposition parties. Whatever may be the cases and causes, critics hold that the Court feared the power packet political tycoons and their totalitarian regime in the governmental process. It is argued that, the instance of this fear can be traced from its inception itself, due to which the Court kept silent till 1967, and after that though the court had revealed its courage with some pronouncements, which gave a silver line of hope, it again circumvented its decision due to fear of being thrown out. It is criticized that while the fear in the beginning was interpreted as 'conservatism' the latter one was interpreted as 'restraint' and during the Emergency regime, the self-inflicted wounds of the Court gave rise to too much criticism[96].

Additionally, the court again looked to its previous jurisprudence in the *Kesavananda Bharati case*[97] and pointed out that although "Parliament has [the] power to amend the provisions of Part III so as to abridge or take away fundamental rights . . . that power is subject to the limitation of basic structure doctrine," and "at least some fundamental rights do form part of basic structure of the Constitution."[98]The Supreme Court thus held it could strike down any law inserted into the Ninth Schedule if it were contrary to the basic structure of the

[95]*Supra* n.4.
Roshen D. Alexander, We, the people: Experiments with Judicial Review, Vol.2, 2008, p.112.
[97]*Supra* n.3.
[98]*I.R. Coelho v. State of Tamil Naidu ,* (2007) 2 SCC 1, at 100

constitution and passed after the *Kesavananda Bharati case*[99]was decided.[100]

1.5.1. Constitutional provisions of Judicial Review in India

Judicial Review refers to the power of the judiciary to interpret the constitution and to declare any such law or order of the legislature and executive void, if it finds them in conflict the Constitution of India. The Indian Constitution adopted the Judicial Review on lines of U.S. Constitution Parliament is not supreme under the Constitution of India Its powers are limited in a manner that the power is divided between centre and states. Moreover the Supreme Court enjoys a position which entrusts it with the power of review in the legislative enactments both of Parliament and the State legislatures. Though there is no specific provision of the Judicial Review in Government of India Act, 1935 and the constitutional problems arising before the court necessitated the adoption of Judicial Review in a wider perspective. Now, Constitution of India, 1950 explicitly establishes the Doctrine of Judicial Review under various Articles 13,32,131-136,143,226,227,245,246.,372**.**[101]Judicial Review is thus firmly rooted in India and has the explicit sanction of the Constitution. The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to the constitutional spirit. In doing so, the courts act as a 'sentinel on the qui vive'.[102]

1.5.1.1 Article 13: Power of Judicial Review and its effect in India

The justifiability of fundamental rights and the source of Judicial Review can be found under Article 13 which are regarded as a key provision as it gives teeth to the fundamental rights cannot be infringed by the state either by enacting a law to that effect or through an administrative action. It declares that all pre-constitution laws shall be void to the extent of their inconsistency with the fundamental rights[103] and expressly provides that the State 'shall not make any law' which takes away or abridges the fundamental rights and a law contravening a fundamental right is, to the extent of such contravention is void.[104] Essentially, it is crucial provision dealing with the post-constitution laws and if any such law

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[99]*Supra* n.3.

[100]*Supra* n.98.

Chapters IV, VIII, X, XXXIII Constitution of India.

[102]*State of Madras v. V.G.Row* AIR 1952 SC 196

Art. 13(1) of the Constitution of India.

Article 13(2) of the Constitution of India.

violates any fundamental right, it becomes void ab-initio.

The foundation of this power of judicial review has been explained by a nine judge bench of Supreme Court in *S.C. Advocates on Record association v. Union of India*[105]. The apex court has held that the Constitution, which is the fundamental law of the land, is the will of the people', while a statute is only the creation of the elected representatives of the people. If therefore, the will of the legislature as declared in a statute, stands in opposition to that of the people as declared in the Constitution, the will of the people must prevail.

Article13 is thus an express declaratory provision dealing with the power of judicial review which cast a constitutional obligation on the judiciary to check constitutional transgressions. The power is conferred on the constitutional courts, i.e. High Courts and Supreme Court. Further, 'state' for the purposes of this provision means 'state' as defined under Article12.Apart from guaranteeing the fundamental rights which are in the nature of political and civil rights, the Constitution also provides the mechanism for their enforcement. It does so by making right to constitutional remedies itself a fundamental right. Articles 32 and 226 confer power of Judicial Review on Supreme Court as well as High Courts respectively to review the virus of any law or administrative action on the touchstone of fundamental rights.

1.5.1.2 Article 32: Writ Jurisdiction of Supreme Court

This provision, for the want of better purposive expression, is called as the right to constitutional remedies' and confers express powers on the Supreme Court to carry out the obligations declared under Article13, that is, to act as a protector of fundamental rights. It constitutes one of the major constitutional safeguards against the state tyranny and can be said to confer ample scope for 'judicial activism' on Supreme Court which is evident from a catena of pronouncements made by it while giving a contemporary meaning to the fundamental rights and thereby creating new rights and obligations from time to time. The Supreme

(1993) 4 SCC 441

Court has described the significance of this provision in *Prem Chand Garg v. Excise Commissioner, U.P.*[106]

The Fundamental Right to move this court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this court should itself as the protector and guarantor of fundamental rights declare that it cannot. Consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights in discharging the duties assigned to it, this court has to play the role of a 'sentinel on the qui-vive' and it must always do it as its solemn duty to protect the said fundamental rights zealously and vigilantly.

It guarantees right to move to the Supreme Court, by appropriate proceedings for the enforcement of fundamental rights enumerated in the Constitution[107] and empowers the Supreme Court to issue appropriate orders or directions or writs including writes in the nature of habeas corpus, mandamus, quo-warranto, certiorari and Public Interest Litigations (PIL's) for the enforcement of fundamental rights.[108] It also empowers the Parliament by law to empower any other court to exercise within the limits of its territorial jurisdiction all or any of the powers exercisable by the Supreme Court under Article 32(2). This can however be done without prejudice to the Supreme Court's powers under Article 32 (1) and 32(2) and it further declares that the right guaranteed by it shall not be suspended except as otherwise provided under the Constitution.

Right of access to the Supreme Court under this provision is a fundamental right per se providing a guaranteed, quick and summary remedy for enforcing them as a person can straight away approach the Supreme Court without having been undergone any dilatory process involved in the judicial hierarchy. The Supreme Court enjoys a broad discretion in the matter of framing the writes to suit the exigencies of a particular case. Apart from issuing writs as discussed above, it can also issue any order including even a declaratory order, or give any direction, as may appear to it to be necessary to give proper relief to the petitioner.[109]

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[106] AIR 1963 SC 996

Art.32(1) of the Constitution of India.

Art.32(2) of the Constitution of India.

[109] *Kuchunni v. State of Madras,* AIR1959 SC 725

Enforcement of fundamental rights under this provision permissibly includes the judicial review of administrative, legislative and governmental action or inaction. However, it cannot be invoked simply to adjudge the validity of any legislation or an administrative action unless it adversely affects the petitioner‘s fundamental rights. The Supreme Court under this provision is only confined to the infringement of fundamental rights and is not expected to go into any other question.[110] In this event, once the court is satisfied that the petitioner‘s fundamental right has been infringed, he need not establish either that he has no other alternative remedy or that he has exhausted all other remedies provided by law, but only has to satisfy the court that he has not obtained proper redressal of his grievances. Similarly, recourse to the same is not available to assail the correctness of a decision rendered by the apex court on merits or to claim its reconsideration by it.[111] While exercising review power under this provision, the court also has power to decide the disputed questions of facts arising in a writ petition if it so desires.[112]

Being a fundamental right per se, this power cannot diluted or whittled down by any law and can be invoked even when a law declares a particular administrative action The Constitution stands silent as to the procedure to be followed under this provision. The Supreme Court in *Bandhua Mukti Morcha v. Union of India*[113] clarified that it is not bound under this provision to follow the ordinary adversary procedure and may adopt such procedure as may be effective for the enforcement of the fundamental rights.

Though this provision basically aims at empowering the apex court to guard the infringement of fundamental rights, nevertheless it has been used for a much wider purpose than what is expected, by laying down general guidelines having the effect of law to fill the vacuum till such time the legislature steps to fill in the gap by making the necessary law.

The provision supplements enormity in judicial power since it empowers the apex court, apart from issuing writs as discussed above, to make any order, pass directions as it may consider appropriate to grant adequate relief to the

[110] *Shantabhai v. State of Maharashtra,* AIR 1958 SC 532
[111] *Khyerbari Tea Co. v. State of Assam,* AIR 1964 SC 925
[112] *Mohd. Aslam v. Union of India,* AIR 1996 SC 1611
(1997)10 SCC 549

petitioners. It may also grant declaration or injunction as well if that be the proper relief and can mould relief to meet the exigencies of specific circumstance. This is been made explicit in *M. C. Mehta v. Union of India*[114]This court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding namely, enforcement of a fundamental right and has the implicit power to issue whatever direction, orders or writ necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the Fundamental Right.

