CHAPTER 3

JUDICIAL REVIEWOF LEGISLATIVE ACTION IN INDIA:A TOOL TO UPHOLD SUPREMACY OF THE CONSTITUTION

3.1 An Overview

The Constitution of India is basically a federal Constitution and is marked by the traditional characteristics of a federal system. Namely, Supremacy of the Constitution and division of powers between the Union and the States, existence of an independent judiciary and a rigid procedure for amendment of the Constitution. The Indian Constitution has conferred various powers and duties upon the three wings of the State i.e. the Legislature. Executive and the Judiciary. Based upon the principle of separation of powers. The Legislative Powers are exercised by the Parliament and the State Legislatures. The Executive Powers are exercised by the President and the State Governments at the Central and State Level respectively. Though they also exercise Legislative Powers. The same are actually exercised by the Council of Ministers in their name.

The judicial powers are exercised by the Courts with the Apex Court being the highest Court in the hierarchy followed by the High Courts and the Subordinate Courts. One of the distinctive features of our Constitution is that while the Legislature and the Executive cannot supervise or review the decisions of the court, the higher Courts can review the decisions of the Executive and test the legality and validity of the laws passed by the legislature. In exercise of their power of judicial review. It will not be out of context to say that the higher Courts have been conferred with the power as well as a duty to uphold the Constitution and to ensure that the other organs of the State function within the limits prescribed for them under the Constitution.

Judicial review is the authority of the Courts to declare void the acts of the legislature and executive. If they are found to be in violation of the provisions of the Constitution. Judicial Review said Khanna, J. in the *Fundamental Rights*

case[1],"has thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statues are found to be vocative of any of the Articles of constitution which is the touchstone for the validity of all laws the Supreme Court and the High Courts are empowered to strike down the said provisions"[2]. It is a power which is inherently found in a federal constituting as the judiciary has the final power to interpret the constitution.

The doctrine of judicial review was for the first time propounded by the Supreme Court of America. Originally, the United States Constitution did not contain an express provision for judicial review. Even though there was no express power of judicial review, it was propounded as a judicial dictum by Chief Justice Marshall in *Marbury v. Madison*[3] in the following words:-

> *"Certainly all those who had framed the written Constitutions contemplate them as forming the fundamental and paramount law of the nations, and consequently the theory of every such Government must be that an act of the legislature, repugnant to the Constitution, is void."*

The Constitution of India, unlike the U. S. Constitution, expressly provides for judicial review in Article 13(1) by declaring all laws in force, immediately before the commencement of the Constitution to be void, to the extent of their inconsistency with the provisions of Part III of the constitution dealing with fundamental rights and Article 13(2) by declaring that the state shall not make any law which takes away or abridges the fundamental rights and that any law to that extent shall be void. The definitions of "State", "law" and "laws in force" are wide enough to convert not only the legislative but also executive action.

"Law" however, would not include an amendment to the Constitution as is made clear by Article 13(4). Parliament can therefore, amend the Constitution of India including the fundamental rights, so long as the basic structure is not affected, as

[1] *Keshavananda Bharati v. State of Kerala,* AIR 1973 SC 1461; (1973) 4 SCC 225
[2] *Ibid.*
[3] (1803)1 Cranch 137, 2 L. Ed. 60

laid down in *Keshavananda Bharati v. State of Kerala*[4]. It has also been held in this case that Judicial Review is the "basic feature" of the Indian constitution and, therefore, it cannot be damaged or destroyed by amending the Constitution under Article 368 of the constitution.

In Part XI of the constitution, there is a clear distribution of the legislative powers between the Union and the State. A combined reading of Articles 245 and 246 would empower exclusively the Parliament to make laws with respect to matters enumerated in the Union list (List 1 in Schedule VII); and the legislature of and State to make laws for such State with respect to matters enumerated in the State list (List II). Parliament and State Legislatures have both the power to enact laws, subject to territorial restriction, with respect to matters enumerated in the Concurrent list (List III). This provision is subject to Article 162 relating to the executive power of the States provide that the executive power shall extend to matters with respect to which Parliament and the State legislatures have, respectively, power to make laws. Thus the provisions of Part XI and Articles 76 and 162 together define the limits of legislative and executive power in terms of competency which shall come in the orbit of judicial review.

The judiciary in India is made up of the Supreme Court of India, the High court's in the States and the subordinate judiciary consisting of District and Sessions Judges, Courts of the subordinate judge, magistrates and massifs etc, but the power of judicial review lies only with the Supreme Court of India and the High Courts of the States.

3.2 Doctrine of Separation of Powers: An Essence of Democracy

The doctrine of separation of powers contemplates the idea that the governmental functions must be based on a tripartite division of legislature, executive and judiciary. The three organs should be separate, distinct and sovereign in its own sphere so that one does not trespass the territory of the other. Aristotle who first perceived and saw that there is a specialization of function in each Constitution developed this doctrine. Later other theorists like Montesquieu, John Locke and James Harrington described these functions as legislative, executive and judicial. All the theories that were forwarded by these political thinkers in relation to the

[4]*Supra* n.1.

doctrine of separation of powers were on a basic presumption that the liberties of the people should be protected from the tyrannical and despotic rulers when all the powers are vested and exercised by the very same persons.

The value of the doctrine lies in the fact that it seeks to preserve the human liberty by avoiding the concentration of powers in one person or body of persons. It also emphasizes that the persons entrusted with power in any one of the three branches – executive, legislative and judiciary shall not be permitted to encroach upon the powers confided to the others.

The framers of the U.S. Constitution have strictly adhered to this doctrine of separation of powers. But, in actual practice it has been seen that this rigidity in the form of watertight compartments is not possible. Therefore, functionally the constitutional provisions are premised on the principle of checks and balances. In *William Marbury v. James Madison*[5], the U.S Supreme Court offered a new dimension to the doctrine of Separation of Powers.

The framers of the Indian Constitution did not recognize the doctrine of separation of powers in a rigid sense. Unlike the American Constitution, this doctrine has not been strictly applied in the Indian Constitution. It cannot be explicitly seen but can be witnessed through the differentiation made in the discharge of functions by the different branches of the government in the Constitution. This doctrine is not completely alien to our Constitution. As we retrospect, relevant classic jurisprudence like *Ram Jawaya v. State of Punjab*[6]clearly elucidates this principle. Chief Justice Mukherjea in the instant case said:

> "*It can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way*".[7]

[5]*Supra* n.3.
[6] AIR 1955 SC 549
[7]*Ibid.*

Thus, it can be inferred from the above that these organs of the government are allowed to exercise their functions but within certain limits. These limits are silver lined constitutionally and the same also guarantees limitable encroachments.

The doctrine of strict separation of powers has been considerably modified in the recent years. The theory could not prevent the vesting of rule-making powers in the courts. In *United States v. Nixon*,[8] the doctrine of separation of powers was invoked to deny judicial control over the President in the assertion of executive privilege to refuse certain tapes and records sought for the purpose of criminal trial. The claim of total immunity failed. The court unanimously denied the President's right to make a final, unreviewable claim of executive privilege. It said, "Neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can an absolute, unqualified presidential privilege of immunity sustain from judicial process under all circumstances".[9]

In Great Britain, which formed the model for Montesquieu theory of the separation of powers, the principles has never been accorded a constitutional status, nor has it ever been theoretically enshrined. The executive is formed by the majority party in the House of Commons, which thus both controls the government and is, in turn, under its direction.

The doctrine of separation of powers is an inseparable part of the evolution of democracy. Democracy dictates a system in which every citizen can, without fear of retribution, breathe, express himself, and pursue his or her interests. It enables him to live a life of his choice to the extent he does not encroach upon the rights of the other people. It is in this context that it can be presupposed that a system of balances and counter balances exists among the three organs of the government to ensure a strong nurtured democratic system. The Legislature, the Judiciary and the Executive are the pillars of democracy. No democracy indeed contemplates conferment of absolute power in any single authority. As in the words of Lord Acton: ***"****Power corrupts and absolute power tends to corrupt absolutely****"****.*

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418 U.S. 683 (1974)

[9]*Ibid.*

Therefore the system of checks and balances is one of the most salient features of our constitutional scheme. The three organs can practically not be segregated into three watertight compartments due to their interdependence on each other to ensure efficacious governance. They have to work in accordance and in consonance to achieve a meaningful sustenance and purposeful progress of citizens. Though, minimum encroachment is always desirable.

3.2.1 Doctrine of Separation of Powers Work as a System of Checks and Balances in India

In India, the doctrine of separation of powers in its absolute rigidity is not inferable from the provisions of the Constitution. The Indian Constitution has, in fact, made no such provision as to the separation of functions among the three organs of the state. It merely states that the executive power of the union shall be vested in the President. But the constitution also contains a provision for a council of Ministers with the Prime Minister at the head to aid and advise the President and the President is bound to accept the advice of the Council of Ministers.[10] A proviso to clause (1) of Article 74 added by the Constitution (44th Amendment) Act, 1978, may be extracted thus: "The President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration." Under this proviso the President has, no doubt, the power to require the Council of Ministers to reconsider the advice tendered to him, but if the same is binding on him. Under Article 75(1) though the president is authorized to appoint the Prime Minister, it does not follow that he can select a Prime Minister of his own choice. His choice is confined to the leader of the party-in-majority in the House of the People. Other ministers are to be appointed by him on the advice of the Prime Minister. Though the ministers hold office during the pleasure of the President,[11] the Prime Minister virtually holds office till he commands the confidence of the House, as other ministers hold office till they enjoy the confidence of the Prime Minister.

Article 74 (1) of Constitution of India.

[11]Article 75 (2) of Constitution of India.

Though the Indian Constitution allocates executive powers to the President and Governors under Article 53 (1) and Article 154 (1) of the Constitution of India, they are also empowered with certain legislative powers under Articles 123, 213 and 356 and certain judicial powers under Articles 103 and 192. Similarly the legislature exercises certain judicial functions under Articles 105 and 194 and judiciary exercises few legislative and executive functions under Articles 145, 146, 227 and 229. However the judiciary is made separate from the executive in the public services of the State under Article 50 of the Constitution.

The doctrine of separation of powers, so far as Indian Constitution is concerned, reveals an artistic blending and an adroit admixture of judicial and executive functions. [12] Separation sought to be achieved by our Constitution is not absolutely or completely separate. The only vitality of the doctrine of separation of powers is that one organ of the state should not assume the essential functions of the other. Hinting on the nature of separation of powers brought about by our Constitution, the Supreme Court in *Ram Jawaya Kapur v. State of Punjab*[13] observed: "The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity, but the functions of the different part or branches of government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another," To the same extent if the observation of justice Das in *Ram Krishna Dalmia v.Justice Tendokar,*[14] when he opined: the Constitution does not express existence of separation of powers and it is true that division of powers of the government into legislative, executive and judiciary is implicit in the Constitution but the doctrine does not form an essential basis or foundation-stone of the constitution frame-work as it does in the United States of America. The American doctrine of well-defined separation of legislative and judicial power has no application in India.[15]

[12] *Kesavananda Bharati v. State of kerala,* Supra n.1.
[13] *Supra n.6.*
AIR 1955 SC 549 at p. 556
[15] *Jayanti lal v.S.M. Ram,* AIR 1964 SC 649*; Chandra Mohan v. State of U.P.* AIR 1966 SC 1987

Re-stressing the same view the Supreme Court of India, in *Indira Nehru Gandhi v. Raj Narain*[16] Further remarked that the Indian Constitution, like the American or Australian Constitution, does not recognize the doctrine of separation of powers. It is in a broad sense only. Expressing his views Ray C. J. observed that the doctrine of separation of powers will not apply while Parliament exercised the constituent power through the Constitution to the various departments or heads. In the hands of constituent authority there is no demarcation or separation of powers. Hence, according to him, the constituent power is independent of the doctrine of separation of powers.

The doctrine of separation of powers in its classical sense is not applicable to any modern government. It does not mean that it has no relevance in the world of today. The logic behind the doctrine is still valid. The rationale underlying the doctrine has been that if all power is concentrated in one and the same organ, there would arise the danger that it any enact tyrannical laws, execute them in a despotic manner and interpret them in an arbitrary fashion without nay external control. Speaking about the relevance of the doctrine Chandrachud J. in *Indira Nehru Gandhi v. Raj Narain*[17] also observed that the political usefulness of the principle of separation of powers is clearly recognized today. No constitution can survive without a conscious adherence to its checks and balances.

3.2.2 Power of Judicial Review and Doctrine of Separation of Power in India

Separation of power is the essential feature of the Democratic Republic established under our Constitution by division of powers between the three important wings of the State, i.e., the Parliament and State Legislatures, the Executive and the Judiciary. However there is absence of specific provisions in the Constitution exclusively vesting legislative powers in the legislature and judicial powers in the judiciary was noticed in *Delhi Laws case*[18] in 1951, but the essence of doctrine of separation of powers and of constitutional limitation was accepted as a feature of basic structure of the Constitution in *Indira Gandhi v. Raj Narain*[19]. Judicial review and activism functions of the judiciary is an

[16] AIR 1975 SC 1590
[17] *Id.*
1951 SCR 747
[19] *Supra* n.16.

important element of our system of justice to keep a check on the legislature who are the law makers of the land, so that they do not exceed their powers and work within the allowances that the constitution has made for them. The separation of the judiciary from the other organs though is taken very seriously so that the commonman's liberty can in no circumstances be compromised and a fair remedy is available to any individual citizen of the state. Thus the Indian Constitution, which is an extremely carefully planned document designed to uphold the integrity and liberty of every citizen, has not in its entirety embraced the doctrine of separation of powers but has indeed drawn a lot from the concept and kept it as a guiding principle.

