CHAPTER – II

JUDICIAL REVIEW IN INDIA

1. CREATION OF FEDERAL COURT IN INDIA

The creation of the Federal Court of India by the Constitution Act 1935 was a landmark in the judicial and legal history of British India. The evolution of the courts in India under the British rule and the progressive application of the British common law to India by enactment of laws, have left their indelible mark on legal history of India during last 200 years. But the creation of the Federal Court was the most outstanding contribution of the British on the eve of their leaving this country on India attaining Independence.¹

The Constitution Act of 1935 envisaged a federal form of government, with clearly defined spheres of legislation as between the federating units and the Centre. It was necessary to create an All India Court to adjudicate upon in the conflicting claims of those units in the matter of legislation and to interpret the Constitution with particular reference to the three lists, which sought to demarcate the Central from the Provincial ambit of legislative jurisdiction.² In fact of all the federal agencies envisaged under the Government of India Act, 1935 the federal court was the only one that held its abiding influence in the Indian Constitution

The Judiciary in Federal System

The essential feature of federation is the division of powers between the national government and the State governments but it is certain that in any

¹ Pylee, M.V.. Federal Court of India, Vikas Publication House Delhi 1996, p. IX.
² Ibid. p. ix.
federation there will be dispute about the terms of the division of powers. In a federal Constitution there is division of power between the Centre and the State and there is every possibility of dispute between the Centre and State government so in all such cases there must be a proper agency to settle all these disputes and define the exact sphere of each Government (State) and its respective authority. It is the federal judiciary, more than any other organ of the government that interprets the constitutional document. The judiciary in a federation is therefore, an unavoidable institution to interpret the Constitution and thereby to resolve the dispute that arises between the States.

The doctrine of Separation of Powers which is a dominant features of the American Constitution, had helped the Supreme Court a great deal in this connection. In Canada, Australia and India the existence of a parliamentary government, which ensures the responsibility of the executive to the legislature, minimizes the possibilities of conflict between the various agencies of the government. However, the position of the federal judiciary in these countries is more or less the same and is similar, to a great extent, to that in the United States regarding constitutional interpretation.

The position in Canada, Australia and India is much different from that of the United States or Switzerland. In these federations the judges of the federal judiciary are appointed by the federal executive as in the U.S. but there is no necessity of an approval by the federal legislature like the power exercised by American Senate. In fact, in these countries there is no chance of a friction between the federal executive and the legislature on this matter, as they

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3 Ibid. pp. 11-12.
4 Ibid. p. 21.
have a parliamentary system of government which ensures harmony between the executive and the legislature.\(^5\)

Thus it is obvious that in most federations the judiciary becomes the pivot on which the constitutional arrangements of the country turns. Its proper appreciation of this pre-eminent position that Dicey has asserted that “federalism means legalism – the predominance of the judiciary in the Constitution, the prevalence of a spirit of legality among the people.”\(^6\)

The judiciary stands on a level with the executive and the legislature therefore, the courts can and must determine the limits of authorities, both of the executive and of the legislatures. Dicey said that the judges are not only guardians of the Constitution but also the master of the Constitution.

**The Evolution of the Federal Court in India**

The judicial system that prevailed in India until the inauguration of Federal Court had no federal characteristic. Infact, the British East India company in its early days, had very little to do in the field of administration of justice, as its activities were of a purely commercial character. The company was confined to its officers and men regarding the maintenance of discipline for which the charter of 1600 had empowered the company. But with the increase in the number and importance of the Company’s settlements in the East, need was felt for the exercise of regular judicial powers over the Company’s servant on land. The Court was empowered to exercise civil, criminal, ecclesiastical, admiralty and equity jurisdictions over the inhabitants

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\(^5\) Ibid. p. 24.
\(^6\) Ibid. pp. 26-27.
of Calcutta and over the British subjects in the provinces of Bengal, Bihar and Orissa. The Mayor’s Courts were replaced by the Recorder’s Courts in 1787.\textsuperscript{7}

The peculiarity of the Indian judicial system at this time was the coexistence of two system of Courts, namely the Supreme Court in the Presidency Town and Sadar Court in the province. Even before the Round Table Conferences, constitutionalists gave expression on the formation of a federal court as an integral part of the federation. The main problem that faced them was the power and function of federal judiciary. There were several pattern to be viewed and considered but American pattern was copied with some modification.\textsuperscript{8}

American system established an independent judiciary, supreme in its decisions regarding constitutional matters. The American Constitution prohibits the legislative absolutism of a majority which might become the master of the Constitution, the judge of its meaning and application. Condition prevailing in India were such that it adopted some modified form of the American pattern to suit Indian needs. There were three important problems which faced the Indian constitutionalist: \textsuperscript{9}

The protection of rights of minorities was an immensely important problem. If the legislature was allowed to be the judge of its own Acts, it would nullify the guarantees to the various groups whose power would be negligible in the legislatures. The practice of a parliamentary government which would be led by a Cabinet dominated by one section was likely to hold the others at its mercy.

\begin{flushleft}
\textsuperscript{7} Ibid. pp. 64-65.  \\
\textsuperscript{8} Ibid., pp. 65-68.  \\
\textsuperscript{9} Ibid. p. 69.
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The unquestioned supremacy of the federal legislature, with a federal executive at its behest, might at any time create a serious encroachment on provincial autonomy. This might spoil not only self government, but also good governance.

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

The minorities also wanted a federal court with independence to safeguard the rights guaranteed to them by the Constitution. India with its vast area, enormous population, diversity of languages, religion, races and culture should have a constitutional machinery which would safeguard these interest. Therefore, it was only a primary requisite to ensure that body entrusted with the task of interpreting and guarding the Constitution and determining the disputes between the various units of the federation should be impartial and independent of the Federation the Provinces and federated States.\(^\text{10}\)

The idea of formation of a federal judicature in India and England took concrete shape during the deliberation of the Second Round Table Conference. The members were unanimous in their opinion that the federal court should be an indispensable link in the federal chain. The subject of was further thoroughly discussed by the federal structure committee of the Second Round

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\(^{10}\) Ibid. p. 71.
Table conference, and they came to an arrangement that the federal courts jurisdiction must be both original and appellate.

The British Parliament enacted on 2 August 1935 that ‘there shall be a Federal Court for India consisting of a Chief Justice of India and such number of other judges as His Majesty may deem necessary’. In pursuance of this enactment, the Federal Court was duly inaugurated on October 1937.\textsuperscript{11} The first sitting of the Federal Court makes an epoch in the history of India. The establishment of the Court will introduce a new element in the jurisprudence of one of the oldest and greatest civilizations of the world. In the exercise of both its original and appellate jurisdiction the Court will have the responsibility and opportunity of displaying in an eminent degree, those qualities of judicial capacity, fairness and dignity. Thus the end of the year 1937 marked the emergence of an all India-judicature and this is a hall-mark in India constitutional history because of the valuable role that has been played by the Federal Court in the field of constitutional advancement in India.\textsuperscript{12}

\textbf{Structure of the Court}

The Constitution Act had prescribed the maximum number of judges to be seven, including the Chief Justice. Section 204(2) makes it clear that the minimum should be three because it prohibits any case being decided by less than 3 judges. In 1937, when the Court came into existence for the first time, it consisted of only 3 judges, even though the strength of the Court was increased to six in the course of a decade. Infact the working of the Court and the number

\begin{itemize}
\item \textsuperscript{11} Ibid., p. 78.
\item \textsuperscript{12} Ibid., p. 79.
\end{itemize}
of cases that came before it during the first five years of its life fully justified the number which first constituted the Court.\textsuperscript{13}

**The Supreme Court of India : A Worthy Successor**

The most distinctive character of the Federal Court was that it was the first all India judicature established in the country. It is true that its jurisdiction embraced only the British Indian Provinces, and not the Indian States which numbered more than five hundred. Nevertheless, the Federal Court, for the first time, gave the vision of truly all India Supreme Court of the future. The federal scheme of the Government of India Act of 1935 was indeed the fore runner of the federal system of an independent India. It is a fact that the Constitution of the Republic of India owes to that Act more than any other constitutional document. The Supreme Court is a substantially different institution when compared to the Federal Court. Under Art. 32 of the Constitution the Supreme Court is made the protector of all the Fundamental Rights embodied in the Constitution. And the Court has to guard these rights against every infringement at the hands of either the Union Government or the State Government by declaring the significance and operation of these rights from time to time. It protects the citizens from unconstitutional laws passed by the legislatures and arbitrary acts done by the administrative executive authorities.\textsuperscript{14}

The Supreme Court is also an all India supreme appellate court having both criminal and civil jurisdiction. The Constitution invests the Court with extensive powers of reviewing the decisions of the Courts below it in criminal

\textsuperscript{13} Ibid. p. 83.
\textsuperscript{14} Ibid. p. 328
and civil cases. In the process, it gets an opportunity to construe not only the Constitution and the laws enacted by Parliament, but also the laws passed by the various State Legislatures.\(^{15}\)

Further, the Supreme Court of India plays a unique role by giving its advice, from time to time, to the President of India on questions of law or fact which are of such a nature and of such public importance that President refers to them to the Court for its consideration and opinion.

**An Independent Court (Art. 124)**

The Supreme Court at present consist of the Chief Justice and twenty five other judges. In 1950, when the Court was inaugurated with the new Constitution, it had only eight judges.

In any country, the judiciary plays the important role of interpreting and applying the law and adjudicating upon controversies between one citizen and the State. In a country with a written Constitution, courts have the additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and keeping all authorities within the constitutional framework. In a federation, the judiciary has another meaningful assignment, namely, to decide controversies between the constituent States *inter se*, as well as between the Centre and the State.\(^{16}\) Therefore in order to maintain the supremacy of the Constitution, there must be an independent and impartial authority to decide disputes between the Centre and States.