However, in due course of time, the activism shown by the Supreme Court has given a new dimension to Article 32 and the court has implied there from the power to award damages when a fundamental right of a person has been infringed and there is no other suitable remedy available to give relief and redress in the specific situation for the injury caused to the petitioner. While doing so, the argument it has put forth is that under Article 32, its power is not only injunctive in ambit, but is also remedial in scope and that in the absence of such a power, the Article would be robbed of its entire efficacy, become emasculated and weakened. Similarly, in *Rudul Shah v. State of Bihar*[115] the court awarded damages to the petitioner against the State for breach of his right of personal liberty guaranteed under Article 21 as he was kept in jail for 14 years even after his acquittal by a criminal court.

Since Rudul Shah, damages have been awarded in quite a few cases to the victims themselves or their kith and kins for police brutality or harassment, custodial deaths, medical negligence, environment pollution, tortuous acts of government servants thereby opening a new vista of compensatory jurisprudence in exercise of this provision.

1.5.1.3 Article 226: Writ Jurisdiction of High Court

This provision signifies an essential aspect of Indian Constitution since it confers writ jurisdiction on high courts as well, with a much wider scope as compared to what is enjoyed by the Supreme Court under Articles 32. Consequently, it can

(1987)4 SCC 463
(1983)4SCC 141

possibly be understood in the sense of arming the judiciary with enormous power to act in an activist manner.

It empowers the high court to issue directions, orders or writs including writs in the nature of habeas corpus, mandamus, quo warranto and certiorari for the enforcement of a fundamental right and certiorari for the enforcement of a fundamental right and for any other purpose.[116] The distinguishing feature of this power is the extension of the writ jurisdiction of high courts for any other purpose in addition to fundamental rights. Such purposes may rightly be understood as forming the actions of the state entities in various delegated capacities. These words for any purpose enable the high court to take cognizance of any matter even if no fundamental right infringement is involved. Since Indian Constitution does not favour the doctrine of separation of powers in strict sense, public authorities in India often exercise various types of powers including executive, adjudicatory and legislative powers, for which the rule of law demands such a power to keep check on their malafide and whimsical exercise thereby making the writ jurisdiction in India more firm as compared to the English system.

The Supreme Court has time and again emphasized that this power of the high court to issue writs is supervisory in nature and is not akin to its appellate power. That is to say that while exercising jurisdiction nudes this provision, the high court cannot go into the correctness of merits of the decision taken by the concerned authority but can only review the manner in which the decision is made.[117] It only ensures that the authority arrives at its decision according to law and in accordance with the principles of natural justice wherever applicable.[118] At the same very time, the court can intervene if the authority acts unfairly and unreasonably. This can make one say that judicial review under this provision is not directed against a decision, as such, but is confined to the decision making process.

Unlike Article 32, the high court under Aricle.226 does not ordinarily issue a writ when an alternative efficacious remedy is available. The High Court, under this

[116]Art.226 (1) of the Constitution of India.
[117]H.B.Gandhi, *Excise and Taxation Officer cum Assessing Authority v.Gopi Nath & Sons*(1992) Supp (2) SCC 312
[118]*State of Madhya Pradesh v. M.V.Vyavasaya & Co.,* AIR 1997 SC 993

provision, has jurisdiction to determine questions of both fact and law by having recourse to affidavits and may even permit cross examination of a person who has sworn to such an affidavit.[119] It can also intervene in case the question pertains to a mixed question pertains to a mixed question of law and fact both. Where, however, disputed questions of fact arise, a petition under Article 226 is not a proper remedy.[120]

1.5.1.4 Article 131: Power to decide Inter-governmental disputes

Since Indian Constitution sets up a federal polity where intergovernmental disputes often arise, Article131 takes care of such instances by providing a mechanism for settling such disputes quickly at the highest judicial level. Under this provision, the Supreme Court has exclusive original jurisdiction in any dispute between the centre and the state, or the centre and state on one side and a state on the other side, or between two or more States. A dispute to be justifiable under this article should involve a question of law or fact on which the existence or extent of legal right depends. That is to say that the dispute must involve assertion or vindication of a legal right of Government of India or a state. Questions of political nature not involving any legal aspect are excluded from the Court‘s view.[121] Supreme Court‘s jurisdiction under this provision is limited by two fold fetters, that is, as to the parties and as to the subject matter. Commenting on the necessity of such a provision, Bhagwati J. has observed in *State of Karnataka v. Union of India*[122]as thus ―This article is a necessary concomitant of a federal or a quasi federal form of government and it is attracted only when the parties to the dispute are the government of India or one or more States arranged on either side.

The Supreme Court has observed that the distinguishing feature of this provision is that the court is not required to adjudicate upon the disputes in exactly the same way as ordinary courts of law are normally called upon to do for upholding the rights of the parties sand enforcement of its orders and decision. The court rather is only concerned to give its decision on questions of law or of fact on which the existence or extent of a legal right claimed depends. Once the court

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[119]*Barium Chemiclas v. Company Law Board,* AIR 1967 SC 295
[120]*Sharma Prashant v. Ganpatrao,* AIR 2000 SC 3094
[121]*State of Bihar v. Union of India,* AIR 1970 SC 1446
[122]AIR 1978 SC 68

comes to its conclusion on the cases presented by any disputants and gives its adjudication on the facts or the points of law raised the function of the court under article 131 is over.[123]

In its exercise of jurisdiction, the Supreme Court has power to grant whatever relief may be necessary for the enforcement of the legal right claimed. It can pass any order or direction as may be found necessary to meet the ends of justice.

1.5.1.5 Article 132: Constitutional Appellate Jurisdiction

The Supreme Court primarily being a court of appeal enjoys extensive appellate jurisdiction in various jurisdictions. Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final order, whether civil, criminal or other proceeding, of a high court of it certifies that the case involves a substantial question of law as to the interpretation of the Constitution.[124] On obtaining such a certificate any party in the case may appeal to the Supreme Court on the ground that any such question has been wrongly decided. However, only those questions can be agitated for which the high court has granted leave unless permitted by the Supreme Court.[125] A very broad power is thus conferred on the Supreme Court to hear appeals in constitutional matters.

This symbolizes the Supreme Court as the final court of constitutional interpretation. Questions of constitutional interpretation are thus placed in a special category irrespective of the nature of proceedings in which they arise. The Supreme Court has commented on this provision as the principle underlying the article is that the final authority of interpreting the Constitution must rest with the Supreme Court.[126] With that object the article is freed from other limitations imposed under Art.133 and 134 and the right of the widest amplitude is allowed irrespective of the nature of the proceedings in a case involving only a substantial question of law as to the interpretation of the Constitution.

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[123] *Supra* n. 121.
Art.132(1) of the Constitution of India.
Art.132(3) of the Constitution of India.
[126] *Pedda Narayana v. State of Uttar Pradesh,* AIR 1975 SC 1252

1.5.1.6 Article 133: Civil Appellate Jurisdiction

Under this provision, an appeal lies to the Supreme Court from any judgment, decree or final orders in a civil proceeding of a high court if it certifies that the case involves a substantial question of law of general importance and that in the opinion of the high court, the said question needs to be decided by the Supreme Court.[127]

No appeal in a civil matter lies to the Supreme Court as a matter of right. It can only lie upon the grant of certificate by the high court. The Supreme Court has emphasized that for grant of certificate, the question, howsoever important and substantial, should also be of such pervasive import and deep significance that in the high court's judgment, the question imperatively needs to be settled at the national level by the highest court, otherwise the apex court will be flooded with cases of lesser magnitude.[128] This provision covers all civil proceedings including all proceedings affecting civil rights. Proceedings under Art. 226 are also regarded as civil proceedings affecting civil rights. Proceedings under Art.226 are also regarded as civil proceedings for the purposes of this provision.

1.5.1.7 Article 134: Criminal Appellate Jurisdiction

This provision regulates the criminal appeals to the Supreme Court and is so designed as to permit only important criminal cases to come before it. It confers a limited criminal jurisdiction on the Supreme Court[129] as the court hears appeals only in exceptional criminal cases where justice demands the intervention of the apex court. An appeal, under this provision, lies as a matter of right to the Supreme Court from any judgment, final order, or sentence of a high court in a criminal proceeding if the high court in a criminal proceeding has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death.[130] However, no appeal lies if the high court reverses an order of convection and acquits the accused.

Art.133(1)of the Constitution of India.

[128]*State Bank of India v. N. Sundara Money* AIR 1976 SC 1111

[129]Under Art. 134(2), the Parliament is authorized to enlarge the criminal appellate jurisdiction of the Supreme Court. To this effect, it has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, further authorizing the Supreme Court to hear appeals from High Courts.

Art.134(1)(a) of the Constitution of India.