The framers of our Constitution drafted it so meticulously that it provides for an independent and impartial Judiciary as the interpreter of the Constitution and as custodian of the rights of the citizens through the process of judicial review. This mandates the judiciary to interpret the laws but not to make them. The scope of judicial review does not extend beyond enquiring whether an impugned legislation or an executive action falls within the competence of the Legislature or of the executive authority or is consistent with the Fundamental Rights guaranteed by the Constitution or with its other mandatory provisions.

In achieving the object independence of judiciary, the Indian Constitution has particularly relied on the American Constitution while rejecting the British pattern of conventions. In England, in spite of the independence of judiciary even the highest judiciary does not have the power to strike down a law enacted by the Parliament. In contradiction to this, the Constitution of India confers absolute powers on the High Court and the Supreme Court to strike down not only legislations brought about by the legislatures but also Acts passed by the Parliament and the peak of the judicial power reached when in *Kesavananda Bharati case*[20], the court held that the amending power enshrined in Article 368 of the Constitution could not be amended so as to affect the basic structure of the Constitution. It is doubtless true that independence of judiciary is a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the constitution.

[20] *Supra* n.1.

The three organs have to exercise their functions keeping in mind certain constitutionally assigned encroachments. However according to Chief Justice Subba Rao in *Golak Nath v. State of Punjab*[21]"It [the Constitution] demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them. …..No authority created under the Constitution is supreme; the Constitution is supreme and all the land".

The Honorable Supreme Court has itself construed that the concept of Separation of powers is a "basic feature" of the Constitution. So if one encroaches the territory of the other it would be a clear violation of the basic structure of the Constitution and judiciary is not an exception to the same.

It is interesting to note that the Supreme Court has itself in *Kesavananda Bharati's case*[22] held that separation of powers is part of the basic structure of the Constitution of India. This has been reiterated in many subsequent decisions of the Supreme Court including by a Bench of five judges in *Indira Gandhi v. Raj Narain*[23], where the Supreme Court while reiterating the principle of separation of powers has clearly held that neither of the three organs of the State, namely the Legislature, the Executive and the judiciary can take over the functions assigned to the other. Despite its own decisions in this regard, the charge is, as in the United States, that the Supreme Court of India has transgressed the limits of its constitutional power.

The perceived corruption of the political wing of the State as well as the apathy and indifference to the deprivation of basic rights of the people, has compelled judicial intervention in areas where otherwise the courts may not seek to step in.

The Supreme Court of India itself has declared that broad separation of powers exists under the Constitution. But obviously the concept has been treated by the court as flexible, for its vast powers to be exercised wherever and whenever public interest demands. One should remember that it is the members of the Bar who initiate public interest litigation after having investigated the facts thoroughly and by structuring the petition so that it falls within the permissible

[21]AIR 1967 SC1643
[22]*Supra* n.1.
[23]*Supra* n.16.

parameters of judicial intervention, while, judges exercise statesmanship in deciding when and to what extent they should utilize the jurisdiction conferred on the court by the Constitution in the larger public interest. Exercise of power by the Supreme Court notwithstanding the separation of powers between the three great departments of State is necessary and should continue as long as the other two wings of State do not discharge to the full, their constitutional obligations and duties.

3.3 Parliamentary Sovereignty vs. Limited Sovereignty

The concept of Parliamentary Sovereignty broadly means that Parliament has the right to make or unmake any law, and no person is allowed to override or set aside the law of Parliament. Acts of Parliament override the law of the judges[24]. These ideas were set forth by A.V. Dicey. It has been said[25] that Dicey's concept lacks support from precedents, and is inherently fallacious because the nature of 'sovereign' power is contrary to the idea of the Parliament. A problem arises because Parliamentary Sovereignty entails the Parliament's ability to make or unmake whatever law without restriction. This necessarily entails that Parliament is not bound by the Rule of Law, and it can exercise power arbitrarily. Parliament can both override judicial interpretation, and even provide that an act is not subject to judicial interpretation.

In the United Kingdom, the parliament is supreme and the supreme judiciarystill forms a part of the legislature. However, the judges there have liberty togive decisions without fear or favour on matters coming to them. Not only dueto the constraints of a federal structure, the fathers of the American constitutionalso had a very strong faith in the judiciary hence, an independent judiciary was established in that country. They were convinced that if any fetters are placed on the independence of judiciary, the rights and liberties of people might been dangered. If experience is any guide, the Supreme Court has invariably shown a high degree of independence in awarding judgements, many of them going against the government tthe powers of colonial and early American courts

[24]A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, 10th ed., 1959, pp. 39-40.

Geoffrey de Q Walker, "*Dicey's Dubious Dogma of Parliamentary Sovereignty*" (1985) 59 Australian Law Journal , pp. 276-284.

followed the pattern set in Britain. Theories of parliamentary/legislative sovereignty ensured that courts remained incapable of limiting the power of the sovereign. Within a modern legal system, enacted laws remain in force until they are repealed or amended, unless they are declared when enacted to have a limited life. It is inherent in the nature of a legislature that it should be free to make new laws. The rise of popular sovereignty, however, brought a new function for the courts; the power of judicial review. Over time, judicial review metamorphosed into the judicial supremacy enjoyed by the United States Supreme Court and its state court counterparts. This tradition has been diffused gradually in many of the political systems in the world.

Albert Venn Dicey commented briefly with identifying the approach to statutory interpretation which he argued was the corollary of the doctrine of the sovereignty of parliament. Calling the legal doctrine of the sovereignty of parliament the "dominant characteristic" of British political institutions, heargued that Parliament—Queen, Lords, and Commons "acting together" had the right to "make or unmake any law whatever", and "no person or body isrecognized by the law of England as having a right to override or set aside the legislation of Parliament."[26]

The idea of the sovereignty of Parliament was long seen as the core of democratic practice. The superior position of the popularly elected legislature and its corollary of majority rule have been central principles for democratic revolutionarise since the notion was appended to the unwritten English constitution.[27]At that time, the threat to liberty was monarchical power, and the subjugation of monarchical power to popular control was the primary goal. The resulting doctrine was that Parliament had "the right to make or unmake any law whatever; and further, that no person or body is recognized by the lawo f England as having a right to override or set aside the legislation of Parliament."[28]

In the continental tradition, the intellectual underpinning of parliamentary sovereignty was provided by the Rousseauian concept of the general will. The

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[26]A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., Macmillan and Co. Ltd., London, 1959, pp. 39-40.
[27]Jack Rakove, "*The Origins of Judicial Review: A Plea for New Contexts*", Stanford Law Review, Vol. 49, 1997, p.1031-1052.
[28]Albert V. Dicey, *The Law of the Constitution*, 8th ed., Macmillan and Co. Ltd., London, 1915, pp. 3-4.

people were supreme, and their general will as expressed through there publican representatives could not be challenged. This theory combined with the regressive position of the judicial parlements in the French Revolution, ledto a long tradition of distrust of judges in France.[29]

It was natural that the early proponents of democracy supported parliamentary sovereignty. They saw threats to liberty from the traditional sources: the ancient regime, the monarchy, and the church. Once these formidable obstacles to popular power had been overcome, theorists could hardly justify limitations on the people's will, the sole legitimate source of power. As democratic practice spread, however, new threats emerged. In particular, Europe's experience under democratically elected fascist regimes in World War II led many new democracies to recognize a new, internal threat tote demos. No political institution, even a democratically legitimate one, ought to be able to suppress basic liberties.

Post-war constitutional drafting efforts focused on two concerns: first, the enunciation of basic rights to delimit a zone of autonomy for individuals, which the state should not be allowed to abridge; and second, the establishment of special constitutional courts to safeguard and protect these rights. These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be counter majoritarian, able to protect the substantive values of democracy from procedurally legitimate elected bodies.

Although the post-war constitutional drafting choices in Europe dealt parliamentary sovereignty a blow, the idea retained force in terms of political practice. More often than not, the idea was used by democraticregimes. Marxist theory was naturally compatible with parliamentary sovereignty and incompatible with notions of constitutional, limited government. Similarly, new nations in Africa and Asia reacting to colonialism often dressed their regimes in the clothes of popular sovereignty, though oligarchy or autocracy was more often the result.

Today, in the wake of a global "wave" of democratization, parliamentary sovereignty is a waning idea, battered by the legacy of its affiliation with

[29]Mauro Cappelletti, *Judicial Review in the Contemporary World*, Princeton University Press, London, 1996, pp.33–34.

liberalism. Judicial review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be an anathema. From France to South Africa to Israel, parliamentary sovereignty has faded away. We are in the midst of a "global expansion of judicial power," and the most visible and important power of judges is that of judicial review[30].

Even in Britain, the homeland of parliamentary sovereignty and the birth place of constitutional government, there have been significant incursions into parliamentary rule. There have been two chief mechanisms, one international land the other domestic. The first mechanism is the integration of Britain into the Council of Europe and the European Union (EU), which has meant that supranational law courts are now regularly reviewing British legislation for compatibility with international obligations. The domestic subordination of legislation of the British Parliament to European law was established when the House of Lords misapplied a parliamentary statute in response to the European Court of Justice's (ECJ) *Factortame* decision of 1991[31].More recently, the incorporation of the European Convention of Human Rights into United Kingdom domestic law by the Human Rights Act 1998 has led to greater.

India is a democracy which has adopted the Westminster system or the cabinet system of parliamentary democracy. But, unlike England, the Parliament or the Legislatures are not supreme. On the other hand, the Indian Constitution is a quasi-federal one and there is a broad distribution of powers between the three great organs of State, the Legislature, the Executive, and the Judiciary.

Limited sovereignty is the predominant feature of the modern world. Unlimited sovereignty leads to despotism. It also generates tyranny; Quest for limitation of sovereignty is the essential pursuit of the Constitutional jurists. The limitation of sovereignty is the main objective of rational man, and it is necessary to search for the principles of constitutional limitation[32]. The modern democratic constitution engrafts the fundamental aspects of limited sovereignty. The constitutional is a charter of defined and limited powers.

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[30]Neal Tate & Thorsten Vallinder, *The Global Expansion of Judicial Power*, New York University Press, NY, 1995, p. 57.

Josef Drexl, *British Supremacy of Parliament after Factortame*, Cambridge University Press, London, 1999. p. 164.

R. H. S. Crossman, *Government and Governed*, P 71, Chatto & Windus, London, 1964.

In England, the Magna Carta of 1215 A.D. gave for the first time the idea of limited government. It established that the King's power can be exercised only according to the established custom and law. Chief Justice Coke in 1610 in *Bonham's case*[33] urged that the law against common right and reason is void. The petition of Rights of 1628 and the Bill of Rights of 1689 effectively recognized the doctrine of Limitation of Powers. John Locke, who flourished in the 17th Century (1632-1704), preached the doctrine of limitation of the legislative and executive powers. He said, "though the legislative whether placed in one or more, whether it be always in being or only by intervals, though it be the Supreme power in every common-wealth; yet, first, it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people… Their power in the utmost bounds of it is limited to the public good of the society.[34] Locke also pleaded that…. "The end of law is not to abolish or restrain, but to preserve and enlarge freedom… where there is no law there is no freedom".[35] Locke's thinking and philosophy dominated the constitutional thoughts of England and America in the century but in England the influence of Locke's concept of limitation of powers remained confined to executive actions alone, whereas in the United States of America the doctrine of Limitation of Power dominated the legislative field. The Bill of Rights of the American Constitution in the shape of the first ten amendments and Fourteenth Amendment of 1868, regarding the 'Due Process' and the 'Equal Protection' Clauses are the instances of the evolution of the concept of limitation of powers which owe much of their credit to the constitutional concept of Locke.

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 materialising the aim of the Constitution by establishing a harmonious and cohesive society based on ideal common

(1610) 8 Co. Rep. 113b at 118a

John Locke, *Two Treatises of the Civil Government*, Chap. XI of the Extent of Legislative Power, From the Great legal Philosophers, edited by Clarence Morris, University of Pennsylvania Press, Philadelphia,1963, PP 153-154.

Locke,*Two Treatises of Civil Government*, Quoted by Alan Barth in his Book 'Heritage of Liberty, McGraw Hill Book Company, New York, 1965,p.54.

morality. In this way the Court is a real participant in the living stream of national life.

3.3.1Concept of Popular Sovereignty: Basis of Judicial Review of Legislative Acts in India

The original concept of sovereignty was of a unitary State. The people of ancient India had also the same concept. Even the great European legal philosophers, such as Plato (427-347 B.C.) and Aristole (384-322), had the same idea .Bodin (1530-1596) ,who was considered to be an enlightened and independent thinker in the age of intellectual sterility[36], Hobbes (1588-1679) and Austin, also dealt with the concept of sovereignty. But their ideas were crude. In their views, sovereignty contained three characteristic: (i) Sovereignty is essential with a State; (ii) Sovereignty is indivisible, and (iii) Sovereignty is unlimited. They had a unitary State in their mind, and their concept of sovereignty was developed in the context of a unitary State. Regarding the location of sovereignty, they were not clear. The modern concept of federation was unknown. Jethrow Brown, who was the interpreter of Austin, said that the State is a Corporation. Thus, for the first time, he introduced the concept of federalism.

Federalism took root in America in a more practical and workable form. Federalism is not the offspring of political science, but it is mostly the product of growing economic and social diversities. The original concept of federalism was to provide peace and security to the people; its modern concept is to secure economic, social and cultural ameliorations. As a Williams S. Livingston remarks: "The essential nature of federalism is to be sought for not in the shadings of legal and constitutional terminology, but in the forces economic, social political, cultural that have made the outward forms of federalism necessary[37].

American federalism was the result of the direct economic and social forces which brought all the sovereign states into one-co-operative tie. Another cause of the evolution of American federalism was the integration of the independent sovereign states into a strong texture of political unity. As Morris R. Cohen

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Chester C. Maxey, *Political Philosophies*, The Macmillan Company, New York, 1948,p.162.