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16 Jain, M.P., *Constitutional law of India*, Wadhawa and Company Law Publisher, Nagpur, 1993, p. 120.
Art. 124 Provides that there shall be a Supreme Court of India.

In India, the judiciary has the significant function of enforcing the Fundamental Rights of people granted to them by the Constitution. Justice Untwalia has compared the judiciary to “watering tower above all the big structure of the other limbs of the State from which it keeps a watch like a sentinel on the function of the other limbs of the State as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme”.

India has a unified judicial system with the Supreme Court standing at the apex and the High Courts below it. The Supreme Court thus enjoys the top most position in the judicial hierarchy of the country. It is the ultimate Court of appeal in all civil and criminal matters and the final interpreter of law of the land, and thus helps in maintaining a uniformity of law throughout the country.

**Supreme Court – The Guardian of the Constitution**

The essence of a federal Constitution is the division of powers between the central and the State government. This division is made by a written Constitution which is the supreme law of the land. There must be an independent and impartial authority to divide disputes between the Centre and the States or the States *inter se*. This function has been entrusted to the Supreme Court. It is the final interpreter and the guardian of the Constitution.

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17 Ibid., p. 120
18 Ibid. p. 120.
The Supreme Court as the guardian of Fundamental Rights

The Constitution has assigned to the Supreme Court a special role “the protector and guarantor of fundamental rights by Art. 32(1)”. Where, therefore, the infringement of a fundamental right has been established, the Supreme Court cannot refuse relief under Art. 32 on the ground.\(^{19}\)

a) That the aggrieved person may have his remedy from some other Court or under the ordinary law’ or

b) That disputed facts have to be investigated or evidence has to be taken before relief may be given to the petitioner; or

c) That the petitioner has not asked for the proper writ applicable to his case. In such a case the Supreme Court must grant him the proper writ and, if necessary modify it to suit the exigencies of the case.

d) Generally only the person effected may move the Court but the Supreme Court has held that in social or public interest, any person may move the Court. This is called expansion of the right to be heard’ it favours public interest litigation.

The Supreme Court can declare any law null and void if it violates the exercise of fundamental rights. The Court also protect these rights if they are infringed by the action of the executive. In case of violation of these rights, the affected person may directly approach the Supreme Court and the Court may issue the writs in the nature of *Habeas corpus*, *Mandamus*, *Prohibition*, *certiorari*, *Quo warranto*.

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**Habeas Corpus**: The writ of Habeas Corpus is issue by the Court to effect the release of a person who has not been detained legally. Under this writ, the Court issue order to the concerned authority or person to produce the detainee before the Court in order to let the Court known on what ground the concerned person has been detained and to set him free if there is no legal justification for imprisonment.

**Mandamus**: The writ of mandamus meaning command is addressed to a public authority to command him to do a duty which he is supposed to do but he has not performed.

**Prohibition**: The writ of prohibition is issued by the Supreme Court or High Courts against the lower Courts to prevent the latter from usurping their designated jurisdiction.

**Certiorari**: The writ of certiorari is also issued against inferior Courts by the supreme Court or the High Courts, if the lower Courts have violated their designated jurisdiction and pronounced the decision on the case.

**Quo-Warranto**: The writ of quo warranto is issued against a person occupying a public office which he is not entitled to. The purpose of the writ is to prevent the unlawful occupation of a public office by persons who are not eligible to that office.

**Jurisdictions of the Supreme Court**

Sir Alladi Krishnaswami Iyer has rightly observed “The Supreme Court in Indian Union has more power than any Supreme Court in any part of the world”[^20^]. But this was not the position in the Draft Constitution which had

envisaged only a narrower jurisdiction for the Supreme Court than it has today. Some of the prominent lawyer members of the Constituent Assembly took the lead in enlarging the jurisdiction of the Supreme Court.

The jurisdiction of the Supreme Court can be divided into three categories, (1) Original jurisdiction (2) Appellate jurisdiction (3) Advisory jurisdiction (4) Review jurisdiction.

1. Original Jurisdiction

A comparison of the Supreme Court of India and U.S.A. shows that the original jurisdiction of the American Supreme Court is wider than that of the Supreme Court of India. In addition to the settlement of disputes among the units of the federation in the United States, the American Supreme Court can try cases relating to ambassadors, consist, ministers treaties, naval forces and maritime matters.\(^21\)

In India the Supreme Court will have no original jurisdiction to decides disputes between residents of different States or those between a States and the resident of another States.\(^22\)

The original jurisdiction of the court extends to the following two types of cases:

i) Dispute relating to the Union and the States – The following disputes are covered under this jurisdiction:

a) Any dispute between the Government of India and one or more States; or

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\(^{22}\) Pylee, M.V., *op. cit*, p. 336.
b) Disputes between the Government of India and any State or States on the one side and one or more States on the other side; or

c) Disputes between two or more States.

The above jurisdiction shall not extend to a dispute arising out of any treaty, agreement, or covenant or similar document which, having been executed before the commencement of the Constitution continues in operation after such commencement. But these disputes may be referred by the President to the Supreme Court for its advisory opinion.

The first suit brought before the Supreme Court was between *West Bengal and Union of India* in 1961 to declare the unconstitutionality of the coal bearing Area Act 1957. In this case the court held that the States under the Constitution are not sovereign and that the union has authority to acquire compulsorily land belonging to State Governments.

ii) Disputes/cases Involving the Violation of Fundamental Rights:

The cases involving the violation of Fundamental Rights can be initiated either in the High Courts or the Supreme Court. Art. 32 of the Constitution gives special responsibilities to the Supreme Court for the protection of Fundamental Rights of the citizens. In case of the violation of these rights the Supreme Court can issue the writs in the nature of *Habeas Corpus, Mandamus, quo warranto, prohibition* and *certiorari*.

2. Appellate jurisdiction

Appellate jurisdiction means the right and jurisdiction of the Supreme Court to entertain appeals against the decisions of the lower courts, e.g., High Courts.

The appellate jurisdiction of the Supreme Court can be divided into four main categories:24

a) Constitutional matters,

b) Civil matters,

c) Criminal matters,

d) Special leave to appeal.

(a) Appeal in constitutional matters

Under Article 132 (1) an appeal shall lie to the Supreme Court from any judgement, decree or final order of a High Court whether in civil, criminal or other proceedings, if the High Court certifies under Art. 134A that the case involves a substantial question of law as to the interpretation of this Constitution.

Under Art. 132 (1) three conditions are necessary for the grant of certificate by the High Court:

i) the order appealed must be against a judgment, decree or final order made the High Court in civil, criminal or other proceedings,

ii) the case must involve a question of law as to the interpretation of this constitution, and

iii) the question involved in such constitutional interpretation must be a question of law.

(b) Appeal in Civil cases – Art. 133

Art 133 provides that an appeal shall lie to the Supreme Court from any judgement, decree or final order in a civil proceeding of a High Court only if the High Court certifies (under Art. 143-A).

a) That the case involve a substantial question of law of general importance; and

b) That in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(c) Appeal in Criminal Cases – Art. 134

An appeal in some criminal cases can be made to the Supreme Court against the judgement of the High Court if the High Court –

a) has reversed the order of acquittal of an accused person and sentenced him to death; or

b) has withdrawn any case from any subordinate court for trial and sentenced the accused to death; or

c) certifies that the case is fit for appeal in the Supreme Court.

(d) Appeal by Special Leave

If a case in question does not fall into the above appellate categories, the Supreme Court may, in its discretion, grant special leave to appeal from any judgement or final order in any matter/case passed by any Court or tribunal in the territory of India. But this does not apply to the judgments under a law relating to the Armed forces. The provisions relating to the special leave petition are given in Art. 136 of the Constitution.\(^{25}\)

3. Advisory Jurisdiction

According to Art. 143, the Supreme Court has advisory jurisdiction. On the matters referred to the court for legal advice, by the President. If at any time, it appears to the President that a question of law has arisen, which is of such public importance that it is necessary to obtain the advice of the Supreme Court, he may refer such question to the Court for consideration. The Supreme Court, may after due consideration; report to the President its opinion on that matter. The Supreme Court is not bound to give its legal opinion on all matters referred to it by the President also the President is not bound to abide by such legal opinion.26

In Kerala Education Bill case the court had expressed the view that the advisory opinion of the Supreme Court under Art. 143, though entitled to great respect, is not binding on Courts, because it is not a law within the meaning of Art. 141.

2. JUDICIAL REVIEW

Judicial Review is the power of the Courts to determine the constitutionality of Legislative act in a case instituted by aggrieved person. It is the power of the Court to declare a legislative Act void on the grounds of unconstitutionality. It has been defined by Smith & Zurcher, “The examination or review by the Courts, in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written Constitution or are in excess of powers granted by it.

26 Ibid. p. 295.
and if so, to declare them void and of no effect”. Edward S. Corwin also says that Judicial Review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the State governments, which in the Court’s opinion transgresses the Constitution.

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

Judicial Review has, however, a more technical significance in public law, particularly in countries having the written Constitutions, founded on the concept of ‘limited government’. Judicial Review, in the constitutional law of such countries, means that courts of law have the power of testing the validity of legislative as well as other governmental actions. Judicial Review prevails in those country which have written Constitution. It means that the Constitution is the supreme law of land and any law inconsistent therewith is void. The courts perform the role of expounding the provisions of the Constitution and exercise power of declaring any law or administrative action which may be inconsistent with the Constitution as unconstitutional and hence void. This judicial functions stems from a feeling that a system based on a written Constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is

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necessary to restrain governmental organs from exercising powers which may not be sanctioned by the Constitution.  