Secondly, an appeal also lies to the Supreme Court if the high court withdraws for trial a case from the lower court and sentences the accused to death.[131]

Thirdly, the Supreme Court can hear an appeal in a criminal case if the high court certifies that the case is a fit one for appeal purposes.[132]

1.5.1.8 Article 136: Power to grant special leave to appeal

Over and above all the constitutional provisions expressly declaring and regulating the power of the Supreme Court in various capacities, this provision empowers the Supreme Court to grant, in its discretion, special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.[133] It however, excludes from its scope any judgment or order passed by a tribunal functioning under a law relating to the Armed Forces. An outstanding feature of this provision is that it empowers the Supreme Court to hear the appeals not only from courts but also from tribunals in any cause or matter.

The power of the Supreme Court under this provision is unaffected by Art.132, 133 and 134 and plenary as the provision puts no qualificatory fetters in its exercise. It is a sweeping power, exercisable outside the purview of ordinary law to meet the pressing demands of justice. The Supreme Court characterizes this power as ―an untrammelled reservoir of power incapable of being confined to definitional bounds the discretion conferred on the Supreme Court being subjected only to one limitation, that is, the wisdom and good sense of justice of the judges.[134] The provision does not define the nature of proceedings from which the Supreme Court may hear appeals and therefore, it could hear appeal in any kind of proceedings whether civil, criminal, or relating to income-tax, revenue or labour disputes sec. It even accommodates the Supreme Court in hearing appeals even though the ordinary law pertaining to the dispute makes no provision for such an appeal. Supreme Court can even disregard the limitations as discussed above and can hear appeals which it could not otherwise hear under

Art.134(1)(b) of the Constitution of India.
Art.134(1)(c) of the Constitution of India
[133]Art.136(1) of the Constitution of India.
[134]*Kunhayammed v. State of Orissa,* AIR 2000 SC 2587

these provisions. Being a jurisdiction conferred by the Constitution, it cannot be diluted or circumscribed by ordinary legislative process.

In its exercise, the Supreme Court claims to have power to give whatever relief may be necessary and proper in the facts and circumstances of the specific case. The Court has power to mould the relief according to the circumstances of the specific case.[135] The court can also invoke its power under Art.142 for this purpose.

1.5.1.9 Article 141: Authority to make final declaration of law

Under this provision, the Supreme Court has the power to declare any law and the said declaration has the force of an authoritative precedent, binding on all other courts in India, of course except the Supreme Court itself. Such a final authority which the Supreme Court claims to possess includes power to decide the validity of a law and to interpret it. Such a claim gives the court an unbridled discretionary power without any accountability whatsoever and the consequent development is the judicial activism.

1.5.1.10 Article 142: Power to do complete justice

The Supreme Court, in exercise of the power conferred under this provision, is entitled to pass any decree, or make any orders, as is necessary for doing complete justice in any cause or matter pending before it.[136] The expressions 'cause or matter' used include any proceeding pending in the court including civil or criminal proceeding. The provision confers very wide powers on the Supreme Court to do complete justice in any case and it has been given a broad and purposive interpretation by the Supreme Court. Under this provision, the jurisdiction and powers of the Supreme Court are supplementary in nature and are provided for doing complete justice in any matter. In the course of time, the apex court has given much wider dimension and ambit to this Article, practically raising it to the status of a new source of substantive power for itself.

As claimed by the judiciary, it contains no limitations regarding the causes or the circumstances in which the power can be exercised nor does it lay down any

[135] *Collector of Customs & Central Excise v. Oriental Timber Industries,* AIR 1985 SC 746. 489
[136] *Delhi Eleric Supply Undertaking v. Basanti Devi,*AIR 2000 SC 43

condition to be satisfied before such power is not exercised, nor does it law down any condition to be satisfied before such power is exercised. The apex court claims to have a complete discretion in its exercise.

In *Supreme Court Bar Association v. Union of India*[137], the Supreme Court characterized its role in the following words. Indeed the Supreme Court is not a court of restricted jurisdiction of only dispute settling. The Supreme Court has always been a law-maker and its role travels beyond merely dispute settling. It is a problem solver in nebulous areas.

Further, describing the nature of its power under this provision, it has held that: The plenary powers of the Supreme Court under Art.142 of the Constitution are inherent in the court and complementary to those powers which are specifically conferred on the Court by various statutes though is not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers exist as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis of its exercise, may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is thus, the residual source of power which this court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law.

1.5.2 Doctrines Formulated by Courts Using the Power of Judicial Review in India

Article 13 of constitution incorporates "Judicial Review of Post constitution and Pre- constitutional laws". This Article inherited most important doctrines of judicial review like Doctrine of Severability, Doctrine of Eclipse. Article 13 provides for the "judicial review" of all the legislations in India, past as well as future.

Some other doctrines are formulated by courts using the power of judicial review

[137] AIR 1998 SC 1895

are Doctrine of Pith and Substance, Doctrine of Colourable legislation. These doctrines are originated by Supreme Court by using power of judicial review through interpreting various Articles. Doctrine of Prospective overruling is the doctrine to interpret the judicial decisions. These doctrines are enumerated through interpret the constitution provisions by Supreme Court.

1.5.2.1 Doctrine of Severability

Article 13 of the Indian constitution incorporates this doctrine. In, Article 13 the word" to the extent of contravention" are the basis of Doctrine of Severability. This doctrine enumerates that the court can separate the offending part unconstitutional of the impugned legislation from the rest of its legislation. Other parts of the legislation shall remain operative, if that is possible. This doctrine has been considerations of equity and prudence. It the valid and invalid parts are so inextricably mixed up that they cannot be separated the entire provision is to be void. This is known as "doctrine of severability"

In *A. K. Gopalan vs. State of Madras*[138], case section 14 of Prevention Detention Act was found out to be in violation of Article 14 of the constitution. It was held by the Supreme Court that it is Section 14 of the Act which is to be struck down not the act as a whole. It was also held that the omission of Section 14 of the Act will not change the object of the Act and hence it is severable. Supreme Court by applying doctrine of severability invalidate the impugned law.

1.5.2.2 Doctrine of Eclipse

This doctrine applies to a case of a pre constitution statute. Under Article 13(1) of the constitution, all pre constitution statutes which are inconsistent to part III of the constitution become unenforceable and unconstitutional after the enactment of the constitution. Thus, when such statutes were enacted they were fully valid and operative. They become eclipsed on account of Article 13 and lost their validity. This is called "Doctrine of Eclipse". If the constitutional ban is removed, the statute becomes free from eclipse, and becomes enforceable again. In *Bhikaji Narain Dharkras vs. State of M.P.*[139], an existing State law authorized the State Government to exclude all the private motor transport operators from

[138] *Supra* n.2.
[139] AIR 1955 SC 781

the field of transport business. After this parts of this law became void on the commencement of the constitution as it infringed the provisions of Article 19(1)

and could not be justified under the provisions of Article 19 (6) of the constitution. First Amendment Act, 1951 amended the Article 19(6) and due to this Amendment permitted the Government to monopolize any business. The Supreme Court held that after the Amendment of clause (6) of Article 19, the constitutional impediment was removed and the impugned Act ceased to be unconstitutional and became operative and enforceable.

1.5.2.3 Doctrine of Prospective Overruling

The basic meaning of prospective overruling is to construe an earlier decision in a way so as to suit the present day needs, but in such a way that it does not create a binding effect upon the parties to the original case or other parties bound by the precedent. The use of this doctrine overrules an earlier laid down precedent with effect limited to future cases and all the events that occurred before it are bound by the old precedent itself. In simpler terms it means that the court is laying down a new law for the future. This doctrine was propounded in India in the case of *Golak Nath vs. State of Punjab*[140]. In this case the court overruled the decisions laid down in *Sajjan Singh*[141] *and Shankari Prasad*[142]cases and propounded Doctrine of Prospective Overruling. The Judges of Supreme Court of India laid down its view on this doctrine in a very substantive way, by saying "The doctrine of prospective overruling is a modern doctrine suitable for a fast moving society." The Supreme Court applied the doctrine of prospective overruling and held that this decision will have only prospective operation and therefore, the first, fourth and nineteenth Amendment will continue to be valid.

1.5.2.4 Doctrine of Pith and Substance

Pith means ‘true nature’ or ‘essence of something’ and Substance means ‘the most important or essential part of something’**.** Doctrine of Pith and Substance says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. Thus, if the substance falls within Union List, then

[140]*Supra* n.70.
[141]*Supra* n.69.
[142]*Supra* n.68.

the incidental encroachment by the law on the State List does not make it invalid.

The doctrine has been applied in India to provide a degree of flexibility in the otherwise rigid scheme of distribution of powers. The reason for adoption of this doctrine is that if every legislation were to be declared invalid on the grounds that it encroached powers, the powers of the legislature would be drastically circumscribed.