William, S. Livingston, *Federalism and Constitutional Changes*, Clarendon Press, Oxford, 1956,p.1.

remarks – "Vigorous forces contended for a strong Central Government, equally powerful groups insisted upon decentralized sovereignty. The solution was reconciliation of these sovereignties into federalism[38]. In Judicial review the Supreme Court of America has always tried to amplify the federal power keeping in view the reconciliation of sovereignties.

In India also, political forces combined with social and economic urges, led to the creation of a federal state in 1934, which took more practical and effective shape under the Constitution of India of 1950.

As about the evolution of the location of Sovereignty, the Parliamentary sovereignty is a subsequent evolution. The original concept is of popular sovereignty. Even the king of the monarch was to obey the wishes of the people. The modern thinkers have dealt with the nature as well as the location of sovereignty, which are the foundations of judicial review.

The English doctrine of Parliamentary supremacy was superseded in America by the doctrine of popular sovereignty. In America the doctrine of popular sovereignty had its foundation in the Declaration of Independence of 1776 and it culminated in the Preamble of the constitution on which the doctrine of popular sovereignty was adopted. The American judges and jurists observes- "The sovereignty of a State does not reside in the persons who fill the different departments of government, but in the people from whom the government remunerates, and who may change it at their discretion. Sovereignty then in the country abides with the constituency and not with the agent.[39]" Willis points out – "Who then, in the United States is sovereign? It is the people. The people not as Rousseau suggested without determinate forms for the exercise of sovereignty; not as citizens of the United States, nor as Citizens of the various States, but the whole people as organized in government in express and adjust their will, either directly or through representatives.[40]

In the Indian Constitution also the concept of popular sovereignty has been adopted India started constitutional agitation to gain popular sovereignty and

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Morris R. Cohen, *American Thought*, Edited with a Foreword by Felix S. Cohen, The Free Press, Glenco, Illinois, 1954,p.125.

Spooner v. McConell (C. C. Ohio 1838) 337 at 347

Hugh Evander Willis, *Constitutional Law of the United States*, The Principle Press, Bloomingdom, Inc., 1936, p.52.

ultimately it succeeded. Pandit Jawhar Lal Nehru while moving the Objective Resolution in the Constituent Assembly on December 13, 1946 said, "all power and authority of the sovereign independent India, its constituent part and organs of Government are derived from the people.[41] Justice Beg of the Allahabad High court has expounded the concept of popular sovereignty with reference to the Preamble of the Indian Constitution. "The idea of sovereignty involves freedom from all foreign control or domination. The idea of democracy involves freedom from all internal control or domination. Both the ideas combined together reassert the sovereignty and Paramount of the people's will over everything".[42] Justice William O'Douglas of the Supreme Court of America on comparing the Constitutional concepts of India and the United States of America says "India and the United States both recognize that the people are the basis of all sovereignty."[43]

The legislature holds exclusive power of legislation and excess in delegation of legislative powers to the executive becomes a matter of judicial review.

Judicial review with reference to the concept of sovereignty has various phases of evolution. Before the introduction of federalism in America, judicial review was confined to arbitrary and unjust legislation as propounded by Chief Justice Coke in England. In the colonial period, the legislation was challenged in the colonial courts as well as in the Privy Council in appeal on the ground that the impugned legislations were against the sentiment and wishes of the people. When Marshall established the system of judicial review, his concept of judicial review was founded on the doctrine of constitutional supremacy and protection and amplification of the federal powers. Thus introduction of federal element in judicial review is a later evolution as federalism itself was a subsequent invention. In the case of federal sovereignty, the question of Union-State relation regarding the distribution of powers becomes a predominant feature which necessitates judicial intervention.

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[41]Jawahar Lal Nehru's Speeches, Vol. 1 (1946-1949), The Publications Division, Government of India, Delhi, 1958, p.6.

[42]*Ramanandan v. State*, AIR 1959 All 101 at P 188, Para 65.

William O Douglas, From Marshall to Mukherjea, The Tagore Law Lectures delivered in July 1955, Eastern Law house Ltd., Calcutta, 1956, p.6.

For the purpose of judicial review of legislative Acts it is necessary to ascertain the location and nature of Sovereignty in a particular constituting. Judicial review is permissible only where the State entertains the Concept of popular Sovereignty and also where the nature of Sovereignty is federal. Where popular Sovereignty prevails, even in the absence of federalism, judicial review is a natural event for determination of the violation of the fundamental rights guaranteed in the constitution and of other constitutional restrictions imposed on the legislature.

In federal Sovereignty, there is distribution of legislative powers between the Union and the State legislature, and encroachment of the legislative power by either is a constitutional conflict to be decided by the court. Judicial review is the proper institution to effectuate the constitutional arrangement regarding location and nature of Sovereignty and the concept of Sovereignty has practice significance.

The Constitution has its foundations on ethical considerations, high public morality and social, economic and political urges. The Constitution prescribes rights, duties and functions of the different governmental organs and limits their powers; and each organ of the government, apart from constitutional compulsion, has moral obligation to obey the limitations and restrictions assigned in the Constitution. A good and virtuous Constitution having moral foundations protects individual freedom and liberty, creates a balance between the individual interest and the social needs and produces good legislations, good rulers and good citizens.

In a modern democracy the court is the essential organ to maintain the fundamental objects of the Constitution. The court keeps the legislators and other governmental authorities within bounds and limits of powers prescribed in the Constitution and thus it helps the citizens in the vindication of justice and restoration of their violated rights guaranteed in the Constitution.

The most predominating condition of judicial review is the concept of popular sovereignty and constitutional supremacy. Where parliamentary sovereignty prevails, as in England, there is no scope of judicial review. The Basic English Constitutional concept is that the people are the source of all powers, and they seized all essential constitutional powers from the monarch and reposed them in

Parliament. At the time of law-making the whole people of England are supposed in be present in Parliament and as such each parliamentary enactment is necessary the verdict of the whole people which can be changed and repealed only by the verdict of the whole people which can be changed and repealed only by the verdict of the whole people by another Parliamentary enactment. But in India, as in America, the concept of popular sovereignty prevails which means that the legislature is the mere agent of the sovereignty prevails which means that the legislative is the mere agent of the sovereign people and as such any enactment by the agent of the people is liable to be scrutinized in the court of law to ascertain if the impugned legislative enactment is against the mandate of the people incorporated in the Constitution. The popular sovereignty and the constitutional supremacy are the fundamental features of the American democracy and India has adopted the same system in its republican Constitution of 1950. As such judicial review is the dominant feature of the Indian Constitutional system also.

Judicial review is the process applied by the court to determine the constitutionality of legislative Act, ordinance or custom having the force of law if enacted or having come into existence against the constitutional directions, intentions, prohibitions and limitations. The court has right to declare such law, ordinance or custom void and to refuse its enforcement. The legislature has to work under constitutional limitations. The legislature may not be able to decipher its own lapses free from bias and as such it is the constitutional policy that the court being an independent and impartial body is the best legal authority to scrutinize the validity of any legislative Act.

With regard to the violation of fundamental rights guaranteed in the Constitutional of India a citizen has right to go directly to the Supreme Court under Art. 32, but in case of a violation of the constitutional directions and prohibitions regarding distribution of powers, of delegation of essential legislative powers to the executive or of constitutional violations of some other kind there is a conspicuous absence of a provision in the Constitution of India to go directly to the Supreme Court. The constitutional amendment to remedy this defect appears to be expedient and necessary. There should be some provision in

the Constitution to enable a citizen to go direct to the Supreme Court in these matters also.

The chapter of Fundamental Rights has to be reorganized and re-written by bringing into light certain other fundamental rights which could not be assimilated and visualized when the Construction was being enacted. But so long as it is not done, the judiciary in interpreting the Chapter of Fundamental Rights has to take into consideration that part III is not exhaustive and there are constitutional silences also in regard to such rights. It would be open to the Judiciary to ascertain and determine if there are any other fundamental rights which, though, have not been explicitly guaranteed yet by implication they would be deemed to have been so.

3.3.2 Contradiction between Parliamentary Sovereignty and Judicial Review in India

The contradiction between the principles of parliamentary sovereignty and judicial review that is embedded in India's constitution has been a source of major controversy over the years. After the courts overturned state laws redistributing land from zamindare states on the grounds that the laws violated the zamindars′ Fundamental Rights, Parliament passed the first (1951), fourth(1955), and seventeenth amendments (1964) to protect its authority to implement land redistribution. The Supreme Court countered these amendments in 1967 when it ruled in the *Golakhnath v. State of Punjab*[44]case that Parliament did not have the power to abrogate the Fundamental Rights, including the provisions on private property. On February 1, 1970, the Supreme Court invalidated the government-sponsored Bank Nationalization Bill that hadbeen passed by Parliament in August 1969. The Supreme Court also rejected asun constitutional a presidential order of September 7, 1970, that abolished the titles, privileges, and privy purses of the former rulers of India's old princely states[45].

In reaction to Supreme Court decisions, in 1971, Parliament passed the Twenty-fourth Amendment empowering it to amend any provision of the constitution, including the Fundamental Rights; the twenty-fifth Amendment, making legislative decisions concerning proper land compensation nonjustifiable, and the

Supra n.21.

[45]Prakash Talwar, *Human Rights*, Isha Books, Delhi, 2006, p.107.

twenty-sixth Amendment, which added a constitutional article abolishing princely privileges and privy purses. On April 24, 1973, theSupreme Court responded to the parliamentary offensive by ruling in the *Kesavananda Bharati v. State of Kerala*[46]case that, although these amendments were constitutional, the court still reserved for itself the discretion not reject any constitutional amendments passed by Parliament by declaring that the amendments cannot change the constitution's "basic structure."[47]

During the 1975-77 Emergency, Parliament passed the forty-second Amendment in January 1977, which essentially abrogated the Keshavananda ruling by preventing the Supreme Court from reviewing any constitutional amendment with the exception of procedural issues concerning ratification. Thef orty-second Amendment's fifty-nine clauses stripped the Supreme Court ofmany of its powers and moved the political system toward parliamentary sovereignty. However, the forty-third and forty-fourth amendments, passed by the Janta government after the defeat of Indira Gandhi in March 1977, reversed these changes. In the *Minerva Mills case*[48]of 1980, the Supreme Court reaffirmed its authority to protect the basic structure of the constitution. However, in the Judges Transfer case on December 31, 1981, the Supreme Court upheld the government's authority to dismiss temporary judges and transfer high court justices without the consent of the chief justice[49].

In 1991 the first-ever impeachment motion against a Supreme Court judge was signed by 108 members of Parliament. A year later, a high-profile inquiry found Associate Justice V. Ramaswamy "guilty of wilful and gross misuses of office and moral turpitude by using public funds for private purposes andreckless disregard of statutory rules" while serving as chief justice of Punjab and Haryana High Court. Despite this strong indictment, Ramaswamy survived parliamentary impeachment proceedings and remained on the Supreme Court after only 196 members of Parliament, less than the required two-thirds majority, voted for his ouster.

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[46]*Supra* n.1.
[47]*Id.*
[48]AIR 1980 SC 1789
[49]Showick Thorpe & Edgar Thorpe, *The Pearson General Studies Manual 2009*, Dorling Kindersley (India) Pvt. Ltd., Delhi, 2009 , p. 355.

Moreover, Parliament and the Supreme Court of India are poised for aconfrontation over the issue of expulsion of 11 members of parliament (MPs)involved in cash-for-question scam[50].The legal-constitutional question pertainsto the exclusive jurisdiction of Parliament over its authority to define itsprivileges and manner to protect and maintain it. The phenomenon of thelegislature versus the judiciary is not new to Indian democracy. Indira Gandhimade a series of attempts through 24th, 25th and 42nd constitutionalamendments to establish supremacy of parliament over the judiciary. She eventried to demoralise the highest judiciary by appointing a junior judge as thechief justice superseding senior judges. The matter could be settled with theenunciation of the 'basic feature doctrine' in the *Kesavananda Bharati case*[51]of 1973. The kernel of this judgement is that the Indian constitution has certainbasic features, which hold a transcendental position and which cannot bealtered by either Parliament or Supreme Court[52].This judgement was able toestablish supremacy of the constitution but only with respect to its 'basicfeatures.'

The other vibrant and dynamic democracies of the world have also gonethrough the process of confrontation between the legislature and the judiciary. However, they have settled it in the process of constitutional development.

Britain, a classic case of a parliamentary system, easily established legislativesupremacy. Parliament is not only supreme vis-à-vis other organs ofgovernment but it is supreme vis-à-vis constitution as well. In the Britishmodel, the legislative supremacy is also established by the fact that theconstitution isunwritten and the one chamber of the legislature, House ofLords, acts as the highest judiciary of the land. The federal constitution of theUnited States is organised on the principle of supremacy of the constitution. Supreme Court in India, therefore, enjoys absolute and extensive power of judicial review. No law of the land is beyond judicial scrutiny[53].

Ibid.

Supra n.1.

[52]"Stung: 11 MPs Take Cash to Ask Questions in Parliament", *The Timesof India*, New Delhi, 12 December 2005

[53]Ashok Desai, "*Interventions*", in Pran Chopra, *The Supreme Court versus the Constitution: A Challenge to Federalism,* Sage Publication Pvt. Ltd., New Delhi, 2006, p. 218.

3.3.3 Constitutional Supremacy Prevails Over Parliamentary Supremacy in India

The framers of the Constitution of 1950 were very much conscious of the doctrine of constitutional limitations and its creative influences and impact on the constitutional working. In Part III of the constitution, fundamental rights have been guaranteed to the citizens of India. In the domain of the division of power also, the Union and the State legislatures have to operate and function under the limitations and restrictions imposed by the Constitution. Any violation of these limitations and restrictions in framing the laws by the legislative department of the government render such laws unconstitutional and void. The doctrine of judicial review owes its origin to the doctrine of the limitation of constitutional powers. Limitation on powers is the fundamental virtue of democracy and the majority rule.

Indian constitution is typical because of the adoption of parliamentary and federal features simultaneously. Parliamentary form of government hints at legislative supremacy. But the federal nature of the constitution makes it imperative that the highest judiciary is able to exercise the power of judicial review. The roots of the present problem also lie in the design of the Indian constitution.