The system of Judicial Review prevailed in a country having a federal Constitution. A federal Constitution affects division of powers legislative, executive and in some cases judicial also between the General and Regional Governments established under it. According to the principles they are coordinate and independent of each other in the areas allotted to them by the Constitution. The two governments thus operate simultaneously upon the same people and territory. In view of the distribution of legislative powers which are strictly defined and limited in relation to the two governments, it is quite likely that the areas and limits may be mistaken or forgotten, such Constitution is invariably a written Constitution.

The distribution of legislative powers, which is the hallmark of a federal Constitution, is quite often presents an important questions as to who is to decide in case of a dispute as to whether the law made by the State legislature encroaches upon the areas assigned to the Central legislatures or vice versa. The question referred to above is not necessarily limited to strictly federal systems, but may also crop up in a constitutional set up like ours, which, according to many is not federal. For the purpose of resolving such disputes, the power is given to the Courts and they are vested with the power of Judicial Review, as to the validity of the laws made by the legislature.

31. Dr. K.C. Wheare observes: 'The Indian Constitution has established a form of government which is at the most quasi federal, almost devolutionary in character, a state with subsidiary federal features rather than a federal state with subsidiary unitary features, Allahabad Journal, p. 21.
The power of judiciary is not limited to enquiring about whether the power belongs to the particular legislature under the question it extends also as to whether the laws are made in conformity with and not in violation of other provisions of the Constitution. For example, in our constitution, if the courts find that the law made by legislature Union or State is violation of the various fundamental rights guaranteed in part III, the law shall be struck down by the courts an unconstitutional under Art. 13(2). Similarly where the courts find that the law is violation of Art. 301 which makes available to all persons the freedom of trade, commerce and inter-course throughout the territory of India, the law shall be struck down. Again where the courts find that there has been exclusive delegation of legislative power a particular case, the parent Act as well as the product, i.e. delegated legislation shall be struck down as unconstitutional.  

The Court also performs the interpretative functions and keeps into consideration that the society does not stand still; it is dynamic and not static; social and economic conditions change continually. Therefore, the courts must so interpret the Constitution that it does not fall behind the changing, contemporary societal needs. The words of the Constitution remain the same, but their significance changes from time to time through judicial interpretation.

The interpretative function of the Constitution is discharged by the Courts through direct as well as indirect Judicial Review. In direct Judicial Review, the

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32. In Hamdard Dawakhana v. Union of India, AIR 1960 SC 554; the Supreme Court for the first time struck down as unconstitutional an Act made by union Parliament on the ground of excessive delegation.
Review, the court overrides or annul all enactment or an executive act on the
ground that it is inconsistent with the Constitution. In indirect Judicial Review,
the court attempts to give such interpretation to the impugned statute so that it
may be held constitutional.\textsuperscript{34} The Constitution of Canada or Australia does not
contain any express provision for Judicial Review but it has become an integral
part of the constitutional process.

The doctrine of Judicial Review is an integral part of the American judicial and constitutional process although the U.S. Constitution does not
explicitly mention the same in any provision.

The power of the Courts to interpret the Constitution and to secure its
supremacy is inherent in any constitution which provides government by
defined and limited powers. Madison explained, “A Constitution can be
preserved in practice in no other way than through the medium of the courts of
justice”. Whose duty it must be to declare all acts contrary to the manifest tenor
of the Constitution void. Without this, all reservations of particular freedoms or
liberties or privilege amount to nothing.\textsuperscript{35} Montesquieu’s theory of separation
of power put a curb on absolute and uncontrollable power in any one organ of
the government. It is by balancing each of these two powers against the other
two that the efforts in human nature towards tyranny can alone be checked and
restrained and any freedom preserved in the Constitution.\textsuperscript{36} Thus the basis of
Judicial Review found in the ‘limited government’ to promote
constitutionalism and to maintain rule of law.

\textsuperscript{34} Ibid., p. 830.
\textsuperscript{35} Pandey, Jitendra and Dubey, R.K., \textit{Civil liberty under Indian Constitution}, Deep & Deep
Publication, Delhi, 1992, p. 32.
\textsuperscript{36} Pandey, J.N., op.cit., p. 61.
If the courts want to ignore any law on the ground that it violates the Constitution, declaration by the Court of its unconstitutionality is essential. “Even though a law becomes void automatically under Art. 13, without the necessity of any declaration by a court, a declaration that a law has become void is necessary before a court can refuse to take notice of it. The voidness of law is not a tangible thing which can be noticed as soon as it comes into existence, a declaration that it is void is necessary before it can be ignored”.37 The Court does not *suo moto* decide unconstitutionality in the present system of Judicial Review in India or in America, unless moved by an aggrieved party and also, unless the determination of unconstitutionality be necessary for the decision of the case. The legislature itself being the maker of law is not competent to determine the constitutionality of any legislative Act. An unconcerned independent and impartial body like the court is the proper authority to look into legislative lapses. This is necessary for the maintenance of the spirit of democracy.

Where parliamentary sovereignty prevails and the legislature enacts atrocious, tyrannous and unjust laws or laws to a violation of the Constitution, the remedy available to the people is to remove the government itself, or to get such law repealed by constitutional agitations, or to attract the mind of the legislatures by strong public opinions to amend or repeal such laws. But where the constitutional supremacy is in force, people have another effective remedy also, i.e., of challenging the legality of the law in law courts, and in such a case, they may not have any necessity of ending the government itself. The English constitutional philosophers envisage only the first kind of remedy as parliamentary sovereignty prevails there. “Democracy provides a peaceful way

of getting rid of governments which fail to convince a majority of their adults, subjects that they have lively concern for the interest of the government”. But in India, as in America, the aggrieved citizens have personal rights to challenge the validity of law in law courts also.

The decision of the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America. Judicial Review in its broadest context is the self assured right of the court to pass upon the constitutionality of legislative act. Judicial Review of the constitutionality of statutes is a peculiarly American phenomenon which has been coped with varying degree of success by other nations also.

The American Judicial Review, however, is a peculiar government features among the nations of the world. It is a humiliation on popular government and is a fundamental part of the constitutional scheme of America. The concept of Judicial Review has its foundation on the doctrine that the Constitution is the supreme law. It has been so ordained by the people, and in the American conception, it is the ultimate source of all political authority. The Constitution confers limited power on the legislature. If the legislature consciously or unconsciously oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional

The Judicial Review is not the judicial supremacy but judicial nationalism to bring about all round progress of the country. This power of the courts to interpret and enforce constitutional clauses is not explicitly granted in the American Constitution. It has been inferred by the courts from the existence of the constitutional restriction.

The Court protects the legislative powers against their encroachments by other agencies. They defend the Union against the exaggerated claims of the State. They protect the public interest against the interest of private individuals. They converse the spirit of order against the innovation of excited democracy.

Timothy Walker argues “one court easily conceive of a more sublime exercise of powers, than that by which few men, through the mere force of reason, without soldiers, and without tumult, pomp, or parade, but calmly, noiselessly and fearlessly proceeded to get aside the acts of either government, because repugnant to the constitution”. Judicial Review is the last word, logically and historically speaking, in the attempt of a free people to establish and maintain a non-autocratic government. Justice Goldberg also remarks “Judicial Review is not a usurped power but a part of the grand design to ensure the supremacy of the Constitution”. Judicial Review means that non-elective and non-removable branch of the government has rejected decisions reached by the two elective, removable branches. As Jhon P. Roche says, “the principle of equilibrium required that judges be more than puppets of a legislature in the

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constitutional scheme of things, it was imperative that some institution exist to protect the fabric of the constitution. To ensure that a legislature and an executive would not connive together, to break the equilibrium of forces”.

To take recourse to Judicial Review is the evolution of the mature human thought. Law must be in conformity with the Constitution. If law exceeds in its limit, it is not law but a mere pretence of law. Law must be just, virtuous and capable of bringing human prosperity and not arbitrary, unjust and in violation of the Constitution. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked. Judicial Review is the cornerstone of constitutionalism which implies limited Government. In this connection Prof. K.V. Rao remarks – “In a democracy public opinion is passive, and in India it is still worse, and that is all the reason why it is imperative that judiciary should come to our rescue. Otherwise .... the Constitution becomes ill-balanced, and leaves heavily on executive supremacy, and tyranny of the majority; and that was not intention of the makers”. The concept of Judicial Review has it foundation on the following constitutional principles:

(i) The Government that cannot satisfy the ‘governed’, the legitimacy of its action cannot be expected to be considered legitimate and democratic and such government also cannot expect to receive the confidence and satisfaction of the governed.

(ii) The government in a democracy is a government of limited powers, and a government with limited powers has to take recourse to a machinery or agency for the scrutiny of charges of legislative views and constitutional disobedience, and such act of scrutiny can be done impartially and unbiasedly only by the court.

(iii) Each citizen in a democracy, who is aggrieved of a legislative Act on the ground of constitutional violation, has the inherent right to approach the court to declare such legislative Act unconstitutional, and void.

(iv) In a federal State, judicial arbitration is inevitable in order to maintain balance between the Centre and the State.

(v) Where the constitution guarantees the fundamental rights, legislative violation of the rights can be scrutinized by the court alone.

(vi) The legislature being the delegate and agent of the sovereign people has no jurisdiction and legal authority to delegate essential legislative function to any other body.