The *State of Bombay And Another v F.N. Balsara*[143], is the first important judgment of the Supreme Court that took recourse to the Doctrine of Pith and Substance. The court upheld the Doctrine of Pith and Substance and said that it is important to ascertain the true nature and character of a legislation for the purpose of determining the List under which it falls.

The case of *Prafulla Kumar Mukherjee v. The Bank of Commerce*[144] succinctly explained the situation in which a State Legislature dealing with any matter may incidentally affect any Item in the Union List. The court held that whatever may be the ancillary or incidental effects of a Statute enacted by a State Legislature, such a matter must be attributed to the Appropriate List according to its true nature and character.

Thus, we see that if the encroachment by the State Legislature is only incidental in nature, it will not affect the Competence of the State Legislature to enact the law in question. Also, if the substance of the enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid.

However, the situation relating to Pith and Substance is a bit different with respect to the Concurrent List. If a Law covered by an entry in the State List made by the State Legislature contains a provision which directly and substantially relates to a matter enumerated in the Concurrent List and is repugnant to the provisions of any existing law with respect to that matter in the Concurrent List, then the repugnant provision in the State List may be void unless it can coexist and operate without repugnancy to the provisions of the existing law.

AIR 1951 SC 318
1947 PC 11

1.5.2.5 Doctrine of Colourable Legislation

In India 'doctrine of colourable legislation' signifies only a limitation of the law making power of the legislature. It comes to know while the legislature purporting to act within its power but in reality it has transgressed those powers. So, the doctrine becomes applicable whenever a legislation seeks to do in an indirect manner what it cannot do directly**.**

Under our Constitution, the legislative powers of Parliament and the State Legislatures are conferred by Article 246 and distributed by Lists I, II, and III, in the Seventh Schedule. The Parliament has power to make law respect to any of the matters of the List II and the Parliament and the State Legislatures both have power to make laws with the respect to any of the matters of the List III and the residuary power of legislation is vested in the Parliament by virtue of Article 248 and entry 97, List I. For making any law or for that law's validity legislative competency is an issue that relates to how legislative power must be shared between the Centre and the States or it focuses only on the relationships between both of them.

In *K.C. Gajapati Narayan Deo v State of Orissa*[145]**,**while explaining the doctrine held that "if the constitution of a state distributes the legislative spheres marked out by specific legislative entries or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of the constitutional power or not. Such transgression may be patent, manifest and direct, but may also be distinguished, covered and indirect and it is the latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements".[146]

1.6 Rule of Law: An Essential Component Judicial Review in India

The rule of Law is an important contribution of the British Constitution. It means that in the eyes of the law all persons, whether big or small, the highest government official or ordinary citizen, a big capitalist or a poor man, are equal.

AIR 1953 SC 375

[146]*Id.*

Dicey has given three meanings of the rule of law. According to him, "It means in the first place, the absolute supremacy or predominance of regular laws as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogatives or even of wide discretionary authority on the part of the Government. Englishmen are ruled by the law and by the law alone a man may be punished for a breach of law but he can be punished for nothing else… no man's punishable or can be lawfully made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."[147]Further Dicey writes, "It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. Dicey continues that, "Not only that with us no man is above the law but (what is a different thing) that here everyman. Whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." Prof. Dicey while elaborating the equality of all before law. Say, "With us every official, from the Prime Minister to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen".

Thirdly, according to Dicey, the Rule of Law may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries, naturally form part of the constitutional code, are not the sources but the consequences of the rights of individuals as defined and enforced by the courts…. It means that the main principle of the constitution, such as the right to personal or of public meeting, has been set up on the foundation of the old common law and not as things derived from any general Constitution Theory. Rights in brief, do not flow from the constitution but from judicial decisions as in the famous Wilkes, case[148].

India has many attributes which if properly utilized can shape it as a world leader in many spheres while providing in that process a better quality of life to all it

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[147]E.C.S. Wade,Dicey: *Introduction to the Study of the Constitution*,10th edition, London, Macmillan,1959,p.188.

[148]N.R.Madhava Menon, *Constitutional Institutions and the maintenance of Rule of Law; Rule of Law in a Free Society*,(ed.) N.R.Madhava Menon,Oxford University Press,2008,p.41-42.

citizens. It has one of the ancient civilizations, which gave to the world universal values of love, peace and non-violence based on 'Dharma'. It has a relatively younger population with tremendous potential for nation-building activities in a knowledge society. It is blessed with a democratic Constitution and a tradition for orderly change and peaceful coexistence.

For a culture shaped in the philosophy of 'Dharma', Rule of Law is not an alien concept. It is innate in the Indian ethos and tradition. The Supreme Court recently reminded the government of "Raj Dharma" in the context of Gujarat violence. The spiritual content of the Rule of Law rests in the universal values of justice and tolerance-tolerance of people who differ from you, tolerance of systems, beliefs and practices which are at variance from yours tolerance with a view to coexist peacefully in a diverse world respecting the rights of others in equal measure as you claim for yourself. It is too simple a proposition to need an explanation for people with common sense. The Rule of Law involves a sense of human equality and respect for basic human rights of all people irrespective of their status in society. It demands acceptance of the supremacy of law and willingness to abide by it howsoever unpleasant its consequences are. In short, the Rule of Law rests in an attitude of the mind, which accommodates differences, respects all human beings alike, and submits to the collective wisdom expressed in the form of law in case conflicts arise[149].

Rule of Law is imperative for a democratic regime in which equality, basic rights and popular will are respected. Rule of a law does not exist where arbitrary exercise of power prevails. In other words, Rule of Law presupposes division of powers and a system of checks and balances intended to prevent authoritarian and arbitrary exercise of public power. It is in this context that the legal system becomes relevant for Rule of Law. Constitution is about division, distribution and management of State power in such a manner that arbitrariness is prevented and accountability (to law) is established. The division of powers among the Centre, state and local governments on the one hand, and the separation of powers between the Legislature, Executive and Judiciary on the other, is a constitutional scheme to ensure the principle of checks and balances under Rule of Law. In a written Constitution, the Judiciary exercising powers of judicial

[149] *Id.* at p.43.

review performs a significant role in the maintenance of Rule of Law by resolving disputes between the citizen and the state. The complementarily of constitutional institutions and their capacity to function within their legitimate jurisdictions enable Rule of Law to be a living reality in constitutional governance[150].

Whenever public discourses on Rule of Law take place, invariably attention is focused on the institution of Judiciary, as it is the principal arbiter under the Constitution to protect the rights of citizens and decide on limits of public authority. In a written Constitution of a federal type based on division of powers and guaranteed rights, the Judiciary inevitably occupies position to declare the law finally. In fact. Article 141 of the Constitution does state that the law declared by the Supreme Court shall be binding on all courts within the territory of India[151].

The Supreme Court and the High Court's engaging concurrent jurisdiction in determining constitutionality of administrative action and of legislation, enjoy vast powers of what is called "judicial review", a vita instrument for preventing arbitrariness in State action. Given the range and scope of powers under judicial review, the Indian Supreme court is possibly the world's most powerful court safeguarding Rule of Law in the world's largest democracy[152].

Government by the "Rule of Law" envisages judicial review as an inevitable projection of the fundamental principles implicit in the doctrine. Public law enforces the proper performance by public bodies of their public duties. Administrative Law is a branch of Public Law concerned with the various organs of government engaged in administering public policies. This is the concept of legal control of government under the Rule of Law. A constitutional guarantee of rights, as in India, wherein constitutional remedy is also guaranteed under Article 32 in the Supreme Court and under Article 226 in the High Courts, transforms the court's power into a constitutional mandate for the protection and enforcement of the rights. Rule of Law is firmly entrenched in this manner[153].

Id .at p.43-44.
Id. at 47-48
Id.at 48.
J.S.Verma, *Rule of Law and Inter- State Relations; Rule of Law in a Free Society,(ed.)*

Rule of Law has been held to be a basic feature of the Indian Constitution. In the Indian Constitution, Article 14 combines the English doctrine of the Rule of Law and the equal protection clause of the Fourteenth Amendment. Rule of law postulates the preservation of the spirit of law through the whole range of government. Because of its amorphous nature Sir Ivor Jennings called it an unruly horse[154].

Soon after the Constitution came into force in 1950 in *A. K. Gopalan's case*[155]the Supreme Court placed rather a narrow and restrictive interpretation upon article 21 of the Constitution. By a majority, it was held in this case that "… the procedure established by law' means procedure established by a law made by the State" and the court refused to infuse in that procedure the principles of natural justice. The court also arrived at the conclusion that article 21 excluded enjoyment of the freedoms guaranteed under article 19.