On December 12, 2005, eleven MPs, ten from the Lok Sabha and one from the Rajya Sabha belonging to mainstream political parties (six from the Bharatiya Janata Party (BJP), three from the Bahujan Samaj Party (BSP), and one eachfrom the Congress and the Rashtriya Janata Dal) were shown in a sting operation on a private TV channel (Aaj Tak) being paid for raising a question in parliament.

Parliament responded quickly by expelling all the eleven MPs who figured inthe sting operation. The Lok Sabah constituted a special (enquiry) committee and the Rajya Sabah referred the matter to the ethics committee of the house.

On the report of the special committee of the Lok Sabah and ethics committee of the Rajya Sabah, both the houses expelled the tainted members and terminated their membership by a motion of each house. The motion was passed on the last day of the winter session, December 23, 2005, amidst a walk out by the BJP, the main opposition party in the Lok Sabha. The BJP already in trouble because of leadership crisis, factional fighting, ideological vacillation, and its vitiating relations with the Rashtriya Swayamsevak Sangh was deeply disturbed. Six out

of eleven MPs belonged to the BJP and two of them were ministers in the erstwhile BJP-led national democratic government the centre.

One expelled member from the BSP, *Raja Ram Pal*[54] challenged the decision of the Lok Sabha speaker in the Supreme Court on two grounds: procedural and legal. His expulsion resolution was not carried on the report of the Privileges Committee of the Lok Sabah. His expulsion was not based on any of the grounds of disqualification specifically mentioned in Article 102 of the constitution and section 8 of the representation of the People's Act 1951. The Supreme Court served a notice on the Lok Sabah speaker on January 16, 2006.The court also referred the matter to a constitutional bench of five judges.

The Lok Sabah speaker, Somnath Chatterjee called an all-party meeting on January 20, 2006. It was unanimously decided in the meeting that it was the privilege of the house to take disciplinary action against its own members. The expulsion from the house was very much within that disciplinary action. It was further held that the Speaker of the Lok Sabah was the sole custodian of the rights and privileges of the house and, hence, not answerable to the judiciary for his role in that capacity[55].

The BJP in the meeting favoured that the Speaker should not appear personally before the Court but should send his representative to present his views before the highest court. The then speaker, Chatterjee, later on briefed the media, 'Even if I go there, that cannot lead to the honourable court to assume or to exercise the power in respect of those matters exclusively conferred on Parliament.'[56]

He also clarified that 'the Constitution was clear on the jurisdictions of the pillars of democracy' and suggested, 'Let us keep within our lakshman rekha.'The Supreme Court seems in a mood to interpret the powers, privileges and immunities of parliament that remain un-codified so far. On the other hand, Parliament insists that it being the sole custodian of its rights and privileges it is within its right to define its privileges and immunities. The whole episode has certainly triggered a new kind of situation that has serious implications of which two are legal-constitutional. First pertains to immunities of the legislature from judicial intervention in its proceedings. Second relates to defining powers and

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[54] *Raja Ram Pal v. Hon'ble Speaker , Lok Shabha,* (2007)3 SCC 184

[55] *Ibid.*

[56] Vinay Kumar, *"Don't Accept Court Notice: All-Party Meet",* The Hindu, New Delhi, 21 January 2006.

privileges of the legislature and its members. Is Parliament the sole interpreter of its powers and privileges? Or, is this power of parliament subject to judicial scrutiny?

Articles 105 and 122 of the Indian constitution clearly restrict the judiciary from intervention in the business of the legislature. Article 122 (1) states, 'The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.' Article 122 (2) explains, 'No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any courtin respect of the exercise by him of those powers.'

The provisions of the Chapter IV of Part V of our Constitution dealing with Union Judiciary provides for a close relationship between the Judiciary and Legislature. Article 122 of the Indian Constitution provides that the Court shall not call validity of any proceedings in Parliament in question on the ground of any alleged irregularity of procedure. And Article 212 provides that the Court should not enquire into the proceedings of the Legislature. But certain judicial anomaly has been felt in the recent past. The most prominent being the famous *Jagdambika Pal case*[57] of 1998 involving the Uttar Pradesh Assembly and the *Jharkhand Assembly case*[58]of 2005. The Interim Order of the Supreme Court in both the cases is a clear violation of the principle of separation of powers between the Judiciary and the Legislature. The judiciary blames Legislature for not doing anything worthwhile over the past three decades, whereas Legislature accuses Judiciary of doing the job of the legislature.

Article 105 (2) gives judicial immunities to the conduct and behaviour of any member of Parliament: 'No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee therefore, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.' Article 194(2) grants the same immunities to the members of the state legislative assemblies.

[57]1998 (2) SCALE 83

[58]2005 (3) JCR 448 Jhr.

The second issue pertains to the powers and privileges of the legislature and its members. Article 105 explains the powers and privileges of Parliament and its members; and Article 194 replicates the same provision for the legislative assembly and its members. Article 105 (1) gives freedom of speech in Parliament and Article 105 (2) gives immunity to freedom of speech and freedom to vote in the house and its committees from judicial proceedings. But other rights and privileges of the house and its members are left un-codified.

Article 105 (3) reads 'In other respects, the powers, privileges and immunities of each House, shall be such as may from time to time be defined by Parliament by law, and, until, so defined, shall be those of that House and of its members and committees immediately before the coming into force of section15 of the Constitution Forty-fourth Amendment Act 1978.' Before this amendment, it was provided that powers, privileges, and immunities of Parliament and its member shall be those of the House of Commons as it was before the commencement of the Indian constitution.

The root of the present controversy lies in the above two issues and related provisions of the Constitution. The BSP MP has challenged in the Supreme Court the power of the house to terminate his membership on the grounds other than that provided in Article 102 and section 8 of the representation of the People's Act 1951. The Lok Sabah insists that its disciplinary jurisdiction over its member has constitutional immunities from judicial intervention as explained in the Articles 105 (2) and 122 of the Indian constitution. Judicial precedents on the issue of parliamentary privileges and judicial immunities to proceedings of the legislature suggest divided opinion.

In *P.V .Narasimha Rao v. State (CBI)*[59], the Supreme Court took the position as per Article 105 (2), 'The bribe-taker MPs who have voted in Parliament against the no-confidence motion are entitled to protection of Article 105(2) and are not answerable in a court of law for alleged conspiracy and agreement.'

However, 'The bribe-takers could be proceeded against by Parliament itself. 'This judgement clearly established that parliament is the sole arbitrator of its business and proceedings and the judiciary cannot come in this matter. This judgement has not been superseded by another judgement reversing the position.

[59](1998) 4 SCC 626

The judicial interpretation of powers and privileges of the legislature and its members has not been consistent. *In re special reference no. (1) 1964*[60], the Supreme Court observed that the legislature in India unlike the House of Commons does not enjoy the power to regulate its own constitution. Hence, the Indian legislature does not have the same powers and privileges as enjoyed by the House of Commons.

3.4 Judicial Review of Constitutional Amendments- Check on Legislative Power

3.4.1. Need of Power of Amendment of the Constitution

An amendment is defined as a formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specifically, a change made by addition, deletion, or correction; especially, an alteration in wording[61]. Most constitutions declare the primacy of popular sovereignty and proclaim that ultimate power resides with 'the people' through the democratic process. At the same time, in keeping with the notion of limiting democratic government, most constitutions also describe what the legislature, the representative of the people, cannot do[62]. By definition, democracy is antithetical to the concept of inalienable rights. The amending process helps maintain the delicate balance between democracy and limited government.

Amendments are often described as the 'pressure valve' of the Constitution. Most Constitutions today have provisions of being amended in one way or the other, but that was not always the case. In fact, it has been said that the idea of incorporating within a constitution a provision for its own amendment was largely an invention of the Constitutional Convention in Philadelphia[63]. It is well known that now there exists a standard of testing the rigidity or otherwise of a Constitution on the basis of ease of amending power. There are perils in leaning too closely to either side. If it is too difficult to change the Constitution, the people may become frustrated and resort to extra-legal behaviour. If on the other

[60]AIR 1965 SC 745
[61]Black's Law Dictionary (Bryan A. Garner et al ed., 2004).
[62]Katz Elai, *On Amending Constitutions:The Legality and Legitimacy of constitutionalEntrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251 (1996).
[63]*Ibid*

hand, it is too easy to change, the Constitution's status may merely equal that of any simple statute and the Constitution's values will not rise above other more ephemeral political decisions[64]. Hence a cautious approach is mandated and usually the amendment procedure is not so much used to right a wrong, than to modify the existing provisions in accordance with the changing times.

Even before the Indian Constitution came into being, in *T.H. Vakil v.Bombay Presidency Radio Club Ltd*[65], Blagden J. made certain pertinent observations regarding the scope of the term 'amendment' which affirms the abovementioned understanding of the concept:

> '*I understand the general rule on the point to be this: first, that amendments must be germane to the subject-matter of the proposition and, secondly, that they must not be, in substance direct negative of it. If, for example, a resolution were that a particular piece of business be now considered, it would be in substance a direct negative to move that it be considered years hence.'*

Presently, the procedure of amendment and amending power is enshrined under Article 368 of the Indian Constitution. An elaborate understanding of this procedure is not needed here except to observe that amendments in India require a special majority. As the procedure is different from the regular legislative process it is more difficult to make amendments in India as compared to say a country like the UK where the absence of a written constitution allows for parliamentary supremacy and a simple amending process. On the other hand, it is easier than in a country like the USA where certain changes cannot be affected through the ordinary amending process laid down in Article V of the American Constitution.

Judicial Review of Constitutional amendments is not generally permissible except on procedural grounds or to prevent the violation of the express limitations mentioned in the Constitution itself. Before 1967 even the Indian Supreme Court had held that it had no power to strike down constitutional amendments on substantive grounds and therefore could not exercise power of

[64] *Ibid.*

[65] (1945) 47 BOMLR 428

judicial review in this respect. It was only after the *Golaknath's*[66] decision in 1967 that the Supreme Court assumed the power of Judicial Review of constitutional amendments. Whether the power of judicial review ought to be extended to constitutional amendments or not can be decided by dispassionately examining the relevant provisions of the Constitution.

3.4.2 Review of Amending Power an Implied Limitation on Sovereignty of Parliament in India

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[67].

The Constitution of India provides for a distinctive amending process as compared to the leading Constitutions of the World. It may be described as partly flexible and partly rigid. The framers of the Constitutions have provided differing degree of rigidity for different Articles, according to their significance and importance in the Constitution, with the result that there are three different modes provided in the Constitution for the amendment. In case of *Shankari Prasad Singh Deo v. Union of India*[68], the Supreme Court has observed that "now the Constitution provides for three classes of amendments of its provisions. First, those that can be affected by bare majority such as that required for the passing of an ordinary law. The amendments contemplated in Article 4, 169 and 240 falls within this class and they are specifically excluded from the purview of Article

Secondly, those that can be affected by a special majority as laid down in Article 368. All constitutional amendments other than those referred to above come within this category and must be effected by a majority of the total membership of each House as well as by a majority of not less than two-thirds of the members of that House Present and voting; and thirdly those that require, in addition to the special majority above mentioned, ratification by resolutions passed by not less than one-half of the States. This class comprises amendments

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[66] *Supra* n.21.

[67]. *Kesavananda Bharati v. The State of Kerala* , Supra 1.
AIR 1951 SC 455

which seek to make any change in the provisions referred to in proviso to Article 368."

The first case on amendability of the Constitution was *Shankari Prasad v. Union of India*[69], wherein the validity of the Constitution 1st Amendment Act, 1951 was challenged which sought to curtail the right to property guaranteed by Article 31. Thus was posed a conflict between Article 13 and 368 raising a basic question whether the Fundamental Rights were amendable so as to dilute or take away fundamental right through a constitutional amendment. The Court limited the scope of Article 13 and held that an amend9ing law passed under Article 368 did not fall within the purview of Article 13. Article 13 refers to a 'legislative' law i.e. an ordinary law made by the legislature, but not the 'constituent' law i.e. a law made to amend the Constitution. Thus, it drew a distinction between ordinary law made in the exercise of legislative power and constitutional law made to the exercise of constituent power. While fundamental rights could not be invaded by the former they could be validly curtailed by the later by introducing alterations in the Constitution itself. Thus, the Court held that Parliament could by following the 'Procedure' laid down in Article 368 amend any fundamental right.

Following the verdict of *Shankari Prasad's Case*[70] for next 13 years, the question of amenability of Fundamental Rights remained dormant. However, in 1964, the matter again came up before the court in *Sajjan Singh v. State of Rajasthan*[71]. Here question was raised about the validity of Constitutional 17th Amendment Act, 1964 which introduced agrarian reforms. With this Amendment was passed number of statutes affecting property rights and were placed in the IXth Schedule. They were sought to be immunized from judicial review. It was therefore argued that exclusion of judicial review affected Article 226 and therefore such an amendment could not be validity made without following the special procedure prescribed for the amendment of entrenched provisions. By majority of 3:2, the Court ruled that the pith and the substance of the amendment were only to introduce agrarian reforms and that Article 226 was affected only incidentally. The Court maintained the difference between the ordinary law and

[69] *Ibid.*
[70] *Ibid.*
AIR 1965 SC 845

the constituent power and the relation between Article 13 and Article 368 which has earlier been drawn in *Shankari Prasad's Case*[72] and further held that the words "amendment of the Constitution" means amendment of all the provisions of the constitution. Gajendragadkar C.J, said that if the Constitution Makers intended to exclude the fundamental rights from the scope of the amending power they would have made a clear provision in this behalf.