Constitutional protection can be available to that person only who is aggrieved. A person only who desires to asserts his constitutional right must show that his rights must show that his rights are affected and infringed. The Court, by evolving the rules of conduct for Judicial Review, has adhere to the principle that the person who challenges the constitutionality of a legislative Act must show that his right has really been infringed. One of the cardinal limitations on the Courts power of Judicial Review of legislation on constitutional grounds is that it will decide only a ripened controversy in which
the results are of immediate consequence to the parties.\textsuperscript{52} Willis has said – “In general, it may be said that appropriate person to raise a tax question is one whose taxes will be increased, an eminent domain question, one whose property is being taken; a police power question, one whose property is being delimited”\textsuperscript{53} Modern democracy demands that if any legislative Act is challenged by an aggrieved person in the court of law, the validity of the Act has to be tested objectively. The Supreme Court of India has laid down that the court has abundant power to look into the validity of law, and to scrutinize if the legislature has over-stepped the field of competency even indirectly by way of device.\textsuperscript{54}

It is not open to the legislature to contravene and flout the provisions of Part III of the Constitution by asking shelter behind the plea that the infringement was accidental and not deliberate.\textsuperscript{55} In the case where the impugned provision is held to have violated a fundamental right, it is the bounded duty of the court to give redress to the party, even if that involves the striking down of the provisions, of a law enacted by the Parliament.\textsuperscript{56} It has been further said that the court is under a duty, imposed by Articles 13 & 14 of the Constitution, to act as a sort of constitutional censor of all legislations and to scrutinize at the instance of any aggrieved citizen any law, or executive act, to examine its legality and thus ensure that no unconstitutional legislation or

\textsuperscript{55} Deoman Upadhyaya v. State, AIR, 1960, All 1, FB, para 51 (Shrivastava J.).
\textsuperscript{56} Manilal Gopalji v. Union of India, AIR 1960, Bombay 83, ara 5 (Mudholkar J.) of the Bombay High Court.)
illegal State actions slips from its vigilant scrutiny. Judicial Review has no prime function: that of imprinting governmental action with the stamp of legitimacy, and that of checking the political branches of government, when these organs encroaches the forbidden ground as interpreted by the court.

Judicial Review relieves the legislature of great responsibility and strain. Through the view expressed by the courts in the process of Judicial Review regarding the constitutionality of any legislative Act, the legislature receives great inspiration, and arouses alertness and caution to rectify mistakes and it creates. By Judicial Review the legislature realize its lapses and becomes alert against future lapses. Existence of Judicial Review on this consideration is also very essential.

Its now well-settled that the judicial interpretations creates precedents and make new laws. Such law is judicial legislation. It has not the sanction of the established legislature, but has the sanction of people itself. The judges in the process of Judicial Review are governed by the beliefs and feelings of the time, the current of economic and social thoughts, constitutional mandates and intellectual and moral tone of the nation, and are guided by the high judicial standard of reasoning, aim and philosophy of life and as such the constitutional decisions handed down by the judges have legislative value. In England, "judicial legislation, extending over more than two centuries, worked out an extra ordinary and within certain limits a most effective reform which was logical, systematic and effectual, just because it was the application to the

actual and varying circumstances of a clear and simple principle”. In America, Judicial Review has rendered great service to the nation. Though on occasions there were determined attempts to curtail the powers of the court, but the nation as a whole has accepted it. In India too Judicial Review has created a very healthy judicial legislation, which can be a perennial guide to the nation.

(a) Tracing Origin in America

A special function performed by American courts is known as Judicial Review. It can be defined as the power possessed by American courts to declare that legislative and executive actions are null and void if they violate the written constitution. It is a power that is possessed and exercised, by a great many American courts, federal and State. Any federal court can declare any statute State or federal invalid under the federal Constitution and refuse to enforce it. The supreme court of the United States determines whether or not a federal statute is in conflict with the federal Constitution.

The United States of America gave to the world a new gleam of Judicial Review. The concept of Judicial Review as evolved in America was the result of continuous thinking and growth. It had the heritage of Plato and Aristotle, inklings of *Magna Carta* and the Cockeian theory of common right and reason and the assimilation of the practical philosophy of Locke and other legal thinker of Europe. Magna Carta yielded a great influence on Coke and Locke and it gave a great heritage to American for Judicial Review. The impact of

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61. It defined the organization and powers of the Great Council in England and prohibited the imposition of certain taxes without the consent of the Great Council.

62. An act of Parliament which is against common right and reason would be adjudge void by the courts.
Magna Carta on the America social life was so great that the revolt against legislative tyranny was a common phase of the Americans since the time of the colonial rule. As J.C. Holts remarks “And just as the charter was claimed by the English Radicals as a natural birth right, so in America some of its principles came to be established as individual rights enforceable against authority in all its forms, whether legislative, executive or judicial…” 63 Before the Federal Constitution was enacted in the United States of America, James Otis, a constitutional lawyer of extra ordinary flexibility of mind, argued in 1761 in Paton’s case on the precedent of Dr. Bonham’s case decided by chief justice Coke in 1610. “As to Acts of Parliament, an Act against the constitution is void. An Act against natural equality is void”. 64 Justice Gray has said that “Otis argued that the Parliament was not the final arbiter of its own Acts and contended that the validity of statutes must be judged by the courts of justice. This argument of Otis fore shadowed the principle of American constitutional law that it is the duty of the judiciary to declare unconstitutional statutes void”. 65 In America Judicial Review has tended to evolve the national outlook to a great magnitude. “It (Judicial Review) has guided the development of a very brief Constitution of agrarian origins into a great body of constitutional doctrine for the governance of a highly technical industrial civilization. This in itself a great achievement”.

The doctrine of Judicial Review of United States of America is really the precursor of Judicial Review in other Constitutions of the world which

evolved after the 18th century and in India also it has been a matter of great inspiration. The Americans have always pleaded for limited sovereignty which means that the making function of the legislative organ is governed by the fundamental rights of the people and other constitutional limitations. No law can be framed which snatches away the constitutional rights of the people. “If sovereignty is considered to be all powerful and uncontrolled, any person or party which can acquire by whatever means the trappings of sovereignty can make building commands, and law would then rest on force and chicanery, which makes nonsense of the normal meaning of law”.66

The theories of popular sovereignty and limited government, is the most significant concepts of American constitutional system which means that government officials possess only such powers as have been conferred on them by the people through the constitution. The Constitution of America set up three institutionally distinct equal organs of Central government: legislative, executive, and judicial. These three organs were tied together in a dynamic relationship of cooperation and conflict by a system of check and balances that, in various ways, provided for each of the three branches of government to have some check on the other two.67

The separation of powers has always been important in political theory and in the evolution of the American constitutional system. In theory, the principle of separation of powers means simply that the powers of government are divided among the legislative, executive, and judicial branches. In practice, a complete separation of executives, legislative, and judicial powers has never

prevailed in the United States. The framers of the Constitution, who had relied principally on the writings of Montesquieu for their conceptions of the principle of separation of powers, did not believe that absolute separations was possible or desirable.\(^\text{68}\)

Having divided government into a threefold process and having assigned each process to a supposedly independent branch, the Philadelphia convention authorized a very considerable amount of participation in, or “checking” of, the affairs of each branch by the other two. There is no hard fast separation between the three branches of the national government, so it is difficult to reconcile completely the supplementary principle of check and balances with the principle of separation of powers.\(^\text{69}\)

The American Constitution does not specifically grant the power of Judicial Review to the Supreme Court. President Jefferson had declared that the design of the founding fathers was to establish three independent departments of government and to give the judiciary the right to review the acts of the Congress and the President. It was not only the violation of the intentions of the framers of the Constitution, the majority of the members of the Philadelphia Convention favoured Judicial Review. Alexander Hamilton intended the Supreme Court to have the power to set aside Congressional legislation. He suggested independent judiciary as “an excellent barrier to the encroachments and oppression of the representative body”. Article VI sections 2 reads, “this Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, under the authority of the United State

\(^{68}\) Ibid., p. 10.
shall be the supreme law of the land”. Article III section 2 reads, “The judicial power shall extends to all cases, in law and equity, arising under this Constitution, the laws of the United State, and treaties made or which shall be made, under their authority”.

The power of Judicial Review is usually associated with the Supreme Court, because it renders final judgements in cases involving the interpretation of the federal Constitution. The concept of Judicial Review rest on an extraordinary simple foundation stripped to its essence, it is almost too plain for stating. The Constitution is the supreme law. It was ordained by the people, the ultimate source of all political authority. It confers limited powers on the national government. These limitations derive partly from the mere fact that these powers are enumerated the government cannot exercise powers not granted to it and partly from certain express prohibitions upon its powers or upon the manner of their exercise. If the government consciously or unconsciously oversteps these limitations there must be some authority competent to hold it in control, to thwart its unconstitutional attempt, and thus to vindicate and preserve inviolate the will of the people as expressed in the constitution. This power the court exercise. This is the beginning and the end of the theory of Judicial Review.

In the Federalist, No. 78, Alexander Hamilton expressed clearly the necessity for Judicial Review in a constitutional system: “The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is,
in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred to the statute, the intention of the people to the intention of their agents”.

The foundation of Judicial Review was laid down by Chief justice Marshall in 1803 in *Marbury v. Madison* where he adopted mostly the classic arguments of Alexander Hamilton in the federal papers No. 78. Since then, the doctrine, having passed through many vicissitudes, has now been firmly embedded in the American constitutional system but it has also undergone better criticism and critical speculation.  

Jhon Marshall was appointed the fourth Chief Justice of America in 1801, and he continued in office till 1835. This was a glorious period in the American constitutional history for the evolution of the doctrine of Judicial Review. His historic decision in *Marbury v. Madison* was preceded by the famous judiciary debate in the Senate in which the power of judges for Judicial Review was vigorously asserted.