Gopalan's case [156]was decided soon after, the Constitution came into force, more than 49 years ago. The judgement was mainly based on the language of the Constitution and the requirements of the particular case before the court. The law has not remained static. The doctrine of exclusivity of fundamental rights as evolved in *Gopalan's case*[157]was thrown overboard by the same Supreme Court, about two decades later in *Bank Nationalization case*[158] , and four years later in 1974, in *Hardhan Saha's case*[159], the supreme court judged the constitutionality of preventive detention with reference to article 19 also. Twenty eight years after the judgement in *Gopalan's case*[160], in 1978 the Supreme Court in *Maneka Gandhi's case*[161], pronounced that the procedure contemplated by article 21 must be 'right, just and fair' and not arbitrary; it must pass the test of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would be no procedure at all and the requirement of article

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N.R.Madhava Menon, Oxford University Press,2008,p.97.

M.N.Venkatachaliah,*Rule of Law and Judiciary ;Rule of Law in a Free Society*,(ed.) N.R.Madhava Menon, Oxford University Press,2008,, p.123

[155]*Supra* n.2.

[156]*Supra* n.2.

[157]*Id.*

[158]*Supra* n. 75.
AIR 1974 SC 2154

[160]*Supra* n.2.

[161]*Supra* n. 85.

21 would not be satisfied. The courts have, thus, been making judicial intervention in cases concerning violation of human rights as an ongoing judicial process. Decisions on such matters as the right to protection against solitary confinement as in *Sunil Batra v. Delhi Admn*.[162] ,the right not be held in fetters as in *Charles Sobraj v. Supdt., Central jail*[163], the right against hand cutting as in *T.V.Vatheeswaran v. State of Tamil Nadu* [164],the right against custodial violence as in *Nilabati Behera v.State of Orissa*[165] , the rights of the arrestee as in *D.K. Basu v. State of West Bengal*[166],or the right of the female employees not to be sexually harassed at the place of work as in the case of *Vishaka v. State of Rajasthan*[167]and *Apparel Export Promotion Council v. A. K. Chopra*[168]are just a few pointers in that direction.

In the case of *Nilabati Behera v.State*[169]the court crystallized the judicial right to compensation, which was further reiterated in *D. K. Basu v. State of W.B*[170]. In this the court went to the extent of saying that since compensation was being directed by the courts to be paid by the State, which has been held vicariously liable for the illegal acts of its officials, the reservation to clause 9(5) of ICCPR by the Government of India had lost its relevance. In fact, the sentencing policy of the judiciary in torture related cases, against erring officials in India, has become very strict.

1.7 Separation of Powers and Power of Judicial Review in India

The necessity of keeping the State under the law led to the establishment of certain written Constitution as fundamental law. This law was above the ordinary law and the latter was invalid to the extent of its inconsistency with the former. The question arose, however, as to who was to determine when ordinary law was inconsistent with the Constitution. The principle of separation of powers or functions of the State into legislative, executive and judicial was invoked to find the answer. Straggly enough, this principle could lend equal support to two

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[162](1978) 4 SCC 494
(1978) 4 SCC 104
[164](1983) 2 SCC 68
[165](1993) 2 SCC 476
(1997)1 SCC 416
(1997) 6 SCC 241
(1999)1 SC 61
[169]*Supra* n.165.
[170]*Supra* n.166.

conflicting answers. On the one hand, it was urged that the separation of powers or functions required that the Legislature, the Executive and the Judiciary should each keep within its own sphere.

Montesquieu emphasized the need to keep judicial and executive powers in different hands and also spoke of the mutual balancing and restraining of the legislative and executive powers. What is the theory behind this balance of powers? Geoffrey Marshall attempts a tentative answer as follow:

> *(P)erhaps through a running together of the checking and balancing theories of mixed government with the separation of persons doctrine, neither he (Montesquieu) nor many others down to the present day seem clear as to whether 'checking' of one branch by another is a participation in the other's function and a partial violation of the separation of powers doctrine, or whether it is actually an exemplification of the doctrine, which carries out the very purpose of the separating and balancing off against each other of the three branches of Government*[171].

The apprehension underlying this theory is that the recognition of the judicial power as a check on the legislative power would be contrary to the democratic theory by which the people vest the sovereign powers in the Legislature. One answer to this theory is that people may choose to separate the constituent legislative powers from the ordinary legislative powers by enacting written Constitutions which would stand as the fundamental law above ordinary legislation. A more satisfying answer is that the exercise of the power of judicial review of legislation should not be regarded as a legislative power.

1.8 Independence of Judiciary: An Essential Feature of Constitution of India

The framers of the Constitution were conscious of this fundamental element for free and peaceful life of the nation as well as development of the nation towards achieving egalitarian goal. The independence of the judiciary was in the mind of the freedom fighters by way of reaction to colonial experience. The Constitution of India contains elaborate provisions regarding appointment, removal and

[171]Geffory Marshall,*Constitutional Theory,* 1971, Clarendon Press, Oxford,p.102.

service security of the judges.

Article 124(4) which is applicable to High Court Judges vide Article 217 (1)(b) which reads: "A judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each house of Parliament supported by a majority of the total membership of the that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity".

The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual reviews just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eye of law.

As observed by Supreme Court in *Minerva Mills Ltd. v. Union of India*[173], the Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and the validity of legislation. Judicial review aims to protect citizens form abuse or misuse of power by any branch of the State.

It is for this reason that an independent Judiciary has to perform its function which may often consist in limiting acts of the Legislature no less than the acts of the Executive.

Dr. Ambedkar's constitutionalism was based on the recognition of the independence of judiciary and its power of judicial review. He did not want to create an Imperium in Imperio. But at the same time he preferred to give the judiciary ample independence so that it could act without fear or favour of the executive[174].

Moreover the role of the judiciary is becoming more and more important in the modern world. It means that independence of the judiciary is very vital for the maintenance and upkeep of the confidence reposed upon it in respect of judicial

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Chief Constable v. Evans, (1982) 3 AII ER. 29

[173](1980) 3 SCC 625 (677-78)

[174]Kanta Kataria,*Ambedkar's Role in the Making of the Indian Constitution* ,Madhya Pradesh Journal of Social Sciences,Vol.16,No.2,2011.

review, judicial independence would then have to be recognized as an ingredient of the basic structure.

The question of importance of independence of the judiciary was raised before the Supreme Court on many occasions. In *Shri Kumar Padma Prasad v. Union of India*[175]the question raised was whether the person who held only non-judicial posts could be appointed District Judge or Judge of High Court. The Court observed that though Judges were used to be appointed from among the members of executive offices, after independence Judges were not being appointed from such offices. One of the Directive Principles also mandates the State to separate judiciary from the executive[176], which means that judiciary shall be free from executive control. Such a separation of the judiciary from the executive was necessary for the maintenance of judicial independence. Hence, Justice Kuldip Singh speaking for the Court held that independence of the judiciary was one of the features of the basic structure of the Constitution of India.

Addition of judicial independence as a feature of the basic structure is certainly a creative stride of the Court. It was very much necessary also. The necessary implication and clear consequence of the decision is that Parliament cannot amend the Constitution in a manner damaging the independence of judiciary.

Independence of the judiciary received further consideration by a constitutional bench of the Court consisting of nine Judges in *S.C. Advocates-on-Record v. Union of India*[177]. In that case the Court had to deal with important questions relating to appointment of judges to the Supreme Court, appointment and transfer of judges to High Courts and the importance and weight the opinion of the Chief Justice of India would carry in these matters. While construing the related provisions in the Constitution, the Court observed that those questions were to be dealt with in the light of the concept of independence of the judiciary. The court unanimously held that the concept of independence of the judiciary. The court unanimously held that the concept of independence of judiciary was very important from the point of view of the Constitution. The Judges quoted the views of legal luminaries, judicial decisions and other authorities with approval

[175](1992)2SCC428
[176]The Constitution of India, Article 50.
[177](1993)4SCC441

to hold that independence of the judiciary was a cardinal virtue. It was observed that independence of judiciary was very much necessary for the maintenance of rule of law and democracy. Considering its importance in the modern society, the Court unanimously held that the concept of independence of the judiciary formed and essential and basic feature of the Constitution of India. The Court construed the constitutional provisions and rendered the decision in tune with the requirements of the concept of independence of the judiciary.

The review power conferred under this head deals with the legislative competence and constitutionality of different laws i.e., whether it violates Constitutional or legislative limitations including derogation of fundamental rights.

1.9 Judicial Activism: Expansion of Power of Judicial Review in India

The concept of Judicial Activism originated in the U.S. It is the process in which Judiciary uses the concept of judicial review to tell unconstitutionality of the legislature and executive orders. Inactiveness of legislature and the Executive makes or compels the Judiciary to be more active. We have followed British legal System besides adopting a parliamentary form of Government. We adopted the concept of United States but there is a difference. In U.S. judicial review is in due course of law but in India it is a procedure established by law.