Until 1967, the Supreme Court had been holding that no part of the Constitution was amendable and that the Parliament might, by passing a Constitution Amendment Act in compliance with the requirements of Article 368, amend any provision of the Constitution, including the Fundamental Rights and Article 368. However, the question whether any of the fundamental rights could be abridged or taken away by in the exercise of Article 368 was gain raised in the significant case of *Golaknath v. State of Punjab*[73]. In this case, the Constitutional Validity of 17th Amendment Act which inserted certain State Acts in IXth Schedule was once again challenged. The matter was referred to Bench of 11 judges. The majority in *Golaknath case*[74] was worried with the large number of amendments which were introduced on account of the judicial verdict in *Shankari Prasad*[75] and *Sajjan Singh*[76]. Thus, the majority view was conditioned by fear that our democracy would soon turn into totalitarian regime, if fundamental rights were amended so often. Thus, the Supreme Court overruling the earlier cases held that fundamental rights were non-amendable and inviolable by constitutional amendment process set out in Article 368. A new and noteworthy line of thought was adopted by majority to arrive at this conclusion. Relying on the earlier wordings of the marginal note to Article 368, the majority ruled that this Article prescribes merely the procedure for amendment and that the power to do so must be located under Article 248. On this line then, an amendment to the Constitution would obviously being a law within Article 13 and would thus be subject to Article 13(2). The majority however, refused to give the retrospective effect to this new view but rather adopted the Doctrine of Prospective Overruling. However, the five minority Judges delivered three separate opinions and upheld

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Supra n.68.
Supra n. 21.
[74]*Id.*
Supra n.68.
Supra n.71.

the power of Parliament to amend fundamental rights. Their fear was that the Constitution would become static if no such powers were conceded to Parliaments. The minority view held that the word 'law' in Article 13(2) referred to only ordinary law and not constitutional law amendment. According to them, Article 368 deals with not only the procedure of amending the Constitution but also contains the power to amend the Constitution[77].

The 24th and 25th Amendment Acts were challenged before the Court in celebrated case of *Keshvanand Bharti v. State of Kerala*[78] which is popularly known as Fundamental Rights Case. In this case, the petitioners challenged the validity of the Kerala Land Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the IXth Schedule by 29th Amendment Act. The petitioner was also permitted to challenge the validity of 24th, 25th and 29th Amendment. The question involved was as to what was the extent of the amending power conferred by Article 368 of the Constitution? A special 13 Judges Bench was constituted and 11 opinions were delivered. It was held that power to amend Constitution is to be found in Article 368 itself. Justice Hegde and Justice Mukherjee found it difficult to believe that the constitution-makers had left the important power to amend the Constitution hidden in Parliament's residuary power. The views endorsed in *Sajjan Singh*[79]and *Shankari Prasad Case*[80]was again endorsed and therefore to this extent *Golaknath's Case*[81]was overruled. Further, the distinction between ordinary law and Constitutional law was once again recognized. Thus, Article 368 conferred power to abridge Fundamental Rights as well. Again in this regard Golaknath's Case was overruled. The majority held that Article 368 even before 24th Amendment contained the power as well as the procedure of amendment.

The most important and significant verdict was evolved that Article 368 confer power on Parliament to amend not only the Fundamental Right but any other Part of the Constitution. Though it recognized the Parliaments power to amend any provisions of Constitution, yet this power was not absolute and unlimited. It was

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[77] *Ibid.*
[78] *Supra n.1.*
[79] *Supra n.71.*
[80] *Supra n.68.*
[81] *Supra n.21.*

now made subject to one qualification that it cannot be employed to destroy or emasculate "the Basic Structure of the Constitution". A Constitutional amendment which offends the basic structure of the Constitution in ultra-virus. Thus was evolved the all-important, Doctrine of Basic Structure of Constitution, which serves as limitation on Constituent Power of Parliament[82].

This case has been characterized as "one of the milestones in the history of jurisprudence". The basic philosophy underlying the doctrine of non-amenability of the basic features of the Constitution, evolved by the majority has been beautifully explained by Justice Hegde and justice Mukherjee as follows:

> "*Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroy.*"[83]

In this seminal case, the Court held the Supremacy of the Constitution, Separation of Powers, Republican and Democratic form of Government, Federal character of Constitution, Secular character, the Unity and Integrity of the nation, parliamentary system, etc… to be the basic feature of the Constitution. These features, however, have been mentioned as only illustrative and the list is not by any means exhaustive. It is for Court to decide from time to time what constituted the Basic Structure. In course of time, the doctrine of basic structure of the Constitution has become very well entrenched in India. Since this celebrated case, this doctrine has been applied in plethora of cases which creates a mark of judicial creativity.

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[82] *Supra n.78.*
[83] *Ibid.*

The next occasion wherein the Supreme Court successfully applied this doctrine was in *Indira Gandhi v. Raj Narain*[84]. The validity of 39th Amendment Act was challenged which sought to place the elections of Prime Minister and speaker beyond the pale of judicial review. The Allahabad High Court declared Election of Indira Gandhi as void but the 39th Amendment Act sought to give itself an overriding effect and validated the elections of Prime Minister and the Speaker retrospectively. The Court reaffirmed the Doctrine of Basic Structure and held the Amendment Act to be violative of the Basic Structure as it violated the free and fair election which was an essential postulate of democracy which in turn was a part of the basic structure of the Constitution and therefore void. The Supreme Court thus added Rule of Law, Judicial Review and Democracy which implies free and fair elections as Basic Structure.

One year later in 1976, Article 368 was again amended by the 42nd Amendment Act which sought to ensure that a constitutional amendment may not be challenged before any court on any ground whatsoever. To achieve this objective, two clauses were added in Article 368. During this period till 1984, there were many attempts to amend the Constitution however, the doctrine of basic structure has proved to be a shield to protect and preserve certain fundamental values inherent in the Constitution.

Scope and extent of doctrine of basic structure was again considered by Court in *Minerva Mills v. Union of India*[85]. The Court ruled that balance between Part III and Part IV is an aspect of Basic Structure. In this case, the Constitution Bench of the Supreme Court has invalidated clause (4) and (5) of Article 368 on the ground that these provisions, introduced by the 42nd Amendment Act, 1976 sought to exclude judicial review, which was one of the basic features of the Indian Constitution. Thus, the Court reiterated this doctrine of Basic Structure under Article 368 and that Parliament cannot so amend the Constitution as to damage the basic or essential feature of the Constitution and that now it rests on firm foundation in India.

In the realm of doctrine of basic structure of the Constitution, these features have not been explicit defined by the Judiciary. However the following are termed as

[84]*Supra n.16.*
[85]*Supra n.48.*

of the basic features of the Constitution such as supremacy of the Constitution; rule of law; the principle of separation of powers; objectives specified in the preamble to the constitution; judicial review; Article 32 and 226; federalism; secularism; the sovereign, democratic, republican structure; freedom and dignity of the individual; unity and integrity of the nation; the principle of equality-not every feature of equality but the quintessence of equal justice; the 'essence' of other fundamental rights in Part III; the concept of social and economic justice-to build a welfare state: part IV in to; the balance between fundamental right and directive principles; the parliamentary system of government; the principles of free and fair elections; limitations upon the amending power conferred by Article 368; independence of the judiciary; effective access to justice; independent and efficient judicial system; powers of the Supreme Court under Article 32, 136, 141, 142; legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act.

A question of great importance as regards the amending power was once again considered by the Supreme Court in *A K Roy v. Union of India*[86]. The 44th Amendment Act was inserted which made several modification in Article 22 liberalizing its provision but the same have not yet been effectuated. By the majority of 3:2, the Court sustained the validity of 44th Amendment and held that the powers to issue notification to bring into force the provisions of a constitutional amendment "it is the constituent power of the Parliament because it does not carry with it the power to amend the Constitution in any manner". Parliament can therefore vest in an outside agency the power to compel the Government to do that which lies in its discretion to do when it considers it opportune to do so. If the Parliament considers that the executive has betrayed its trust by not bringing the amendment into force, it can censure the executive.

Another significant development was regarding the interpretation of Non Obstante Clauses. Since some of the provisions of the Constitution have non obstinate clauses i.e. "Notwithstanding anything in the Constitution…" to that effect, question was raised whether such a non-obstante clause comes in the way to test the provision against the touchstone of violation of the basic features of the Constitution. The Supreme Court has answered that in spite of such a clause,

[86]AIR 1982 SC 710

the principle that no constitutional amendment can be made so as to damage any basic feature of the Constitution will prevail.

In *S.P. Sampat Kumar v. Union of India*[87], the Constitutional validity of Article 323 A and the provisions of Administrative Tribunals Act, 1985 was challenged on the ground that the Act by excluding the jurisdiction of the High Court under Article 226 & feature of the Constitution. The Supreme Court upheld the validity of Article 323A and the Act as the necessary changes suggested by the Court were incorporated in the Administrative Tribunal Act. It held that the Act has excluded the judicial review of High Court in service matters under Articles 226

227, but as it has not excluded judicial review of the Supreme Court under Articles 32 & 136, the Act is valid. The amendment does not affect basic structure of the Constitution as it has vested the power of judicial review in an alternative institutional mechanism.

In another landmark judgment in *L. Chandra Kumar v. Union of India*[88], the Supreme Court has unanimously while reconsidering *Sampath Kumar's Case*[89], has struck down clause 2 (d) of Article 323 A and clause 3 (d) of Article 323 B which provided for the exclusion of the jurisdiction of the High Court under Article 226 and 227 and the Supreme Court under Article 32 of the Constitution as unconstitutional and invalid as they damage held that power of judicial review over legislative action vested in the high court under Article 226 and the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution and formed part of its basic structure. Ordinarily, therefore, the power of the high Courts and the Supreme Court to test the constitutional validity of legislations cannot be ousted or excluded. Following the *Keshavnanda Bharti's Case*[90], the Court declared unconstitutional clause 2(d) of article 323 A and Clause 3(d) of Article 323 B of the Constitution, to the extent that they excluded the jurisdiction of the High Court under Articles 226 and the Supreme Court under Article 32 of the Constitution.

AIR 1987 SC 386

[88] AIR 1997 SC 1125

Supra n.88.

Supra n.1.

In the year 2007, in case of *M Nagraj v. Union of India*[91], a 5 Judge Bench of the Supreme Court has explained the basic feature theory again in detail as "Basic Structure are systematic principles underlying and connecting provisions of the Constitution. They give coherence and durability to Constitution. These Principles are part of Constitutional law even in not expressly stated. This Doctrine has essentially developed from the German Constitution. It is not based on literal words. These principles are part of constitutional law even in not expressly stated. Theory of basic structure is based on the concept of Constitutional identity. The main object behind the theory is continuity and within that continuity of identity." In this case, the petitioners challenged the Constitutional validity of the Constitution (77th Amendment Act, introducing Article 16 (4A) nullifying number of decisions the 81st Amendment Act 2000 introducing Article 16 (4B) introducing promotion in reservation also which was stopped in *Indra Swney's Case*[92] and 82nd Amendment Act 2000 introducing proviso to Article 355 which emphasizes the importance of maintaining efficiency in administration and the 85th Amendment Act, 2001 adding words – with consequential seniority in Article 16 (4A) nullifying decisions in *Ajit Singh's case*[93] on the ground that they violate basic feature of the Constitution. However, a five judge bench of the Supreme Court held that these amendment do not violate the basic feature of the Constitution. They are enabling provisions and only apply to SC and ST. they do not obliterate constitutional requirement, such as 50% ceiling limit in reservation, creamy layer rule and post based roster sub classification between other backward classes on one hand any scheduled tribes on the other. They do not alter structure of equality codes, therefore, they are not beyond amending power of Parliament. The power to amend the Constitution is an enumerated power in the Constitution and therefore, its limitation, if any must be found in the Constitution itself.

Another development in this area was in relation to IXth Schedule and power of Judicial Review. It is permissible for the legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31-B but subject to the right of citizen to assail it on the enlarged judicial review concept. If the law that

[91]AIR 2007 SC 71
AIR 1993 SC 447
[93]AIR 1996 SC 1189

abrogates or abridges rights guaranteed by Part III of the Constitution violates the basic structure doctrine, whether by amendment of any Article of Part III or by an insertion in the IXth Schedule, such law will have to be invalidated in exercise of judicial review power of the court. The legislature cannot grant fictional immunities and exclude the examination of the IXth Schedule law by the court after the enunciation of the basic structure doctrine. All amendments to the Constitution by which the IXth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14 and 19; Article 14 and 15 read with Articles 16 (4), (4A), (4B); Articles 20 and 32, etc and the principles underlying them. This means laws included in the IXth Schedule by constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental rights taken away pertain to the basic structure or if the law infringes the essence of any such fundamental rights. Parliament cannot increase the amending power by the amendment and destroy and damage the fundamentals of the Constitution. Article 368 does not vest such a power in Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. If the constituent power under Article 368 cannot be made unlimited, it follows that Article 31 B cannot be so used as to confer unlimited power. Article 31-B cannot go beyond the limited amending power contained inn Article 368. The power to amend the Ninth Schedule flows from Article 368 which has to be compatible with the limits on the power of amendment. This limit came after the decision of celebrated case of *Keshvananda Bharti*[94], after which Article 31 B despite its wide language cannot confer unlimited or unregulated immunity. In *I.R. Coelho v. State of Tamil Nadu*[95], the validity of Central and State laws put in IXth Schedule was challenged. The Court said that the validity of any IXth Scheduled has been upheld by the Apex Court and would not be open to challenge it again, but if the law held to be violative of fundamental rights incorporated in the IXth Schedule after Keshvananda Bharti's Judgment will be open to challenge on the ground that they destroy or damage the basic feature of Constitution.

Supra n.1.

[95] AIR 2007 SC 861

The doctrine of basic structure as evolved by the judiciary illustrates the judicial creativity and the policy making role of the Supreme Court of a very high order. Now, this doctrine sought to protect and preserve the basic features of the Constitution against the unfettered amending power. This doctrine made to felt convinced that certain ideals and values embedded in the Constitution will be preserved and not destroyed by any process of constitutional amendment.