In 1803 Marshall wrote the decision of *Marbury v. Madison* in which he declared that the legislature has no authority to make laws repugnant to the Constitution and in the case of constitutional violation the court has absolute and inherent right to declare the legislative act void. By Marbury decisions

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74. 1 Cr. 137 (1803).
Marshall did not intent the system of Judicial Review which was already in the process of evolution, but by this decisions he strengthened the system to a remarkable extent.\textsuperscript{75} Bernard says: “From a historical point of view Marbury v. Madison is a crucial importance as the first case establishing the power of the Supreme Court to review constitutionality”.\textsuperscript{76} The system of Judicial Review thereafter became the integral part of the American constitutional jurisprudence. Marshall was threatened openly by the Republicans of ousting him from office if his verdict were to go in favour of judicial control of legislative Acts. The threat was also a threat of impeachment. The highest judiciary of the country was overawed by the political party. But Marshall had a great sense of nationalism and he possessed extra ordinary strength of mind and coolness of temper and without being perturbed by the threatening given to him to gave the solemn decision of \textit{Marbury v. Madison} establishing constitutional supremacy. By his judicial decision he nurtured in the American mind a great unifying nationalism. Thus, Marshall brought to the Supreme Court of America a sense of dignity and Honour. Jerre S. William remarks – “In case after case, he had been building the constitutional structure with consistent plan and imperishable materials. The political winds blew and always against him. But Marshall withstood and built on and on”.\textsuperscript{77} On the whole, Marshall had a congenital back-ground for the establishment of Judicial Review through his constitutional decisions. The doctrine of Judicial Review established by Chief Justice Marshall in \textit{Marbury v. Madison} is still vibrant and
its forces stands unabated, although it has everbeen criticized. By 1803 Judicial Review had a long history in America.

Marshall’s theory of Judicial Review mostly depended upon his own personal view which he had held long before he became the Chief Justice of the Supreme Court of America. But he was also inspired in his view by Alexander Hamilton who through his essay in ‘the Federalist’ (1788) had sought to establish the theory of Judicial Review. Hamilton’s concept of Judicial Review has became a source of great inspiration in the Indian constitutional working. Marshall after Hamilton played a very significant part in the development of American democracy through Judicial Review.

The Americans Bar played a very substantial part in the development of the doctrine of Judicial Review and constitutional interpretations were due to the able and unstinted cooperation given by the members of the bar who possessed extra ordinary forensic merits. However Marshall’s concept of Judicial Review had a limited scope. His philosophy of Judicial Review was that a legislative Act in violation of the constitution was void. He did not envisage that even an arbitrary and unjust legislation would be considered to be the legislation against the will of sovereign people for which the sovereign people did not delegate power to the legislature and as such the law should be void. This development took place later on the enactment of the IVth Amendment.

**Marbury Vs. Madison**

The institution of Judicial Review is attributed to Chief Justice Jhon Marshall of U.S. Supreme Court who for the first time laid it down in *Marbury*
v. Madison. The circumstances in which that decision was given were somewhat remarkable and require a brief analysis. Marshall belonged to the Federalist party and was secretary of State in the Cabinet of President Adams, who succeeded Washington as the President of the United States. He was nominated by President Adams to the additional office of Chief Justice of the Supreme Court in January, 1801. He held both offices during the final weeks of the Adams administration. In the elections of November, 1800, the hitherto dominant Federalist party lost both the presidency and Congress and Jefferson, author of the declaration of American independence and leader of the Republican party was elected as President. But the Federalist were not to be denied. They tried to maintain their influence by finding positions for loyal Federalist in the period between the election of 1800 and the inauguration of Jefferson on March 4, 1801.

In January 1801, President Adams named his secretary of State, Jhon Marshall, to be chief justice of the United States. Following a plan of Hamilton the mastermind of the Federalist, they passed a law creating many new Federal District courts. The judges were to be appointed for life, so that they could not be removed by the incoming Republican administration. The main purpose was to fill the new posts with Federalists. Time was passing swiftly and by the evening of 3rd March, several of the commissions had not yet been signed. Late into the night, Chief Justice Marshall, acting as secretary of State, sat at his desk filling out the commissions and signing them. Jefferson Chose levi Lindon as his Attorney General, gave him his watch and ordered him to take possession of the State Department. On the stroke of midnight when Jefferson

79. (1803) 1 Cranch 137, 2 L Ed. 60.
would become President. Lincoln dramatically entered judge Marshall’s office. “I have been ordered by President Jefferson” he said solemnly to take possession of office and its papers. “Why, Mr. Jefferson has not yet qualified”, exclaimed that started chief justice secretary of State. “It is not yet twelve O’clock” and he draw out his watch. There upon Levi Lincoln drew out his watch and showed it to Marshall. “This is the President’s watch”, he said, “and rules the hours”.

In the days of Federalist administration, however, the pressure of business was so great that Secretary of State Marshall was unable to issue all commissions. Hence when the triumphant republicans entered office in March, 1801 there were still some of the new federal justices who had not been duly commissioned. The new Secretary of State, James Madison, refused to deliver the commissions, and Congress soon abolished the new judicial posts. However, one of the so-called “Midnight” judges, William Marbury, who had been appointed a justices of the place for the District of Columbia, turned to the judiciary Act of 1789, which empowered the Supreme Court to issue a writ of mandamus; he asked the court to issue such a writ to Madison, requiring him to deliver the commission on Marbury’s demand. It was this case, Marbury v. Madison, which came before the Supreme Court in original jurisdiction, that gave chief justice Marshall, now arrived on the bench, the opportunity to enunciate and claim the power of Judicial Review for the federal Supreme Court.

Marshall made up his mind to give effect at the earliest opportunity to the power of Judicial Review proclaimed by the Federalists. That opportunity
came to him in Marbury v. Madison. It might be supposed that Jhon Marshall who as secretary of State had been responsible for the failure to deliver the Commission, would refuse to sit on the case because of his personal connection with it. Nevertheless, with characteristic boldness, he proceeded to seize the opportunity believing as he did that constitutional opportunity knocked but once. He held, (1) that Marbury had a right to the Commission because the appointment was legally completed with the signing and sealing of the Commission and that the Government was acting illegally in withholding it. (2) He held that mandamus was unquestionably the appropriate remedy. (3) He held that under the judiciary Act of 1789, invoked by Marbury, the Court had been expressly granted jurisdiction to issue the writ of mandamus to any person holding office under the authority of the United States and so to the Secretary of State who definitely came within that description. He then proceed to observe that “If this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional and so void”. (4) He then argued that the Constitution prescribed specifically the supreme courts’ original jurisdiction, that this jurisdiction did not include the power to issue writ of Mandamus to federal officers and that Congress had no power to alter this jurisdiction. Therefore, the attempt of Congress in the judiciary Act of 1789 to give the Supreme Court authority to issue writs of mandamus to public officers “appears not to be warranted by the Constitution”. Jhon Marshall had proclaimed the power of Judicial Review while deciding immediate issue in favour of the administration. In order to appreciate fully the origin of the doctrine of Judicial Review, it would be better to reproduce the opinion of Chief Justice Jhon Marshall in Marbury v. Madison (1803) which run as under:
The court held “….that the people have an original right to establish, for their future government, such principles, as in their opinion shall most conduce to their happiness is the basis on which the whole American fabric has been created… the principles, therefore so established, are deemed to be fundamental… This original and supreme will organize the government, and assigns to different department their respective powers… the powers of the legislature are denied and limited and that those limits may not be mistaken or forgotten, the Constitution is written… certainly all those who have framed written Constitutions contemplate them as forming the \textit{fundamental and paramount} law of the national and, consequently… An act of the legislature, repugnant to the Constitution is void, so if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case. The court must determine which of these rules govern the case… If, then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both apply”. The court continued that “the interpretation of the laws is the proper and peculiar province of the courts. A Constitution is in fact and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body”.

The powers of the legislature are defined and limited and that those limits may not be mistaken or forgotten, the written Constitution constitute ‘the fundamental and paramount law of the nation’ and, consequently an act of the legislature, repugnant to the Constitution is void so if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case.
The Court determine which of these rules govern the case. The court further held that the interpretation of the laws is the proper and peculiar province of the courts. A Constitution is in fact and must be fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

(b) Emergence of Judicial Review in India

Indian constitution is the blend of American and British Constitutions. Indian Parliament is not a sovereign law making body like its English counterpart. It is owing to this reason that our constitutional system “wonderfully adopt the via media between the American system of judicial supremacy and the English principles of parliamentary supremacy”.

Judicial Review is one of the cardinal features of Indian constitutional system. India has constitutional and limited democracy which imposes limitations on the power of the government and banks on majority rule to avoid tyranny and arbitrariness. The Preamble of the Indian Constitution has promised equality and justice to all citizens of India and have the laws of India are liable to be tested judicially. The majority rules though the best rule, is found generally to be addicted to tyranny. This is why the existence of some impartial body is essential for the maintenance of democracy.

India has written constitution and have a democratic federal constitution, which is the supreme law of the land and all other laws are subject to this supreme law. The tendency in the growth and prolixity of the unconstitutional

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legislation in India unquestionably signifies a matter of great concern and it requires alertness and determination to cultivate the habit of evading laws in conformity with the Constitution.

There is no express provision in the Constitution of India declaring the Constitution to be the supreme law of land, because they believed that when all the organs of government, federal and State, owe their origins to the constitution and derive powers therefrom, and the Constitution itself can not be altered except in the manner specifically laid down in the Constitution.  