The Supreme Court of India began as a positivist court and strictly followed the traditions of the British Courts. In *Gopalan's case*[178]the Court declined an invitation made on behalf of the petitioner, Mr. Gopalan, a communist leader who had been detained under a law of preventive detention, to read the provisions of the Constitution liberally so as to give effect to the spirit of the Constitution rather than remaining in the confines of its text. The court gave a narrow construction to words such as "personal liberty" and "procedure established by legitimated law" contained in Article 21 of the Constitution. The economy, the Court observed judicial restraint and legitimated the actions of the government. These were the days of the welfare state and the court was supposed to Latinize the expanded sphere of the state and its powers. The court and Parliament clashed only on the scope of the right to property. Parliament

[178]*Supra* n.2.

wanted to usher in a radical programme of changes in property relations and the Court had adopted the policy of interpreting the right to property relations and the Court had adopted the policy of interpreting the right to property expansively so as to impede such programme. Since the constitution allowed Parliament to amend the Constitution, a decision of the Court could be circumvented. Since the Constitution could be amended by a majority vote of two-thirds of the members present and voting and an absolute majority of the total membership in each house of Parliament, and the ruling party could easily muster such majority, the Court's decisions could not obstruct the property rights reforms. The struggle between the two wings continued and, in fact it was during this time that the Supreme Court, while interpreting Article 368 of the constitution empowering parliament to amend the constitution, made its landmark judgment in *Keshwananda Bhait's case*[179]holding that the basic structure of the constitution was not amendable, not even by a legislation of the Parliament. Even this judgment was described by then prime minister as road blocks to reforms. During the last two decades, judicial activism has played a major role in protecting the rights and freedoms of individuals, as guaranteed under the Constitution. After the landmark decision in the *Menaka Gandhi's case*[180], courts have assumed an activist posture, the judiciary interpreted the constitutional provision in its wider possible meaning to protect basic civil liberties and fundamental rights. During this period, our judiciary developed the concept of social action litigation and public interest litigation by discarding the traditional and self-imposed limitations on its own jurisdiction.

The activist Court delivered many verdicts expanding the scope of right to life under Article 21.The court held the right to speedy trial as an essential part of the right to life and liberty under Article 21[181]. The inhuman conditions that prevailed in protective homes, trafficking in women, non-payment of wages to bonded labourers, and the inhuman conditions of prisoners in jail were held to be gross violations of Article 21[182] and directions were issued for the protection and

[179]*Supra* n.3.
[180]*Supra* n.85.
[181]*Hussainara Khatoon (I-VI) v. Home Secretary, State of Bihar, Patna,* (1980) 1 SCC 81
[182]*Upendra Baxi v. State of Uttar Pradesh,* (1983) 2 SCC 308

preservation of human rights of female prisoners[183]. The Court further expanded the scope of Article 21 by including right to protection against solitary confinement[184], the right against custodial violence[185], the rights of the arrested[186], the right of the female employees against sexual harassment in working place[187], etc. within it. The court also ensured a pollution free environment and established the link between environment development and human rights[188]. The court even developed a new environmental health jurisprudence through its judicial creativity and later incorporated the theory of sustainable development ensuring green belts and open spaces for maintaining ecological balance[189]. The court even granted compensation under Article 32 for the deprivation of the fundamental right to life and liberty caused by the unlawful acts of the instrumentalities of the State. Thus, as corrective machinery, the court achieved many beneficial results, due to the then identified Constitutional obligations viz. the protection of human rights.

1.10 Public Interest Litigation and Judicial Review

With the interpretation given by it in *Menaka Gandhi case*[190] the Supreme Court brought the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human-rights-jurisprudence. This was made possible in India, because of the procedural innovations with a view to making itself more accessible to disadvantaged sections of society giving rise to the phenomenon of Social Action Litigation/Public Interest Litigation. During the Eighties and the first half of the Nineties, the Court have broken there shackle's and moved much ahead from being a mere legal institution, its decisions have tremendous social, political and economic ramifications. Time and again, it has sought to interpret constitutional provisions and the objectives sought to be achieved by it and directed the executive to comply with its orders.

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[183] *Sheela Barse v. State of Maharashtra,* (1983) 2 SCC 96
[184] *Sunil Batra v. Delhi Administration,* Supra n.162.
[185] *Nilabati Behera v. State of Orissa,* Supra n.165.
[186] *D. K. Basu v. State of West Bengal,* Supra n.166.
[187] *Vishaka v. State of Rajasthan,* Supra n.167*; Appareal Export Promotion Council v. A. K. Chopra,* Supra n.168.
[188] *Subhash Kumar v. State of Bihar,* (1991) 1 SCC 598
[189] *M. C. Mehta v. Union of India,* (1996) 4 SCC 351
[190] *Supra* n.85.

In view of the operations by the courts on a wider canvass of judicial review, a potent weapon was forged by the Supreme Court by way of public interest litigation (PIL) also known as social action litigation. The Supreme Court has ruled that where judicial redress is sought in respect of a legal injury or a legal wrong suffered by persons, who by reason of their poverty or disability are unable to approach the court for enforcement of their fundamental rights, any member of the public, acting bonafide, can maintain an action for judicial redress.Thus, the under privileged and the downtrodden have secured access to court through the agency of a public-spirited person or organisation. This weapon was effectively used by the Supreme Court and the high courts, being Constitutional courts, to a large extent from 1980 onwards.

The decision of the Supreme Court in *Sunil Batra v. Delhi Administration*[191]; *Municipal Council, Ratlam v. Vardhichand*[192] *; Akhil Baratiya Soshit Karamchari Sangh, Railway v. Union of India*[193]and umpteen number of decisions thereafter by the Supreme court and more particularly the decision of the supreme court in *S.P.Gupta's case*[194]represent watersheds in the development of PIL and liberalization of the concept of locus standi to make access to the courts easy. The principle underlying order 1 rule 8, Code of Civil Procedure has been applied in public interest litigation to entertain class action and at the same time to check misuse of PIL. The appointment of amicus curiae in these matters ensures objectivity in the proceedings. Judicial creativity of this kind has enabled realization of the promise of socio-economic justice made in the preamble to the Constitution of India.

The Supreme Court of India had developed new strategy of Public Interest Litigation (PIL) or Social Action Litigation (SAL) for upholding and enforcing the rights of the unprivileged. It has devised new methods, forged new tools and innovated new strategies. The credit of this new development goes primarily to the activist judges like P.N. Bhagwati, Krishna Iyre, D.A. Desia, Chinnappa Reddy J.J., etc. their attitude was influenced by radicalism .

The Supreme Court has played this vital role of social justice and human rights

[191] *Supra* n.162.
[192] AIR 1980 SC 1622
AIR 1981 SC 298
AIR 1982 SC 149

while exercising its writ-jurisdiction. It is well-settled principle of the Commonwealth law that an aggrieved person only may approach to court. This rule is called rule of locus standi. Thus, ordinarily, only the affected person should approach the courts. However, this rule limits access of justice to several underprivileged sections of society as they may not be able to approach the court even if their rights are abridged. This may be because of ignorance or their weak financial position. .

The expanded concept of locus standi in connection with PIL, by judicial interpretation from time to time, has expanded the jurisdictional limits of the courts exercising judicial review. This expanded role has been given the title of 'judicial activism' by those who are critical of this expanded role of the judiciary. The main thrust of the criticism is that the judiciary by its directives to the administration is usurping the functions of the legislatures and of the executive and is running the country and, according to some, ruining it. What these critics of the judiciary overlook is that it is the tardiness of legislatures and the indifference of the executive to address itself to the complaints of the citizens about violations of their human rights which provides the necessity for judicial intervention. In cases where the executive refuses to carry out the legislative will or ignores or thwarts it, it is surely legitimate for courts to step in and ensure compliance with the legislative mandate. When the court is apprised of and is satisfied about

1.11 Judicial Review as the Part of Basic Structure of the Constitution in India

Judicial review is a part of the basic structure of the Indian Constitution. The Supreme Court propounded this in the *Fundamental Rights case*[195]after sowing its seeds in *SajjanSingh's case*[196]and *Golaknath's case*[197]. While Justice Hidayatullah and Justice Mudholkar expressed their anxiety on 'fundamental rights being the play things of majority' and the 'erosion of basic features' of the Constituion in *Sajjan Singh's case*[198], the majority in *Golaknath's case*[199]held

[195]*Kesavananda Bharati v. The State of Kerala and Others ,* AIR 1973 SC 1461
[196]*Supra* n. 69.
[197]*Supra* n.70.
[198]*Ibid,* n.196.
[199]*Ibid,* n. 197.

that the termn law under Article 13 of the Constitution includes Constitutional Amendments and thereby asserted the power of judicial review over Amendments to the Constitution. While this position was reversed in *Kesvandna Bharati's case*[200], it put a limitation on the amending power and held that the amending process should not damage and destroy the 'basic structure of the Constitution.