The role of the judiciary under the Constitution is a pious trust reposed by the people. The Constitution and the democratic polity there under shall not survive, the day judiciary fails to justify the said trust. If the judiciary fails, the Constitution fails and the people might opt for some other alternative. In view of the role of the Judiciary in the context of the Constitution it is fallacious to say that the legislatures alone are answerable to the people regarding the functioning of the judiciary. It is rather the judiciary which screens the functioning of the Executive and the legislatures through the judicial process.

3.5. Power of Legislature to Overrule a Judicial Decision by a New Legislation

Whether the legislature has the competence to enact a new law or amend an existing law so as to nullify or render ineffective a judgment of the Court. Article 141 of the Constitution provides that the law declared by the Supreme Court shall be binding on all the Courts within the territory of India. Article 141 therefore incorporates the principle of Stare Desists. Further Article 144 of the Constitution declares that all authorities civil and judicial in the territory of India shall act in aid of the Supreme Court. The law declared by the Supreme Court is binding on all the Courts. Though Article 141 refers to only “Court” and not to the other organs of the State. But by virtue of Article 144 the authorities have to act in the aid of the Supreme Court and not disobey or overrule the decisions of the Supreme Court. Though Article 144 does not use the words Executive or the Legislature. However the term “authorities” referred to in Article 144, is enough to point out the intention of the Constitution framers that the other organs of the State have to work in harmony with the Supreme Court and as such abide by its decisions.

In one of the earliest case dealing with this aspect, the Apex Court in *Mahal Chand Sethia v. State of West Bengal*[96], pointed out that a legislature cannot declare a judgment of the Court to be of no effect. It was held "A Court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the legislature of it infringed the rights enshrined in Part III of the Constitution. Needless to add, it can strike down or declare invalid any act or direction of a State Government which is not authorized by law. The position of a legislature is however different. It cannot declare any decision of a Court of law to be void or of no effect.

In *P. Sambamurthy v. State of A.P.*[97] the Apex Court held that it is a basic principle of rule of law that the exercise of power by the Executive or any other authority must not only be conditioned by the Constitution. But must also be in accordance with law and the power of judicial review is vested by the Constitution with a view to ensure that the law is observed and there is compliance with the requirement of law on the part of the Executive and other authorities. It is through the power of judicial review conferred on a Constitutional authority such as the High Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Not if the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it. It would sound the death knell of the rule of law. The rule of law would cease to have any meaning because then it would be open to the State Government to defy the law and yet to get away with it."

In *Keshavananda Bharti v. State of Kerala*[98], rule of law was held to be a part of the basic structure of the Constitution. The concept of rule has been in turreted by various authors in different concepts. But in my opinion. It means that everyone is bound by the Constitution. The Government or its instrumentalities cannot do anything which is either against the Constitution or violates its basic structure. Judiciary's independence being a basic structure of the Constitution cannot be undermined by passing a legislation to render ineffective a judgment or order of

[96]1969 UJC (SC) 616
[97]AIR 1987 SC 663
[98]*Supra, n.1.*

the Court or asking anybody not to obey the orders of the Court. As the Apex Court in Municipal Corporation of the *City of Ahmadabad v. New Shrock Spg. And Wvg. Co. Limited*[99], observed that ‘’no legislature in this country has the power to ask instrumentalities of the State to disobey or disregard the decisions given by Courts.

The question regarding the competence of the legislative to set aside the orders of the Court also came up for consideration before the Apex Court in Indian *Aluminum Co. v. State of Kerala*[100]. In this case the State Legislature had passed a validating act or renders valid the collection of tax declared earlier by the Court to be invalid. The Apex Court laid down various propositions for the purpose of maintaining a balance of separation of powers.

The case of *People's Union for Civil Liberties v. Union of India*[101], is one of the latest cases, which depict the zeal of the legislature to overrule and nullify the judgment delivered by the Apex Court. The brief facts were that the Apex Court. The brief facts were that the Apex Court in *Union of India. v. Association for Democratic Reforms*[102]had given certain direction to the Election Commission to call for information on Affidavit from each candidate seeking election to the Parliament or a State Legislature regarding the past antecedents of the can date, pendency of criminal cases including confections. Acquittal of discharge if any. Assets of the candidate both movable and immovable. Liabilities if any and the educational qualification of the candidate.

In order to render ineffective the aforesaid directions given by the Apex Court. The Central Government brought the Representation of People (Amendment) Ordinance 2002 which was later on repealed by the Representation of the People (Third Amendment) Act. 2002. Section 33-B of the Act in particular provided that notwithstanding anything contained in any judgment decree or order of either instruction issued by the election commission no candidate shall be liable to disrespect of his election. Which is not required to be disclosed or furnished under this Act or the Rules made.

[99]AIR 1970 SC 1292
[100]AIR 1996 SC 1431
[101]AIR 2003 SC 2363
[102]AIR 2002 SC 2112

The aforesaid amendments were challenged in a writ petition under Art. 32 of the Constitution before the Apex Court and Section 33-B was held to be unconstitutional. Concurring judgments delivered by the learned Judges of the Apex Court. Justice M.B. Shah specifically held "the legislature can change the basis on which a decision is rendered by this Court and change the law in general. However, this power can be exercised subject to Constitutional provision. Particularly legislative competence and if is violative of fundamental rights enshrined in Part III of the Constitution such law would be void as provided under Art. 13 of the Constitution.

Unlike the problem faced by the United States in *Marbury v. Madison*[103], express provision was made in the Constitution of India whereby laws inconsistent with the basic or fundamental rights were declared void.[104] The distribution of legislative power between the State and the Centre[105] would require the Court to pronounce upon issues of legislative competence and consequently to declare as void laws which were beyond the competence of Parliament or of one among the 30 State legislatures in the country. The Constitution vested the Supreme Court with original jurisdiction to enforce the fundamental rights by issuing writs[106]with the extent of jurisdiction remaining broadly undefined and hence left to the judgment of the Court. As a result, the interpretation of the Court, from the early years of the Constitution, in regard to its own powers, vis-à-vis the two other organs of the State, resulted in friction.

The early years of the Supreme Court, as is well-known, were years of conflict. Very many judgments, particularly on land reforms, were neutralized by Parliament by amending the Constitution. So much so, that in *Golaknath's case*[107], the Supreme Court ruled that Article 368 of the Constitution only provided for the procedure for amending the Constitution and was not an independent source of power. The amendments to the Constitution had no higher status than that of any other law made by Parliament and to the extent that it encroached on Fundamental Rights, it would have to be declared void by reason

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[103]*Supra n.3.*
Article 13 of the Constitution of India.
Article 245 and 246 of the Constitution of India.
Article 32 of the Constitution of India.

[107]*Supra n.21.*

of its judgment would be to invalidate all the past amendments to the Constitution, and consequently invalidate all the land reform and nationalisation laws which had been passed by Parliament, the chaotic consequences were avoided by the Court by adopting the principle of prospective overruling.

The *Kesavananda Bharati case*[108], rendered immutable the Constitution in regard to its basic features, so that, the Constitution stood frozen in perpetuity, without the elected representatives of the people being able to alter it to bring about social reforms, of a nature which would affect the basic structure of the constitution, to meet the changing needs of society.

The constitution had vested exclusive power of judicial review in the superior courts that is High Courts and the Supreme Court of India. The Indian Supreme Court in this regard has said:

> "*Judicial review is an incident of and flows from this concept of the fundamental and the higher law being the touchstone of the limits of the powers of the various organs of the State which derive power and authority under the constitution and that the judicial wing is the interpreter of the constitution and, therefore, of the limits of the authority of the different organs of the State. In a federal set up the Judiciary becomes the guardian of the constitution. The interpretation of the Constitution as a legal instrument and its obligation is the function of the courts. "It is emphatically the province and duty of the judicial department to say what the law is.*"[109]

The legal position regarding the power of Supreme Court and High Courts to the judicial review the legislative action was well decided with the decision of the seven Judges Constitution Bench of the Apex Court in *L. Chandra Kumar v. Union of India*[110]. In this case, the question arose regarding the Constitutional validity of Arts. 323A (2)(d) and Art. 323(B)(3)(d) of the Constitution. Which empowered the Parliament and the State Legislature to totally exclude the jurisdiction of all Courts except that of the Supreme Court under Art? 136 of the

[108]*Supra n.1.*
[109]*Sub-Committee on Judicial Accountability v. Union of India*, (1991) 4 SCC 699
[110]*Supra n.88.*

Constitution. In respect of disputes and complaints referred in Art. 323A (1) or 323B (2) of the Constitution.

The power to test the Constitutional validity of legislation and this power is a part of the basic structure of the constitution. The courts not only see as to whether the legislation in question is within the legislative competence of the legislature concerned or not but also see whether impugned legislation has contravened any provision of the Constitution or not. It would not be irrelevant to say that this power being a basic structure of the Constitution cannot be taken away even by an amendment of the Constitution.

3.6. Fundamental Rights: A Limitation on the Power of Legislature in India

The Constitution of the United States of America is regarded as one of the oldest democratic written constitutions in the world. It is well known that it has overwhelmingly influenced the constitutions of a great number of countries, particularly those of Asian countries.[111] India is no exception in this respect. Though India adopted the Westminster type of Government, yet since England has no written constitution, the members of Indian Constituent Assembly, particularly Shri B.N. Rau, the Constitutional Adviser to the Assembly and Sir Alladi Krishnaswamy Ayyar, in an effort to evolve comprehensive written constitution for India, relied heavily on the Constitution of the U.S.A. In fact, Shri Rau did have frequent deliberations with important American politicians, judges and academicians like President H. Truman, Justice Felix Frankfurter and Judge Learned Hand, to a name a few.[112] Consequently, the federal form of government, the provision of an indissoluble second House i.e., Rajya Sabha, the Directive Principles of State Policy developed on the doctrine of Police Powers, the Fundamental Rights on the model of American Bill of Rights and the judicial review in the form of Article 13 of the Constitution of India, are some of the important matters indicating direct influence[113] of the constitution of the United States of America on the Indian Constitution.

. See Ed. Lawrence Ward Beer , *Constitutionalism in Asia* , University of California Press ,1979.

. A.G. Noorani, '*A Bulwark of Liberty'*, The Span, June, 1983.

. Prof. P.K. Tripathi, '*Perspective on the American influence on the Indian Constitution*' henonline.org/HOL/PDE Searchable? Collection. p. 59. Assessed on 2/7/17.

In*V.G. Rows case*[114], the Apex Court has been conferred by the Constitution the duty to act as the protector of the fundamental rights of the citizens and this power too is an inbuilt of the power of judicial review. The Higher Courts can judicially review the legislations and the Executive decisions to determine as to whether the constitutional provisions and the fundamental rights in particular might have been infringed or not by the legislature or the Executive. Re-affirming its power to test the validity of legislations, the Apex Court *in special reference No. 1 of 1964*[115], held "whether or not there is distinct and rigid separation of powers, there is no doubt that the constitution has entrusted the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens when a statute is challenged on the ground that it has been passed by a legislature without authority or has otherwise constitutionally trespassed on fundamental rights. It is for the Courts to decide whether the law passed by the legislature is valid or not." It was also held that adjudication of such a dispute is entrusted solely and exclusively to the judicature of this country.

The power to ensure that a law passed by the legislature is in accordance with the provisions of the Constitution, is vested only with the High Courts and the Supreme Court and for this reason the judicial review of legislations becomes very relevant and it is further relevant so far conformity of the legislations with the provisions contained in Part III of the Constitution is concerned.

The legal position in this respect was highlighted by the Apex Court in *State of Madras v. V G. Row*[116], in express terms. It was held "our Constitution contains express provisions for judicial review of legislations to its conformity with the Constitution like as in America. Where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted ''due process" clause in the fifth and fourteenth Amendments. If then the Courts in this country face up to such important and none too easy task. It is not out of any desire to till at legislative authority in a crusader spirit but in discharge of duty plainly laid upon them by the Constitution. This is especially

[114]AIR 1952 SC 196
[115]*Supra n.60.*
[116]*Supra n.112.*

true as regards the fundamental rights as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment. It cannot desert its own duty to determine finally the Constitutionality of an impugned statute."

Article 32, which itself is a fundamental right, empowers the Supreme Court to issue directs or orders or writs, including writs in the nature of habeas corpus, mandamus prohibition, quo warrant and cautionary for the enforcement of any of the fundamental right. Article 226 on the other hand also empowers the High Courts to issue the above writs. But the difference in the phraseology of the Articles 32 and 226 bring out the marked difference in the nature and purpose of the right conferred by these Articles whereas the right guaranteed by Article 32 can be exercised for the enforcement of fundamental rights only, the right conferred by Article 226 can exercised not only for the enforcement of fundamental rights but for "any other purpose". The powers of the High courts are in addition to the power vested in the Supreme Courts and not in derogation thereof. They can be directed also against the Union Government, provided the cause of action arises within the State concerned. The power of the High Court's cannot be suspended during emergency as in the case of Article 32. Article 32 itself being a fundamental right, the remedy cannot be curtailed by any procedural provisions. In *A. K. Goplan v. State of Madras*[117] , Section 14 of the Preventive Detention Act, 1950, preventing the detent from disclosing to the Court, the grounds of detention was held violative of Article 32 and struck down as unconstitutional.

The rule of res judicata based upon public policy also operates in the sphere of judicial review. If a question has been once decided by the Supreme Court under Article 32, the same question cannot be reopened again under Article 226. *Jagannath Baksh Singh v. State of U.P.*[118]. In *Daryao v. State of U.P.*[119], it was held that where the matter had been 'heard' and 'decided' by the High Court under Article 226, the writ under Article 32 is barred by the rule of res judicata and could not be entertained. But there is an important exception to this rule of

[117] AIR 1950 SC 27
[118] AIR 1962 SC 1563
AIR 1961 SC 1457

res judicata. In *Gulam Sarvar v. Union of India*[120], the court held that the rule of res judicata is not applicable in the writ from the High Court; he may file a petition for the same writ under Article 32.