The framers of the constitution were aware of the inherent weaknesses of Judicial Review, therefore they tried to define its scope and adopted several devices to prevent courts from abusing their powers and acting as “super legislature” or permanent “third chambers”.

The Constitution makers of India very wisely incorporated in the Constitution itself, the provisions of Judicial Review so as to maintain the balance of federalism, to protect the fundamental rights guaranteed to the citizens and to afford a useful weapon for equality, liberty and freedom. So observed Patanjali Sastri, J., in State of Madras v. V.G. Rao, Justice Khanna, former judges of the Supreme Court of India has in his book “Judicial Review or confrontation” made the following remarks in this connection “Judicial Review has constitutional system and a power has been vested in the High Court and the Supreme Court to decide about the constitutional validity of the provision of the statutes”.

84. (1952) SCR 597 (1952)SCJ 253, AIR 1952 SC 196.
The Constitution of India explicitly establishes the doctrine of Judicial Review in several Articles, such as 13, 32, 131, 136, 143, 226 and 246.

Art. 13(2) says that “the State shall not make any law which takes away or abridges the right conferred by this part and any law made in contraventions of this clause shall, to the extent of the contravention, be void”.

The doctrine of Judicial Review is not a revelation to the modern world. In India the concept of Judicial Review is founded on the rule of law which is the proud heritage of the ancient Indian culture and traditions. Only in the methods of working of Judicial Review and in its form of application there have been characteristic changes, but the basic philosophy upon which the doctrine of Judicial Review hinges is the same. In the modern world also where the doctrine of Judicial Review prevails, the system of its working and the method of its application are dissimilar in different countries. The basic idea of Judicial Review is that law should be the generator of peace, happiness and harmony; the ruler has no legal authority to inflict pain, torture and tyranny on the ruled and to usurp the basic rights of freedom and liberty of people which are rooted in the ancient Indian civilization and culture. The fundamental object of Judicial Review is to assure the protection of rights, avoidance of their violations, socio-economic uplifts and to alert the legislature to be in conformity with the Constitution. In India such spirit was prevalent.\footnote{Jha, Chkradhar, op.cit., p. 113.}

The ancient Indian concept of law is that law is the king of kings, and nothing can be higher than law by whose aid even the weak prevail over the strong. The \textit{vedic} concept of sovereignty was that the State was a trust and the monarch was the trustee of the people. The address of the people to the
monarch at the time of coronations and the reply of the consecrated king to his people on the occasion of Abisheka (coronation) embodied in the yajurveda reveals the concept of ideal, kingship and the democratic concept of law and order which enshrined in the doctrine of Judicial Review. Thus the spirit of Judicial Review can be drawn from the fundamental concept of law and governance which required ancient India.\(^86\)

In all history, no republic had as rich a heritage of the system of Judicial Review as in India. The roots of Judicial Review go long back into ancient India, ancient medieval Europe, pre Revolution Englands and into colonial and Post-Constitution regimes in the United States of America and for certain other countries which had a heritage of Judicial Review from the United States, such as Canada, Australia, Ireland, Japan etc.\(^87\)

In ancient India the Rule of Law had a firm stand which meant that the law was above the ruler and that the government had no constitutional authority to enforce any arbitrary or tyrannical law against the government. Thus the people of ancient India visualized and cherished the supremacy of law and not the supremacy of the king.\(^88\)

In the colonial courts the legality of law in several instances, was vehemently challenged on the basis of the principle enunciated by Chief Justice Coke. Subsequently, the United States of America not by any specific and clear provision in the Constitution but by judicial precedents created before the world a new pattern of democracy and demonstrated to the world that Judicial

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86. Ibid., p. 113.
87. Ibid., p. 422.
88. Ibid., p. 422.
Review could act as a poet and powerful check on democracy against
degenerating into autocracy and submitting to a rule of tyranny. India was
wiser in incorporate into the Constitution itself the provision of Judicial
Review and by this method India has established a Constitution which has its
individuality and uniqueness in so far as it lays down new standards of
constitutional rule in the modern world. Chief justice Patanjali Shastri of the
Supreme Court of India remarked “while the court naturally attaches a great
weight to the legislative judgement it can not desert its own duty to determine
finally constitutionality of an impugned statute”.\textsuperscript{89}

Judicial Review of India for the first time saw its light in \textit{Emperor v. Burah}.\textsuperscript{90} The Calcutta High Court as well as Privy Council adopted the view
that the Indian courts had power of Judicial Review under certain limitations.
This view was further reaffirmed in certain other case before the Government
of India Act of 1935 came into operation. By the Government of India Act of
1935 Federation was introduced and the experiment in Judicial Review took a
new approach under the Constitution of 1950 Judicial Review assumed an
important role in the Indian democracy. Its working under the present
Constitution of India, is a real protection of liberty and freedom of the people.
Some Indian writers have observed that the scope of Judicial Review in India is
very limited and the Indian Courts donot enjoy as wide jurisdiction as do
Courts in America. In their opinion it is due to the ‘Due Process’ clause that the
America courts have wider scope; in India the scope of Judicial Review is
narrower.\textsuperscript{91}

\textsuperscript{89} The State of Madras v. V.G. Row, AIR 1952, SC 196, para 13.
\textsuperscript{90} Emperor v. Burah, ILR, Calcutta, 63 (1877).
\textsuperscript{91} Kagzi, M.C.J., \textit{The Constitution of India}, Metropolitan, Delhi, 1958, pp. 85-86; (ii) Pylee, M.V.,
\textit{Constitutional Government in India}, Asia Publishing House, Bombay, 1965, p. 501; (iii) Rao,
In India the residuary power vest in the Union Parliament and as such in India there is greater fear of interference from the side of the union. The Indian judiciary has to keep this aspect in view while dealing with the constitutionality of the law violating the mandates of the Constitution regarding distribution of powers.

A historical interpretation of the constitutional evolution of India, England, the United States of America, Canada and Australia becomes necessary in order to appreciate the growth, functioning and practical operation of Judicial Review. The system of Judicial Review in India too is not an event of sudden emergence but it has a gradual evolution which predominantly depended on the constitutional thoughts and ideas in the different stages of the constitutional evolution in India. The constitutional growth the United States of America reveals that the legislative powers were subject to constitutional limitations and restriction at each stage of its growth. In India, since the enactment of Government of India Act, 1858 to the Government of India Act, 1935, the Indian legislature was subordinate to the English Parliament and any legislative Acts in India in contravention of the parliamentary directions and restrictions were void. By the Government of India Act of 1935 federalism was introduced which led to the expansion of the concept of Judicial Review in India. From 1885, when the Indian National Congress was established, to the inauguration of the Indian Republic there were constant and vigorous agitations, for the establishment of federalism and for the State recognition of fundamental rights. India which had the heritage of the Rule of law from

ancient India acted strenuously and assiduously towards establishing the judicial control of the legislative powers. As a result the provisions for judicial were incorporated in the constitution itself.  

**Evolution of Judicial Review**

1858: Government of India Act of 1858 imposed some restrictions on the powers of the Governor-General in Council in evading laws, but there was no provision of Judicial Review. The Court had such power only by implication.

1861: The Indian Councils Act of 1861 provided that the measures passed by the Governor-General legislative council were not to become valid unless the assent of the Governor-General was received. It also contained constitutional restrictions against the making of any law or regulation which might have the effect of repealing or in any way affecting the provisions of the Indian Council Act. The provision to section 22 of the Indian Council Act 1861 lays down constitutional restrictions in framing laws which reads:

“provided always that the said Governor-General council shall not have the power of making any law or regulations which shall repeal or in any way effect any of the provisions of this act …”.

1877: The case of *Emperor V. Burah* Book Singh ILR3 Cal. 63 (1877) was decided in Calcutta High Court in which it was held that aggrieved party had right to challenge the constitutionality of a legislative Act enacted by the Governor-General Council in excess of the power given to him by the Imperial Parliament.

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1913: Lord Haldane in 1918 in a Privy Council case laid down the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. Government of India Act of 1858.  

1918: Abdur Rahim, officiating Chief Justice of the Madras High Court relying on the Privy Council case decision observed in 1918 in a special Bench case of Madras High Court that there was a fundamental difference between the legislative powers of the Imperial Parliament and the authority of the subordinate Indian Legislature. Any enactment of the Indian Legislature in excess of the delegated powers or in violation of the limitation imposed by the imperial Parliament will null and void.  

1930: Co K.N. Haskar and K.N. Pannikar wrote in their book ‘Federal India’ that the Supreme judicial authority in India should be invested with the power to declare *ultravires*, measures which would go against the Constitution.  

1935: Government of India Act of 1935 which came into operation on December 6, 1937 embodied a federal constitution. It was implicitly empowered to pronounce judicially upon the validity of the statutes, though there was no specific provision for the same. Sir Brojender Mitter, Advocate General of India in his address to the judges of the Federal Court on the occasion of its inauguration said that the function of the federal court would be to expound and define the provisions of the Constitution Act, and as guardian of the Constitution to declare the validity or invalidity of the statutes passed by the legislatures in India.