Then, it was further observed in *Minerva Mill's case*[201]that the power of judicial review is an integral part as well as a part of the basic structure of the Constitution for the maintenance of democracy and the rule of law. The power of review as a basic structure, which was further upheld in many cases, could never be excluded, as it envisages checks and balances upon the actions of the Legislature and the Executive by confining these powers within the four walls of the Constitution. The Legislature and the Executive is omnipotent and may exercise their powers arbitrarily. The courts, by exercising the power of judicial review, controlled and prevented the evils committed against our Constitutional democracy and ensured the observance of the rule of law. It also acted as the 'balance wheel of federalism' by invoking the power of review over the States and the Union, and States inter se, thereby harmonizing the federal system.

Even though law is a changing phenomenon which changes with the changing aspirations of time and society, several age old laws are unable to work in par with the emerging modern trends. Here Judiciary plays an important role by 'filling the lacunae' and adapting the old laws to the new society. In a democracy, the power is held by the majority and these vast powers can be misused to suppress the minority. By virtue of the power of judicial review, the Judiciary protects the minority over majority against the capricious, tyrannical and whimsical power of the State. In the ultimate analysis, the aged criticisms against the process of review like usurpation of powers by the Judiciary, overthrowing of separation of powers, etc. need not be answered since judicial review is the only potent weapon to check the omnipotent Legislature and the Executive from arbitrariness.

Ibid n.195.

[201]*Supra* n.6.

The decisions in *Minerva Mills*[202], *Sampath Kumar*[203]and *Samba Murthi*[204]share some common features. In all of them judicial review was recognized as part and parcel of basic structure not in an independent capacity but as one necessary for guaranteeing the continuance of the aspects of the Constitution which the Court recognized as ingredients of the basic structure was out of the fear of the Court that its absence might lead to termination of democracy and decadence of rule of law. That perhaps is the reason for the Court to hold in all of these cases that though judicial review cannot be abrogated, it could be partially excluded and substituted by an equally efficacious and alternative remedy. The idea that even if a feature is an ingredient of basic structure, it could have a substitute was raised for the first time by Justice Bhagwati in the *Minerva Mills Case*[205]. It is doubtful whether feasibility of such a proposition was examined by the Court in a proper perspective in *Sampath Kumar* [206]and *Sambamurth*y[207]. If a feature is identified as an ingredient of the basic structure, it implies that it is so important for the maintenance of the identity of the Constitution. In such a context it is doubtful whether it can be substituted by any other scheme at all. For, substitution of such a feature by any other concept my help destroy some of the characteristics of the basic structure and amounts to watering down its contents. Further, it would also imply that the feature is no so essential one. Moreover, judicial review is imbued with certain features that cannot exist in its absence. The training of a judicial mind and the independence extended to the judicial officers are some of the prerequisites for effective judicial review, which are absent in any mechanism other than judicial review howsoever efficient it be. Therefore, the holding of the Court that though judicial review constitutes a part of basic structure, it can be substituted by equally efficient methods is certainly open to objection It is in such a context that the decision of *L. Chandra Kumar v. Union of India*[208]becomes highly relevant. This case was decided by a constitutional bench consisting of nine Judges[209]. The court reiterated its stand in *Minerva Mills*[210]that

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Id.

[203]*Supra* n.5.

AIR 1987 SC 663

[205]*Supra* n.6.

[206]*Supra* n.5.

[207]*Supra* n.204.

[208]A.I.R. 1997 S.C. 1125

[209]Justice A.M. Ahmadi, C.J. M.M. Punchhi, K. Ramaswamy, S.P. Barucha, S. Saghir Ahmed, K. Venkitaswamy and K.T. Thomas JJ

judicial review was a feature of the basic structure of the Constitutions. The Court further held that the jurisdiction of the Supreme Court under Article 226 and 227 also formed part of the basic structure of the Constitution and therefore they cannot be ousted or excluded at all. It was justified on the ground that the jurisdiction of High Court under Articles 226 and 227 was as important as that of the Supreme Court under Article 32[211].

The court highlighted the importance of judicial review on the basis of the independence enjoyed by the judiciary.[212]In reaching the conclusion that Article 32 formed part of the basic structure, the Court might have been influenced by the observation made by Dr. Ambedkar at the time of enacting the provision in the Constituent Assembly that it was the most important one in our Constitution[213]. On a variety of grounds, the Court considered the powers vested in High Courts under Articles 226 and 227 as very important which therefore could not be excluded[214]. The court observed that administration of justice by Tribunals leaves much to be desired[215]and the remedy under Article 136 was too costly and would lead to crowding of cases in the Supreme Court[216]. Therefore, the Court held that decisions of Tribunals, were reviewable by Division Bench of High Courts. The Court further extended the scope of judicial review to include specifically jurisdiction of judicial superintendence by High Courts over the decisions of all courts and tribunals within their respective jurisdictions as envisaged by the Constitution of India.

In short, the court deviated from its earlier stand in *Minerva Mills*[217], *Sampath Kumar*[218]and *Samba Murthi*[219]that judicial review could be substituted by equally

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[210]*Supra* n. 6.

Supra n.208, the court observed, "If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other Court," there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constituion."

[212]Id,at p. 1149.

[213]C.A.D., Vol. VII, p. 953. He said, "If I was asked to name any particular Article in this Constituion as the most important – and Article without which the Constitution would be a nullity – I could not refer to any other Article except this one. It is the very soul of the Constituion and the very heart of it and I am glad that the House has realized its important."

[214]*Supra*, n. 208 at p. 1150.

[215]*Id.* at p. 1153.

[216]*Id.*

Supra n.6.

[218]*Supra* n.5.

[219]*Supra* n.204.

effective methods and clarified that judicial review as envisaged by Article 32, 226 and 227 cannot in any way be substituted. The court further held that the jurisdiction of Tribunals was only supplemental to and not in substation of the review power of High Courts. Clearly, it is only after the decision of *L. Chandra Kumar*[220]that the concept of judicial review got the full-fledged status as a feature of basic structure. The change in the view of the Court in Chandra Kumar reflects the correct perception of the Court that judicial review is so important in our legal system that it is a basic feature which cannot be substituted. While in the earlier decisions the court had given importance to judicial review only as an accessory to some other goals to be achieved by the Constitution, in Chandra Kumar, the Court has raised judicial review from its status of an accessory element to the level of a salient feature of the basic structure of the Constitution. It is evident from the decision in Chandra Kumar that the Court considered the status of the higher judiciary as different from that of any other authority.

Moreover the role of the judiciary is becoming more and more important in the modern world. It means that independence of the judiciary is very vital for the maintenance and upkeep of the confidence reposed upon it in respect of judicial review, judicial independence would then have to be recognized as an ingredient of the basic structure.

1.12 Amending Power of the Legislature and Power of Judicial Review

Though India follows the Parliamentary form of democracy, it is the constitution which is supreme. Therefore, not just legislation, but even a constitutional amendment which seeks to change the "basic structure" of the constitution can be called in question for review before the courts[221]. The Constitutional ensures that an administrative action is subject to judicial review by providing for a comprehensive scheme of judicial control over the administration under Article 32,136, 226, and 227.

After adhering to the conventional wisdom for seventeen long years, the Supreme Court asserted the power of judicial review over the Amendments to the

[220]*Supra* n.208.

[221].*Kesavananda Bharati v. The State of Kerala and Others* , Supra n.3.

constitution in *Golaknath's case*[222]. Later in *Kesavananda Bharati's case*[223]the Court held that fundamental rights are amendable, but the process must not affect the basic structure of the Constitution. The Supreme Court even though changed its earlier position and accepted the constituent power of the Parliament, cautioned that the "constituent power was only within the framework of the Constitution." It is presumed that the radical change in the approach of the Court in 1967 in *Golaknath's case*[224]and subsequently in *Kesavananda Bharati's* [225]case points out to the 'argument of fear,' the fear of overrunning the constitution by a Legislature comprised of the new breed of politicians the practical, professional politicians, playing the dynamic game of power politics[226]. The unpredictability of Indian politics after the death of Nehru and the absence of other eminent leaders of the national movement promoted the Court to protect Part III of the Constitution from the immature manipulation of the Legislature comprised of the new breed. Thus, the court had won the game by not giving the unbridled power of amendment to the Legislature. The Court checked the rule of two third majorities with the doctrine of basic structure. The 'argument of fear' later changed into 'save the court motto' in *Indira Nehru Gandhi's case*[227]and the Court tried to shield the 'save the Court' notion by successfully projecting the image that 'the Court is deciding the matter in accordance with the settled law.' If the argument of fear resulted in the amenability of Part III of the Constitution, the image of 'in accordance with the law' resulted in satisfying both the ruling as well as the opposition parties. Whatever may be the cases and causes, critics hold that the Court feared the power packet political tycoons and their totalitarian regime in the governmental process. It is argued that, the instance of this fear can be traced from its inception itself, due to which the Court kept silent till 1967, and after that though the court had revealed its courage with some pronouncements, which gave a silver line of hope, it again circumvented its decision due to fear of being thrown out. It is criticized that while the fear in the beginning was interpreted as 'conservatism' the latter one was interpreted as

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Supra n.70.