3.6.1 Procedure Established by Law- Restraint on Judicial Power

The doctrine of judicial review though not specifically mentioned even in the constitution of the U.S.A., came to influence the Indian constitutionalism in a big way. It is regarded as the outstanding American contribution to the world polity.[121] In fact, the 'due process' clause of the 5th and later of the 14th Amendment of the U.S. constitution bears the seeds of the doctrine of judicial review, which has, therefore, been mainly regarded as a judicial surveillance of the legislatures.[122] As is well known, even in the U.S.A., its application has not been free from practical and even theoretical difficulties. This fact deterred the framers of the Indian Constitution from incorporating it in the Indian statute book. It was, therefore, subjected to very keen discussion and faced tough resistance at practically every stage of its journey to the Draft Constitution in the Constituent Assembly. Shri B.N. Rau and Shri A.K. Ayyar had pointed out that the 'due process' clause has spawned a great deal of litigation in the United States; it had led to a great deal of uncertainty regarding the standards of constitutional behavior and would, if adopted in India, pose a threat to the validity of social welfare legislations.[123] Consequently, the supporters of 'due process' clause were made to content with its diluted version in the form of 'according to the procedure established by law' in Article 21 of the Indian Constitution.

The 5th Amendment (1791) of the U.S. Constitution says: "No person shall be deprived of life, liberty or property without due process of law". This momentous phrase has nearly for two centuries shaped the constitutional history of the U.S.A. and shown a remarkable capacity for adoption.[124] De facto, the 'due process' clause in the American jurisprudence has proved a handmaid of the

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[120] AIR 1967 SC 1335

□Ā□Ā□ Prof. Tripathi, *supra n.65* , p. 59.

□Ā□Ā□ .A.G. Noorani, 'The Enduring Guarantec' in the Span, Feb., 1983.

□Ā□Ā□ B. Siva Rao, 'The Framing of India's Constitution-A study', Indian Institute of Public Adminstration, N.M.Tripathi Pvt. Ltd., Bombay, p. 232-235.

□Ā□Ā□ A.G. Noorani, *supra n. 122*.

American judiciary and its fight against the powerful executive there and inter alia this is the clause which gave the power of judicial review to the American judges.

Picked up from here, the American constitution markers, realizing the value of life and personal liberty, included it in the first instance, in the Bill of Rights as the Fifth Amendment. Since this amendment was only available against the federal government, it was later adopted mutatis mutandis as the 14th Amendment in 1868 so as to make it applicable against the States also. Built up against the background of a catena of compendious case law,[125] and supported by genuinely activist judges' like Cardozo, Brandeis, Holmes, "this varitable revolution in due process…enabled the Supreme Court of the United States to test legislation – federal or State-on the touchstone of reasonableness and strike down unreasonable restrictions upon property rights and civil liberties".[126]

History of the 'due process' clause under the Indian Constitution can be traced to the debates of the Consumable, when the group led by Dr. Ambedkar wanted to introduce this doctrine in the Indian polity, but another group led by Dr. Alladi Krishnaswamy Ayyar pointed out the fallacy of following blindly the American constitutionalism, which because of its indefinite import and uncertain meaning, had by then given rise to serious conflicts between the judiciary and the executive. The Indian Consumable, therefore, after a heated discussion, remained content with its diffused form as contained in Article 21 modeled on the pattern of the Article 31 of the Japanese Constitution. To assuage further the feelings of the favorites of 'due process' clause, the framers introduced Articles 20 and 22 to accommodate the conundrums of the said American doctrine.

However, before finalizing Article 21, two important variations were made in it. The first is the prefix 'personal' added to the word 'liberty', which was intentionally done to circumscribe the scope of 'liberty', which in American jurisprudence means anything and everything necessary for the 'pursuit of happiness', but in the Indian Constitution Article 19 was already framed to take

[125] *Barron vs. Baltimore*, (1833) 7 Pet 243; *Slaughter House Cases*, (1873) 16 Wal 36*; Smyth vs. Ames*, (1898) 169 US 466.
G.V. Subba Rao et al, *'Revolution in due process',* AIR 1980 (Journ). 44.

care of the offshoots of liberty. The other vital variation is the absence of the word 'due' in the Article, which word is the very life and soul of the American doctrine.

Article 21 has a very chequered history under the Indian constitutional law. *Goplan v State of Madras*[127] is the first case, wherein the 'due process' clause was pressed into service, where only Justice Fazal Ali, in a minority judgment, tried to read this doctrine in Article 21. But the majority led by Kania C.J., held that 'law' in Article 21 is 'lex' and not 'jus' and pleaded that the absence of the word 'due' in Article 21 precluded the court to go into the reasonableness of the law enacted by a competent legislature. Not only that, Article 19 was excluded for application to cases under Articles 21 and 22. In *K.K. Kochuni*[128] a feeble attempt was made by Justice K. Subba Rao to agree with the views of Fazal Ali J., in Gopalon. And yet another bold attempt to recognize the 'due process' clause was again frustrated in the case of *Municipal Committee, Amritsar v. State of Punjab*[129], wherein Justice Shah reiterated Gopalan and observed as follows:

> "*The courts in India have no authority to declare a statute invalid on the ground that it violates the due process clause of law. Under our constitution the test of due process of law cannot be applied to the statutes enacted by the Parliament or the State legislatures*".

But in the *Bank Nationalization*[130] case Justice Shah of the Supreme Court realised from his position taken earlier in the foresaid case and the rule of exclusion of Article 19 with regard to the cases under Articles 21 and 31 was rejected. It was emphasized that while considering the reasonableness of the restrictions imposed by law, it is the view of the Supreme Court that is conclusive and not the will of the legislature. So ultimately Article 19, coupled with Article 14, was virtually regarded as the 'due process' clause of the Indian Constitution which supplemented and supported the procedure in Article 21. Thus virtually after every decade or so the due process clause kept on knocking at the doors of the Indian Supreme Court. But ultimately it was left to *Maneka*

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[127] *Supra n.117.*

[128] AIR 1960 SC 1080
AIR 1969 SC 1100

[130] *R.C. Cooper v. Union of India,* (1970) SCR 530

Gandhi v Union of India[131]to herald the era of 'due process' jurisprudence in the Indian constitutionalism and this doctrine descended on the Indian scene with such a bang that it almost revolutionized the whole set-up relating to Articles 14, 19, 21 and 22.

Starting from *Maneka Gandhi*[132] and *Nandini Satpathi,*[133] representing the 'social and political elites' of Indian society, down to *Moti Ram*[134] -the poor rural mason, and *Hussainara,*[135] the illiterate under-trial, the Indian Supreme Court fired with the unprecedented zeal of social justice, which to some extent, has so far been based on only economic standards, handed down judgments which have rejoiced one and all. While Maneka Gandhi has enlarged the right to personal liberty and enriched the procedure, releasing it from Gopalan, Nandini Satpathi proved that the 'constitutional silence' against self-incrimination envisaged in Article 20(3) and the 'statutory silence' provided in Section 161(3) of the Criminal Procedure Code is available even to a suspect held in custody under the omnipotent Indian police, even before he is branded as an accused. It is being seriously felt in some quarters that the clear and unambiguous result as evolved from the police jurisprudence under the Indian conditions of poverty and illiteracy is that contrary to the universal legal promise that 'everybody is innocent till proved otherwise', the Indian police allegedly seems to proceed with the presumption that everybody is guilty, till proved otherwise. Extending Article 21 to *Sunil Batra*[136] the Supreme Court held that even a life convict does not lose all his fundamental rights. In fact Sunil Batra is a logical corollary of *Bhanudas*[137] and *shambhunath sarkar,*[138] where in the former case Desai J., observed that conviction does not degrade a person into a non-person. Thus even persons convicted and condemned to death have the liberty to be within the sights and sounds of other inmates of the jail-the normal rules and regulations of the prisons notwithstanding. Justice Iyer, when extending the doctrine of due process through Article 21, he observed:

AIR 1978 SC 597

[132]*Ibid.*

[133]*Nandini Sathpathi v. P.L. Dani,* AIR 1978 SC 1026

[134]*Moti Ram v. State of M.P.,* AIR 1978 SC 1594

[135]*Hussainara Khatoon v. State of Bihar,* AIR 1980 SC 470

[136]*Sunil Batra v. Delhi Administration,* (1978) 4 SCC 494

[137]*Union of India v. Bhanudas,* AIR 1977 SC 1027

[138]*Shambhunath Sarkar v. State ofWest Bengal,* AIR 1973 SC 1425

> *"Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and worth of human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence.*"[139]

The crusade led by Iyer and Bhagwati JJ., of reading 'due process in Article 21 of the Indian Constitution continues to be unabated. In a spirited act of judicial activism the Indian Supreme Court in a recent case of *Mithu v State of Punjab*[140] declared Section 303 of the Indian Penal Code as unconstitutional because it prescribes a mandatory death penalty without providing for a fair opportunity of hearing to the offender and a reasonable and just procedure. Attacking the pre-determined sentence ordained and the lack of due procedure in Section 302 IPC. The court said:

> *"The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of conscience are the hallmarks of justice. The mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to circumstances which led to the commission of the crime, is a relic of ancient history".*[141]

Similar powerful pronouncements of the Supreme Court in the recent pass have amply demonstrated that by extending the concomitants and contours of Article 21, the highest tribunal of India has shown immense judicial creativity in energizing the dormant 'due process' jurisprudence in the Indian Constitution.

In *Sunil Batra v. Delhi Administration,*[142] Justice Krishna Iyer said that though our constitution did not have a 'due process' clause as in the American Constitution, the same consequence ensued after the decisions in the *Bank*

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[139] *Ibid.*

AIR 1983 SC 473

[141] *Ibid.*

Supra n.136.

Nationalization case[143] and *Maneka Gandhi case*[144]. In *Sunil Batra*[145] Desai J., also observed as follows:-

> *"The word 'law' in the expression 'procedure established by law' in Article 21 has been interpreted to mean in Maneka Gandhi case that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary it would be violative of Article 14…"*[146]

A little earlier in *Bachan Singh v State of Punjab*[147] upholding the constitutional validity of death penalty, Justice Sarkaria, speaking for the majority echoed the same views with greater force and pointed out that if Article 21 is understood in accordance with the interpretation put upon it in *Maneka Gandhi's case*[148], it will read to say that:

> "*No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law*."[149]

Looking to the catena of cases since Maneka Gandhi the Supreme Court became very forthright in the interpretation of Article 21, which led Chandrachud C.J., speaking for the majority, in *Mithu v State of Punjab*[150] to say as follows about the relation of the legislative vis-s-vis judiciary with regard to the procedure:

> "*These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it; that is for the legislature to provide the punishment and for the punishment and for the courts to impose it*". [151]

Supra n.130.
Supra n.131.
[145]*Id*.n.142.
Ibid.
AIR 1980 SC 898
[148]*Id*.n.144.
Id n.147.
[150]*Supra* n.140.
[151]*Ibid.*

The Chief Justice further clarified and said that just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the court to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable.

The Indian judiciary is clear and the day does not seem to be far away when the 'law' in Article 21 will also be treated as 'reasonable law', through the self-same lately growing 'due process' jurisprudence.

3.7. Power to Review the Ninth Schedule of the Constitution

The Ninth Schedule was included in the Indian Constitution by the Constitution (First Amendment) Act, 1951, along with Article 31B. It provides that none of the Acts and Regulations included in the Ninth Schedule to the Constitution shall be deemed to be void on the ground that they are inconsistent with any of the rights conferred by Part III of the Constitution. In effect, the sole purpose of the Ninth Schedule read with Article 31B is to save the Acts passed by the legislature from the power of judicial review of the courts. Recently, on 11-1-2007 in *I.R.Coelho (Dead) by LRs v. State of Tamil Nadu*[152], the Nine-Judge bench headed by Justice Y.K. Sabharwal, C.J.I., after a reference being made to it by a five-judge bench has unanimously pronounced upon the constitutional validity of the Ninth-Schedule laws that, in the post-1973 they are open to attack for causing the infraction which affects the basic structure of the Constitution. Such laws will not get the protection of the Ninth Schedule for escaping the judicial scrutiny and are open to challenge in the courts of law. It is an unanimous judgment of the nine judge bench of the Supreme Court of India, wherein the court is confronted with a very important yet not very easy task of determining the nature and character of the protection provided by Article 31B of the made after 24th April 1973, the date on which the judgment was pronounced in the famous *Kesavananda Bharti's case*[153]propounding the doctrine of Basic structure of the Constitution to test the validity of constitutional amendments. The judgment in this case put an end to the politico-legal controversy by holding the Parliament's amending power subject to judicial Review in line with Kesavananda Bharti's

[152]*Supra* n.95.

[153]*Supra* n.1.

decision that the violation of Doctrine of Basic Structure will never be tolerated. The judgment upholds the right of the judicial review and the supremacy of judiciary in interpreting laws[154].

Ever since the First Amendment, the Ninth Schedule has been relied upon to amend the constitution multiple times over. The 4th amendment inserted six acts to the 9th schedule. The 17th amendment added 44 more acts. The 29th amendment brought in two acts from Kerala. In 1975 Indira Gandhi's infamous abuse of executive power leading up to emergency saw the 39th amendment adding certain central enactments.

Originally, sixty-four laws were added to the Ninth Schedule. It was again amended by the 4the and 17 Constitution, (Amendment) Acts 1955 and 1964 respectively by which certain more Acts added to the Ninth Schedule. The Constitution (29th Amendment) Act, 1972, added Kerala Land Reforms Acts, 1969 and the Kerala Land Reforms Act, 1971, to the Ninth Schedule. The validity of this amendment was upheld by the Supreme Court in *Kesavananda Bharati*[155].