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94. Secretary of State v. Moment, ILR 40 Cal. 391 (1913).  
97. Federal Court Reports, 1939, p. 4.
The Federal Court was introduced by the Government of India Act of 1935 to function as an arbiter in the Central and State relationship and to scrutinize the violation of the constitutional directions regarding the distribution of the powers on the introduction of federalism in India. It was highly essential to have an independent and impartial superior court to maintain balance between the Centre and the provinces. The power of Judicial Review were not specifically provided in the Constitution, but the Constitution being federal, the federal court was entrusted impliedly with the function of interpreting the Constitution and to determine the constitutionality of legislative Acts. A large number of cases cropped up involving the question of the validity of the legislative Acts was one of the main topics of decision before the Federal Court and the Privy Council. Maurice Gwyer C.J. of the Federal Court of India observed “we must again refer to the fundamental proposition enunciated in (1878) 3 AC 889 (Reg V. Burah) that Indian legislatures within their own sphere have plenary powers of legislation as large and of the same nature as those of parliament itself. It was true in 1878, it cant be less true in 1942”. 98

During the span of a decade of their career as constitutional interpreters the Federal Court and the High Court of India reviewed the constitutionality of a large number of legislative Acts with fully judicial self-restraint insight and ability. The Supreme Court of India as the successor of the Federal court intended the great traditions built by the Federal court. 99 Thus, though there was no specific provision for Judicial Review in the Government of India Act

98. Bhola Prasad v. Emperor, AIR 1942 FC17, At 20, Col. 2.
of 1935 the constitutional problems arising before the court necessitated the adoption of Judicial Review of legislature Act in a wider perspective.

1950: The Republican Constitution of India, adopted in 1950, which has specifically provided for, Judicial Review regarding infringement of fundamental rights and the Indian courts have powers of Judicial Review regarding constitutional violations of the distribution and separation of powers and other constitutional restrictions. Art. 13, 32 and 226 expressly provide for and envisage Judicial Review.

Under the Constitution of India, 1950, the scope of Judicial Review has been extremely widened. The Court in India, in the present democratic setup, are the most powerful organ for scrutinizing the legislative lapses. The spirit of the protection of individual liberty and freedom yielded a great influence on the constitutional agitationist in India. The ancient Indian heritage is rooted in the Constitution of India, 1950, in which are enshrined the various provisions of individual liberty and freedom against the State. Under the impact of ancient Indian heritage the Constitution of India of 1950 evolved a unique system of Judicial Review. The fundamental subject of Judicial Review in the present constitution of India relates to:

i) Enactment of legislative Act in violation of the constitutional mandates regarding distribution of powers.

ii) Delegation of essential legislative power by the legislature to the executive or any other body.

iii) Violation of fundamental rights.
iv) Violation of various other constitutional restrictions embodied in the constitution.

v) Violation of implied limitations and restrictions.

The world of the Constitution is supreme in India and the legislative and executive Acts to be valid will have to conform to it. The only agency capable of upholding the supremacy of the Constitution being the national judiciary, the process of Judicial Review is expected to play a no mean role in the working and development of the constitution”. The Indian judges have enough power under the Constitution to declare a legislation void if it is in violation of the Constitution or if the law is highly tyrannous and arbitrary against the intention of the Constitution and the sovereign people. Much depends upon the way the court approaches the matter and the degree of self-restraint the court exercises. The constitution does not limit the powers of the Indian courts in the matter of Judicial Review but the constitution has left the matter entirely on the dignity and rational thinking of the courts.

Just after the Constitution of India of 1950 came into force the Calcutta High Court in a special Bench case gave a memorable decision by which the entire Bengal Criminal Amendment Act of 1930 was declared void. The Court held – “The legislatures in this country have only those powers of legislation which are bestowed upon them by the Constitution Act. If they pass an Act in excess of these powers, the Act becomes void to that extent. Under our Constitution, the Court i.e. the judiciary is to decide this and nobody else. We recognize that great powers necessarily involve grave responsibilities, but we are not dismayed. Amidst the strident clamour of political strife and the tumult
of the clash of conflicting classes we must remain impartial. This court is no
respector of persons and its endeavour must be to ensure that above this
clamour and tumult, the strong calm voices of justices shall always be head”.
This view of the Calcutta High Court has been echoed in the several decisions
of the Supreme Court and the High Courts of different States. In 1958 even the
law commission adopted the same view – “The Constitution in express terms
requires the courts to act as supervisory body in the matter of laws alleged to
encroached upon the exercise of fundamental rights. The lines as to how far a
law shall go in derogation of the citizens fundamental rights is, according to the
Constitution, to be drawn by more other then the judiciary. The government
and their policies may change what contributes to the stability of the States is
its judiciary. A nation may afford to lose its confidence in its king or even in its
Parliament but it would be an evil day if it loses its confidence in its
judiciary”.

**Judicial Review of Constitutional Amendments**

Provision for amendment of the Constitution is made with a view to
overcome the difficulties which may encounter in future the working of the
Constitution. If no provisions were made for the amendment of the
Constitution, the people would have recourse to extra constitutional method
like revolution to change the Constitution.

The legislature is the fundamental organ of the State and “the repository
of the Supreme Will of Society”. The rationale of the vast amending power of
the legislature is that, notwithstanding the Supremacy of the Constitution, the

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constitution must develop out of the life and aspirations of the people; its fundamental concepts, if they have to be useful and lasting, should be in tune with their particular culture and the times. A federal constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American Constitution is very difficult. It is a common criticism of federal constitution that is too conservative, too difficult to alter and that it is consequently behind the times.

The framers of the Indian Constitution were keen to avoid excessive rigidity. They were anxious to have a document which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. The nature of the ‘amending process’ envisage by the framers of our constitution can best be understood by referring the following observation of the late Prime Minister Pt. Nehru, “While we want this constitution the as solid and permanent as we can make it, there is no permanence in the constitution. There should be a certain flexibility. If you make anything rigid and permanent you stop the nation’s growth, of a living, vital, organic people… In any event, we could not make this constitution so rigid that it can not be adopted to changing conditions. When the world is in a period of transition, what we may do today meupot be wholly applicable tomorrow”.

But the framers of Indian Constitution were also aware of the fact that if the constitution was so flexible it would be a playing of the whim and caprices of the ruling party. They were, therefore, anxious to avoid flexibility of the

extreme type. Hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. The machinery of amendment should be like a safety valve, so devised as neither to operate the machine with too great facility nor to require, in order to set in motion. The Constitution maker have, therefore kept the balance between the danger of having no amendable constitution and a constitution which is too easily amendable.

Under the American Constitution, the courts have stayed away from deciding upon the validity of constitutional amendments. The Supreme Court of American has time and again declared that the court is not a proper forum for deciding political questions. The constitutional amendments involve political question and, therefore, the court applying the doctrine of Judicial Review. Abrogation has consistently refused to employ the power of Judicial Review in relation to amendments to the Constitution. In India also in the beginning the position was the same. The question whether fundamental rights can be amended under Art. 368 came for consideration of the Supreme Court in Shankari Prasad v. Union of India\textsuperscript{103} the first case on amendability of the constitution the validity of the constitution (First Amendment) Act, 1951, curtailing the right to property guaranteed by Art. 31 was challenged. The argument against the validity of the First Amendment was that Art. 13 prohibits enactment of a law infringing an abrogating the fundamental rights, that the word ‘law’ in Art 13 would include any law, then a law amending the constitution and therefore, the validity of such a law could be judged and scrutinized with reference to the fundamental rights which it could not infringe.

\textsuperscript{103} AIR 1951 SC 455 at p. 458.
It was argued that the “State in Article 12 included Parliament and the word “law” in Art. 13(2), therefore, must include constitutional amendment. The Supreme Court, however, rejected the above argument and held that the power to amend the constitution including the fundamental rights is contained in Art. 368, and that the word ‘law’ in Art. 13(8) includes only an ordinary law made in exercise of the legislative powers and does not include constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridges or takes any of the fundamental rights. In 1964 in *Sajjan Singh v. Rajasthan* the same question was raised when the validity of the Constitution (Seventeenth Amendment) Act, 1964, was called in question. Once again the court reiterated its earlier view that constitutional amendments, made under Art. 368 are outside the purview of Judicial Review of the Courts. In this case the Constitution (Seventeen Amendment) Act, 1964 was challenged an upheld. Within a short period of two years the same Seventeen Amendment Act, 1964 was once again challenged in *Golakh Nath v. State of Punjab* and the Supreme Court once again invited to reconsider its decision in the earlier two cases. The Supreme Court by a majority of 6 to 5 prospectively overruled its earlier decisions in *Shankari Prasad* and *Sajjan Singh* case and held that Parliament had no power, from the date of the decision to amend part III of the Constitution so as to take away or abridge the fundamental rights ensured therein Subha Rao, C.J. supported his judgement on the following reasons:

104. AIR 1965 SC 845.
105. Unlike Shankari Prasad’s case, this was not a unanimous judgement. Only 3 out of 4 judges who constituted the bench for the purpose held that Shankari Prasad’s case was rightly decided. The remaining two judges (justice Madhokar and Hidayatullah, did not express any opinion).
106. AIR 1967 SC 1463.
a) The Chief Justice rejected the argument that power to amend the constitution was a sovereign power and the said power was supreme to the legislative power and that it did not permit any implied limitations and that amendment made in exercise of that power involve political question and that therefore they were outside of Judicial Review.

b) The power of Parliament to amend the constitution is derived from Art. 245, read with Entry 97 of list 1 of the Constitution and not from Art. 368. Art. 368 only lays down the procedure for amendment of Constitution. Amendment is a legislative process.

c) An amendment is a ‘law’ within the meaning of Art. 13(2) included every kind of law. Statutory as well as constitutional law and hence a constitutional amendment which contravened Art. 13(2) will be declared void.