[223]*Supra* n.3.

Supra n.70.

Supra n.3.

Upendra Baxi, *Courage, Craft Contentio: The Indian Supreme Court in the Eighties*, N. M. Tripathi Ltd., Bombay, (1985) p. 68.

[227]*Supra* n.4.

'restraint' and during the Emergency regime, the self-inflicted wounds of the Court gave rise to too much criticism[228].

1.13 Ninth Schedule of the Constitution and Judicial Review

Asserting its right to judge the validity of any law, the Supreme Court has ruled that Acts placed in the Ninth Schedule of the Constitution by the legislature, to make them immune from to challenge for violation of fundamental rights, were open to judicial scrutiny[229]. A nine judge Constitution Bench headed by Chief Justice V.K. Sabharwal delivered the verdict on Jan 11, 2007. It said[230]:

> *"Justification for conferring protection not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall not be a matter of constitutional adjudication by examining the nature and extent of the infraction of a Fundamental Right…*"

The court said the authority to enact a law and to decide the legality of the limitations cannot be vested in one organ. It observed[231]:

> *"The validity to the limitation on the rights in Part III (Fundamental Rights as given in the Constitution) can only be examined by another independent organ, namely, the Judiciary.*"

The court, however, upheld the validity of Article 31B of the Constitution which empowers Parliament to place laws in the Ninth Schedule. But it said that even though an Act is put in the Ninth Schedule, its provisions would be open to attack on the ground that they destroy or damage the basic structure, if the Fundamental Rights are taken away or abrogated pertaining to the basic structure[232].

Upholding Parliament's power under Article 368 to amend the Constitution and place laws in the Ninth Schedule, the Court said it was a limited power, which was subject to judicial review. Deciding a reference made by a five member constitution bench on the justifiability of laws placed in the Ninth Schedule after

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[228].Roshan D.Alexander, *We, The People: Experiments With Judicial Review*, Nuals Law Journal, Vol.2, 2008, p.112.

[229].*Supra* n.98.

[230]*Id.*

Id.

[232]*Id.*

April 24, 1973 (when the Supreme Court propounded the 'basic structure doctrine' in the *Keshavananda Bharati*[233], will be open to challenge. Laying down the tests to be adopted to examine the validity of laws placed in the Ninth Schedule, the Court said it would have to be seen if the law in question violated any fundamental right[234].

Thus, the Supreme Court has upheld Parliament's power to place a law in the Schedule. But it said such laws are open to judicial scrutiny and do not enjoy blanket protection. The process of judicial review, thus, is a neutralizing and nationalizing influence over various interest groups and classes in the community to keep them sufficiently balanced[235].

1.14 Development and Expansion of Scopeof Judicial Review in India

In the present era of Globalization where international regulatory regimes such as WTO and GATT are working parallel to the constitutional and other domestic regimes. It becomes necessary to develop constitutional interpretations that can make the private entities that are largely international in character performing public functions without popular mandate that comes through elections liable under the domestic laws of the nation. This further included the application of present constitutional principles to the private entities that were developed with the State entities in view[236].

In *Amar Alcohli Ltd. v. SICOM Ltd*. [237] the issue was whether respondent No. 1 is a State Financial Corporation within the meaning of and governed by State Financial Corporation Act, 1951. The Supreme Court dismissed the appeal upholding the decision of the High Court that it was a financial corporation and it had been notified as such by the Central Government in exercise of its powers under Section 46 of the Act. It was further held that reduction of shareholdings below 50% of the Govt. of Maharashtra would not make any difference to the status of the respondent being financial corporation. Supreme Court observed that when it is not in dispute that it has been established by State and Central Government had extended the provisions of Section 29 of the Act to the

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Supra, n.3.

[234]*Supra* n.98.

[235]*Id.*

[236]Priya Bansal, *Changing Dimensions of Judicial Review,* AIR 2006(Jour.) 161.

[237]AIR 2006 SC 286

respondent then, it would be covered by the expression "an institution established by a State Government" offering range of services including the object of financing industrial concerns in the State. It would thus be financial corporation covered under the Act.

Thus, it becomes apparent that in the era of outsourcing and privatization, the number of functionaries against whom judicial review is applicable is expanding.

In addition to expanding the subjects of judicial review, the scope of judicial review has also been greatly expanded. This can either be done by giving a wider meaning to illegality, irrationality or procedural irregularities or through the utilization of new doctrines such as the doctrine of judicial review on fact and the doctrine of proportionality.

In recent times the scope of judicial review has been expanded in several ways. One very interesting aspect has been with regard to the development of the concept of judicial review on fact. This concept seeks to enlarge the scope of judicial review on counts of irrationality.

The concept of judicial review on fact was viewed with a great deal of suspicion. Although the Courts have intervened in relation to factual error whenever they felt this to be necessary, they did so without too close an inquiry as to whether such intervention was justified in the light of the existing case law. In fact, issues have always been raised with regard to the scope of this head of judicial review, rather than with its existence. Thus, there is very little in terms of a systematic and principled judicial guidance as to when facts ought to be susceptible judicial scrutiny.

This was the prevalent situation until very recently when the English and Indian Courts and some jurists have taken the issue head on. Carnwath, L. J. in *E. v. Secretary of State for the Home Department*[238]elucidated upon the existing literature on the subject and opined on what should be the position of the Courts with regard to this elusive concept. P. P. Craig in a fascinating article titled "Judicial Review, Appeal and Factual Error"[239], also gave some shape to this developing concept. The Indian Supreme court acknowledged both these

(2004) 2 WLR 1351
2004 Public Law,pg. 788.

opinions in very recent judgments.

Prior to these developments, there were two views on the scope of judicial review on facts. The first was a narrower view, which claimed that judicial review for error of fact only existed in limited circumstances, and there was no general right to challenge the decision of a public body on fact alone. The second was a much broader view, which cited several authorities in a variety of circumstances to explain the Courts jurisdiction to review error of fact.

This view was approved in *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai*[240] wherein it was opined that even a judicial review on facts might be available in certain situations.

It can be said that this concept is yet to gain a universal acceptance and attain a jurisprudential position. However, while courts and jurists in the United Kingdom have directly discussed the issue, it has been only hinted at in India. It has become a distinct possibility for the expansion of the scope of judicial review in India.

1.15 A Sum Up

Judicial review is the evolution of the mature human thought. Law must be in conformity with theconstitution. Judicial review is the cornerstone of constitutionalism which implies limited Government. It is the duty of the judiciary to keep different organs of the state within the limits power conferred upon them by the constitution. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked.

The Constitution of India invests our independent judiciary, especially the Apex Court with extensive jurisdiction over the acts of the legislature and the executive. Judicial review is part of the basic structure and cannot be altered even by amending the Constitution. It is the judiciary which ensures the

(2005) 7 SCC 627

effectiveness of Judicial Review. The independence and integrity of our judiciary is therefore of the highest importance not only to the judges but also to people at large who seek judicial redress against perceived legal injury or executive excess.

In India the power to enforce the fundamental rights was conferred on both the Supreme Court and the High Courts. The judiciary can test not only the validity of laws and executive actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders, supported with the power to punish for contempt, can reach everyone throughout the territory of the country. Since its inception, the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public policies and establishment of rule of law and constitutionalism.

In recent years the judiciary has widened its field of operation by declaring judicial review as a basic feature of the Constitution. Supreme Court has not merely interpreted the language of the Constitution but also pronounced on issues which involve matters of policy.

The power of judicial review has in itself the concept of separation of powers an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf by the courts.

The division of powers among the Centre, state and local governments on the one hand, and the separation of powers between the Legislature, Executive and Judiciary on the other, is a constitutional scheme to ensure the principle of checks and balances under Rule of Law. In India, as we have a written Constitution, the Judiciary exercising powers of judicial review performs a significant role in the maintenance of rule of law by resolving disputes between the citizen and the state.

The Supreme Court in India, in order to make access to justice equal for all classes of citizens a reality is endeavouring to dismantle the barriers of poverty that exist between poor man and the justice/judicial system. And this task is

accomplished by liberalizing the scope of locus standi.Supreme Court, during the last two and half decades has been responding to this new responsibility in an admirable manner. It has been guarding political liberties as well as socio-economic and developing Public Interest Litigation (PIL) wherein the courts are now allowing even the third parties to vindicate the socio-economic rights of the unprivileged and weaker sections of the society.

Though one does not deny that power to review is very important, at the same time one cannot also give an absolute power to review and by recognizing judicial review as a part of basic feature of the constitution Courts in India have given a different meaning to the theory of Checks and Balances this also meant that it has buried the concept of separation of powers, where the judiciary will give itself an unfettered jurisdiction to review anything that is done by the legislature. Judicial review is one of the basic features of the Constitution of India and hence no Legislative Assembly or even the Parliament can be vested with an unchallengeable power to deprive an individual of his life or liberty.