The fundamental question discussed by the Supreme Court in *I.R.Coelho*[156] is whether on and after 24th April, 1973 when basic structure doctrine was propounded, it is permissible for parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and if so, what is its effect on the power of judicial review of the Court? The order of reference was made by a Constitution Bench of Five Judges is reported in *I.R. Cohelo (Dead) by LRs v. State of Tamil Nadu*[157]. The Gudalur Janman Estates (Abolition and Conversion into Ryotwari), Act, 1969 (the Janman Act), in so far as it vested forest lands in the Janman estates in the State of Tamil Nadu because this was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution. Section 2 of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgment by the State of West Bengal was dismissed. By the

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[154]*Supra* n.152.

Kesavananda Bharati v. State of Kerala, Supra n.1. [156]*I. R. Cohelo (Dead) LRs v. State of T. N.,*Supra n.95. [157]*Supra* n.95.

Constitution (Thirty-Fourth Amendment) Act, the Janman Act, in its entirety was inserted in the ninth Schedule. These insertions were the subject matter of challenge before a Five Judges Bench. It rests on two counts (1) judicial review is a basic feature of the Constitution; to insert in the Ninth Schedule an Act which, or part of which, has been struck down as unconstitutional in exercise of the power of judicial review, is to destroy or damage the basic structure of the Constitution. (2) To insert in the Ninth Schedule after 24.4.1973, an Act which, or part of which, has been struck down as being violative of the fundamental rights conferred by Part III of the Constitution is to destroy or damage its basic structure. These insertions were the subject matter of challenge before a Five Judge Bench. The contention urged before the Constitution Bench was that the statutes, inclusive of the portions thereof which had been struck down, could not have been validly inserted in the Ninth Schedule. The five-judge Constitution Bench observed that, according to *Waman Rao v. Union of India*[158] amendments to the Constitution made on or after 24the April, 1973 by which the Ninth Schedule was amended from time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the Constituent Power of Parliament since they damage the basic or essential features of the Constitution or its basic structure.

The decision in *Minerva Mills*[159] and *Maharao Sahib Shri Bhim Singhji*[160] were also noted and it was observed that the judgment in *Waman Rao*[161] needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which or a part of which, is or has been found by Supreme Court to be violative of one or more of the fundamental rights conferred by Articles 14, 19, and 21 can be included in the Ninth Schedule or whether it is only constitutional amendment amending the Ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of

[158](1981) 2 SCC 362
[159]*Supra* n. 48.
[160]AIR 1985 SC 1650
[161]*Supra* n. 159.

nine judges. This is how the matters have been placed before Supreme Court's nine judge bench.

The main thrust of the argument of the petitioners is that post-1973, it is impermissible ot immunize Ninth Schedule laws from judicial review by making Part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Article 368, is the thrust of the contention. The contention proceeds that since fundamental rights form a part of basic structure and thus laws inserted into Ninth Schedule when tested on the ground of basic structures shall have to be examined on the fundamental rights test.[162]

The key question however is whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights. According to the petitioners, the consequence of the evolution of the principles of basic structure is that, Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Article 31B. Assuming that such immunity can be conferred, its constitutional validity would have to be adjudged by applying the direct impact and effect test which means the form of an amendment is not relevant, its consequence would be determinative factor.[163]

On the other hand, the contention urged on behalf of the respondents is that the validity of Ninth Schedule legislations can only be tested on the touch-stone of basic structure doctrine as decided by majority in *Kesavananda Bharti's case*[164]which also upheld the Constitution 29th Amendment unconditionally and thus there can be no question of judicial review of such legislations on the ground of violation of fundamental rights chapter. The protective umbrella provided by Article 31B, and, therefore, the challenge can only be based on the ground of basic structure doctrine[165]. Legislation of other constitutional provisions. This would also show, that there is no exclusion of judicial review and consequently, there is no violation of the basic structure doctrine. The contention is that there is no judicial review in absolute terms and Article 31B only restricts that judicial

[162]*I. R. Cohelo (Dead) LRs v. State of T. N,* Supra n. 95 at 877.
[163]*Ibid.*
[164]*Supra* n.1.
[165]*Ibid.*

review power. It is contended that after the doctrine of basic structure which came to be established in *Kesavananda Bharti's case*[166], it is only that kind of judicial review whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. Giving immunity of Part

to the Ninth Schedule laws from judicial review does not abrogate judicial review from the Constitution. Judicial review remains with the court but with its exclusion over Ninth Schedule laws to which Part III ceases to apply. The contention is that the majority in *Kesavananda Bharti's case*[167] held that there is no embargo with regard to amending any of the fundamental rights in Part III subject to basic structure theory and therefore the petitioners are not right in the contention that in the said case the majority held that the fundamental rights form part of the basic structure and cannot be amended. The further contention is that if Fundamental Rights can be amended, which is the effect of *Kesvananda Bharti's case*[168] overruling *Golak Nath's case*[169], then fundamentals rights cannot be said to be the part of the basic structure, unless the nature of the amendment is such which destroys the nature and character of the Constitution. It is contended that the test for judicially reviewing the Ninth Schedule laws cannot be on the basis of mere infringement of the rights guaranteed under Part III of the Constitution. The correct test is whether such laws damage or destroy that part of fundamental rights which form part of the basic structure. Thus, it is contended that judicial review of Ninth Schedule laws is not completely barred. The only area where such laws get immunity is from the infraction of rights guaranteed under Part III of the Constitution.

To answer this question the court first examined the judgement in *Keavananda Bharati*[170], particularly with reference to 29th Amendment. Khanna, J. was of the view that 29th Amendment Act did not suffer from any infirmity and as such was valid. Thus, while upholding the 29th Amendment Act, there was no mention of the test that is to be applied to the legislations inserted in the Ninth Schedule. The implications that the respondents seek to draw from the above was that this amounts to an unconditional upholding of the legislations in the Ninth Schedule.

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166 *Supra n.1.*

167 *Id.*

Id.

169 *Supra n.21.*

170 *Supra n.1.*

However, Khanna, J. in Indira Gandhi made it clear that he never opined Kesavananda Bharati that the fundamental rights were outside the purview of the basic structure According to him, what has been laid down in that judgment is that no article of the Constitution is immune in from amend mentory process because of the fact that it relates to a fundamental right and is contained in the Part III of the Constitution. Thus, after this clarification, it is not possible to read the decision of Khanna, J. in *Kesavananda Bharati*[171] so as to exclude fundamental rights from the purview of the basic structure, the inevitable consequence is that the 29th Amendment even if treated as unconditionally valid is of no consequence on the point in issue before the court. The problem was solved in Minerva Mills by the Supreme Court by holding that Acts inserted in the Ninth Schedule were not unconditionally valid but would have to stand the test of fundamental rights.

The court in *I.R. Coelho*[172], after discussing the above cases, was of the opinion that rights and freedom created by the fundamental rights chapter could be taken away or destroyed by amendment of relevant article, but subject to limitation of basic structure doctrine. It may reduce the efficacy of Article 31B but that is inevitable in view of the progress the laws have made post-Kesavananda Bharati, which has limited the power of Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure. Part III is amendable subject to basic structure doctrine. It is permissible for the legislature to, amend the Ninth Schedule and grant a law the protection in terms of Article 31B but subject to the right of citizen to assail it on the concept of enlarged judicial review. The legislature cannot grant fictional immunities and exclude the examination of Ninth Schedule law by the Court after the enunciation of the basic structure doctrine. The constitutional amendments are subject to limitations and if the question of limitations is to be decided by Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitation cannot vest in one organ. The validity to the limitation on the rights in Part III

[171] *Id.*

[172] *Supra n.95.*

can only be examined by another independent organ, namely, the judiciary. The doctrine of basic structure as a principle has now become an axiom. The power to amend the Constitution is subject to the aforesaid axiom[173].

After the judgment of Supreme Court in this case it is now well settled principle that any law placed under Ninth Schedule after April 24, 1973, are subject to scrutiny of Court's if they violated fundamental rights and thus put the check on the misuse of the provision of the Ninth Schedule by the legislative.

3.8. A Sum up

A legal view of national constitutions is that of a supreme law of the land, a fundamental normative fountain from which all the other secondary norms such as statutory laws, executive orders, and ordinances are derived. When these secondary norms fail to conform to the constitution, various judicial bodies (courts or special constitutional tribunals) are urged to declare the impugned laws as unconstitutional. The term of judicial or constitutional review applies to this procedure only[174]. Thus, Judicial Review basically is an aspect of judicial power of the state which is exercised by the courts to determine the validity of a rule of law or an action of any agency of the state. In the legal systems of modern democracies it has very wide connotations. The judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and also they try to provide every citizen what has been promised by Constitution. All this is possible because of the power of judicial review.

India is fortunate enough to have a constitution in which the fundamental rights are enshrined and which has appointed an independent judiciary as guardian of the constitution and protector of the citizen's liberties against the forces of authoritarianism. In a true form of democracy, the rule of a fearless independent and impartial judiciary is indispensable and cannot be over-emphasized. Judicial review of legislation is a result of two of the most fundamental features of Indian constitution. The first is the two-tier system of law with the constitution as the Supreme law and other legislation being the ordinary law which is valid only in

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[173]*Id.*

[174]The Blackwell Encyclopedia of Political Institutions, 1987, p. 142.

so far as is consistent with the constitution. The Second is the separation of the legislative, the executive and the judicial powers.

In India, we follow a separation of functions and not of Separation of powers. And hence, we don't abide by the principle in its rigidity. Though in India strict separation of powers like in American sense is not followed but, the principle of 'checks and balances', exists as a part of this doctrine. Therefore, none of the three organs can usurp the essential functions of the organs, which constitute a part of the 'basic structure' doctrine so much so that, not even by amending the Constitution and if any such amendment is made, the court will strike it down as unconstitutional.

Further pointing out the relevance of the power of the judiciary to pronounce upon the validity of laws. The Apex Court in *Minerva Mills v. Union of India*[175] held that "our Constitution is founded on a nice balance of power amongst the three organs of the State namely the Executive the Legislature and the Judiciary. It is the function of the Judges to pronounce on the validity of laws, if the Courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies is a writ in water. A controlled Constitution will become uncontrolled."

The judicial review power does is no way makes the Supreme Court supreme as against Parliament. This power is an essential feature of our federal system. It is the duty of the Court to uphold the Constitution, and to owe "true faith and allegiance to the Constitution". It is undertaken not out of any desire to tilt at legislative authority in a crusader's spirit, but in a discharge of the duty plainly laid upon the Court by the Constitution. Judicial Review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive.

The concept of popular sovereignty and federalism go together. In both the phases of the constitutional philosophy, legislative idealism has no place and the legislature has to face judicial scrutiny. This is why the doctrine of judicial review has occupied such a predominant position in democratic federal states like India and America. The impact of the concept of popular sovereignty is apparent

[175] *Supra n.48.*

and the governance of such countries cannot be worked out with balance in the absence of judicial review.

The doctrine of sovereignty of Parliament is associated with the British Parliament while the principle of judicial supremacy with that of the American Supreme Court. Just as the Indian parliamentary system differs from the British system, the scope of judicial review power of the Supreme Court in India is narrower than that of what exists in US. This is because the American Constitution provides for 'due process of law' against that of 'procedure established by law' contained in the Indian Constitution (Article 21). Therefore, the framers of the Indian Constitution have preferred a proper synthesis between the British principle of parliamentary sovereignty and the American principle of judicial supremacy. The Supreme Court, on the one hand, can declare the parliamentary laws as unconstitutional through its power of judicial review.

The Parliament, on the other hand, can amend the major portion of the Constitution through its constituent power. The amending power of the Parliament under the Indian Constitution is the main area which has lead to most serious disagreements between the Parliament and Judiciary, the conflict involving Parliamentary Supremacy on one hand and the Judicial review of the scope and extent of the power and the manner in which such power is to be exercised on the other.

Often lack of political will becomes the reasons for repealing even a successful legislation. Repealing of legislation or enacting a new law merely to render ineffective a judgment of the Court can be very dangerous/harmful for the democratic set up of our country. If the higher Courts point out a defect in an existing legislation. It is proper for the legislature to cure such defects. However, the practice of repealing a legislation merely for the purpose of pleasing any particular class of persons. Is neither going to serve any good our legal system or to the society.

The issue of parliamentary versus judicial supremacy has been a subject of heated scholarly debate over the last few years. It has exercised the minds of legislators, jurists, politicians and non-professionals as well through-out the world. The supporters of absolute independence of judiciary argue that in the

absence of an impartial, independent and sovereign judiciary, democracy cannot succeed. In contrast to this view, supporters of parliamentary supremacy pursue the concept that judicial supremacy which is expressed in the form of judicial review, is incompatible with a democratic government because the importance of majority rule lags behind by the few unelected judges who are not directly accountable to people.

What is crucial to note here is that it has turned into a competition between the legislature and the Judiciary as to which of the two is supreme. While this seemingly never ending tussle is in continuance, it is the individuals, the citizens of this very nation for whom these two separate organs have been instituted who are getting side lined. The people of this country are living in the shadows of ambiguity and uncertainty because at the end of the day, it's the people who are forced to bear the brunt of the clash.

The evolution of the Doctrine of Basic Structure in *Kesavananda Bharati v. State of Kerala* proved to be pivotal point. This Doctrine is of prime importance as it prevents the Parliament from having unconditional and unrestrained power. A certainty that has manifested out of this tussle between Parliament and the judiciary is that all laws and constitutional amendments are subject to judicial review and the laws that transgress the basic structure are prone to best ruck down by the Supreme Court. The *Coelho* case held that laws and constitutional amendments that altered the basic structure of the constitution, by violating fundamental rights, could be invalidated. This decision of apex court in *Coelho* can be viewed as a victory for fundamental rights.

Thus, it is imperative for the Parliament and the Judiciary to work in harmonious construction and not be at each other's throat and only then will the citizens be able to recognize their rights and these two institutions would be able to reflect and serve justice in its essence.