The Chief Justice said that the fundamental rights are assigned transcendental place under the Constitution and therefore they were kept beyond the reach of Parliament. The majority held that the (17 amendment) was void in as much as it took away or abridge the fundamental rights under Art. 13(2) of the Constitution. The Chief Justice applied the doctrine of prospective overruling and held that this decision will have only prospective operation and therefore, the first, fourth and nineteenth Amendment will continue to be valid. The majority did not express any final opinion on the question whether the word ‘amendment’ in Art. 368 included the power to destroy the basic structure of the constitution or abrogation of the constitution or the complete rewriting.
The majority view of five out of eleven judges was the word ‘law’ in Art. 13(2) refers to only ordinary law and not a constitutional amendment and hence Shankari Prasad and Sajjan Singh case rightly decided. According to them, Art. 368 dealt with only the procedure of amending the constitution but also contained the power to amend the constitution.

Hidayatullah and Madholkar, J.J., however, by a separate judgement doubled the correctness of the majority view, as to whether fundamental rights were really fundamental and should be amended under Art. 368. Mudholkar J. posed a further question, whether making a change in a basic feature of the constitution can be regarded as merely as amendment or would it, in effect be rewriting a part of the Constitution, and if the later would, it be within the purview of Art. 368.

It was, therefore held that if a constitutional amendment had the effect of abridging or taking away any of the fundamental rights guaranteed in part III of the constitution it would be struck down by the court as unconstitutional. The Seventeen Amendment which was in challenge before Supreme Court in Golaknath’s case, however, was validated by resorting to the American doctrines of ‘prospective overruling’ which the Supreme Court applied in this country for the first time. The net result of the Supreme Court decision in Golaknath’s case was that Parliament was deprived of its power to amend the fundamental rights so as to abridge or take them away with effect from Feb. 27, 1967 the date of decision of the case.

The supreme Court decision in Golaknath’s case came as a stumbling block and prevented the government and the Parliament from proceeding
further with socio-economic measures because the government argument that nothing worth in this direction could be attempted without interfering with the fundamental rights particularly the right to property with a view to obtaining mandate from the people for important and preserving amendments in the constitution (including those in the area of fundamental rights) Smt. Indira Gandhi, the P.M. of India went to the polls by getting the Lok Sabha dissolved on December 27, 1970. She returned to power with record majority and plunged headlong and rushed through a series of constitutional amendments beginning with the Twenty Fourth Amendment in 1971 remodelling Art. 368 which provides for amendments of the constitution.

In order to remove difficulties created by the decision of Supreme Court in Golakh Nath’s case Parliament ended the Twenty fourth Amendment Act, 1971. The amendment added a new clause (4) to Article 13 which provides that “nothing in this Art. shall apply to any amendment of this Constitution made under Art. 368. In all the amendment has made from changes in Art. 368(1) it substituted a new marginal heading to Art. 368 in place of the old heading “procedure for amendment of the constitution”. The new heading is “power of Parliament to amend the constitution and Procedure therefore”. (2) It inserted a new subsection (1) in Art. 368 which provides that “notwithstanding anything in this constitution, Parliament may in exercise of its constituent power amend by way of addition variation or repeal any provision of this constitution in accordance with the procedure laid down in this Article”. (3) it substituted the words, “it shall be presented to the President who shall give his assent to the Bill and there upon” for the words it shall be presented to the president for his assent and upon such assent being given to the Bill. Thus section 3(c) makes its
obligatory for president to give his assent to the Amendment Bill. (4). It has added a new clause (3) to Art. 368 which provides that nothing in Art. 13 shall apply to any amendment made under this Article. Thus the Twenty fourth Amendment not only resorted the amending power of the Parliament but also extended its scope by adding the words “to amend by way of the addition or variation or repeal any provision of this constitution in accordance with the procedure laid down in this Articles”.

In 1972, the Supreme Court was called upon to consider the validity of the twenty fourth, twenty fifth and twenty ninth Amendment in the famous Keshavananda Bharti case. The Golakhnath decision was also reconsidered. Keshavananda provided yet another opportunity to the Supreme Court to rule upon the hints of the amending power. Keshavananda Bharti case popularly known as the Fundamental Rights case, decided by Supreme Court on April 24, 1973. The question involved was, what is the extent of the amending power conferred by Art. 368 of the Constitution? On behalf of the Union of India it was claimed that amending power is unlimited and short of repeal of the Constitution any change may be affected. On the other hand the petitioner contended that the amending power was wide but not unlimited.

Under Art. 368, Parliament cannot destroy the ‘basic feature’ of the constitution. A special bench of 13 judges was constituted to hear the case. Out of 13 judges 11 judges delivered separate judgement. The Twenty fourth Amendment was upheld and Golakhnath expressly overruled. The Hon’ble Supreme Court, however, laid down a much complex, complicated; and vague

doctrine of basic structure. According to the court, the power of the Parliament to amend the constitution under Article 368 did not extend to abrogating or destroying the basic features or framework of the constitution, what features were considered by the Supreme Court as ‘basic’ were not spelt out or enumerated consistently in the various opinions given in this case. The majority held that Article 368 even before the Twenty fourth Amendment, contained the power as well as the procedure of amendment. The twenty fourth Amendment merely made explicit what was implicit in the unamended Art. 368-A. The twenty fourth Amendment does not enlarge the amending power of the Parliament. The amendment is declaratory in nature. It only declares the true legal position as it was before that amendment, hence it is invalid.

Delivering the leading majority judgement Sikri C.J. said: “in the Constitution the word ‘amendment’ or ‘amend’ has been used in various places to mean different things. In some articles, the word ‘amendment’ in the context, has a wide meaning and another context it has a ‘narrow meaning’.

In view of the great variation of the phrases used although the constitution, it follows that the word ‘amendment’ must derive its colour from Article 368 and the rest of the provisions of the constitution. Reading the Preamble, the fundamental importance of the freedom of the individual, its inalienability and the importance of the economic, social and political justices mentioned in the Preamble, the importance of directive principles, the non-

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108. It would be interesting to note that largest ever Bench consisting of 13 out of 14 judges in supreme court was constituted in this case and the decision in the case was in a way worse than that in Golaknath for six judges held one view, six others held the opposite view and the judgement of the 13th judges, Mr. Justice H.R. Khanna, was in way clear as to whom he sided with. The judgement ultimately was not 7-6 but 6.6 and 1. The judgement of Mr. Justice Khanna was very crucial for determining the exact ratio of the case.
inclusion in Art. 368 of provisions like Articles 52, 53 and various other provisions are irresistible conclusion emerges that it was not the intention to use the word ‘amendment’ in the widest sense. It was the common understanding that the fundamental rights would review in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution namely, secularism, democracy and the freedom of the individual would always subsists in the welfare State. In view of the above reasons a necessary implication arises on the power of Parliament that the expression ‘amendment of this constitution’ has consequently a limited meaning in constitution and not the meaning suggested by the Attorney General. The expression ‘amendment’ of this constitution in Art. 368 means any addition or change in any of the provision of the constitution within the broad colours of the Preamble and the Constitution carry out the objectives in the Preamble and the Directive Principles applied to fundamental rights, it would mean at while fundamental rights can not be abrogated reasonable abridgements of fundamental right. If this meaning is given, the Chief Justice said, “it would enable Parliament to adjust fundamental rights in order to secure what the Directive Principles direct to be accomplished, while maintaining the freedom and dignity of every citizen”. The Chief Justice said, that the concept of amendment within the contours of the Preamble and of constitution cannot be said to be a vague and unsatisfactory idea which parliamentarians and the public would not be able to understand. He said that the argument that because something can not be cut and dried or nicely weighed or measured and therefore does not exist is fallacious. There are many concepts of law which are not capable of exact
definition, but it does not mean that it does not exist. It was also argued that every provisions of the Constitution is essential, otherwise it would not have been put in the Constitution. The Chief Justice further said, “But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same”.

According to Keshavananda, even a fundamental right can be amended or altered provided the basic structure of the Constitution is not damaged in any way. It is for the court to decide from case to case as to which fundamental right is to be treated as a ‘basic’ feature. The right to property has not been treated as such and so the fundamental right to property has been abrogated.

Theoretically Keshavananda is, therefore, a more satisfactory formulation as regard the amendability of the Constitution than Golaknath which gave primacy to only one part, and no other parts, of the Constitution.

Applying the basic structure doctrine enunciated above, the Supreme Court for the first time in the Constitutional History of India struck down as unconstitutional a part of Article 31-C introduced by the Twenty fifth Amendment. The portion which struck down had provided for exclusion of Judicial Review in respect of a particular matter, even by the Supreme Court of India. The Keshavananda Bharti doctrine was subsequently applied by the Supreme Court in *Indira Nehru Gandhi v. Raj Narain*\(^\text{109}\) (The P.M.s’ Election case). In this case the Supreme Court applied the theory of basic structure and

\(^{109}\) AIR 1975 SC 2299 decided by Supreme Court on November 7, 1975.
struck down Cl. (4) of Article 329-A, which was inserted by the Constitution (39th Amendment) Act, 1975. On the ground that it was beyond the amending power of Parliament as it destroyed the ‘basic feature’ of the Constitution. In this case the appellant Smt. Indira Gandhi, the then Prime Minister of the country, filed an appeal before the Supreme Court from the decision of a judge of the Allahabad High Court who had held that the appellant had committed certain malpractices in her election. But before the appeal could be heard by the Supreme Court, the Parliament passed the Election laws (Amendment) Act 40 of 1975 which came into force on 6 August 1975. This Act, if valid, would have virtually sealed the controversy in the appeal field in the Supreme Court by the appellant from the decision of the Allahabad High Court. On Aug. 7, 1975 a Bill to insert a new Article 329A making special provisions as to election to Parliament in the case of Prime Minister and the Speaker was introduced and passed by the House of people. Article 329A was challenged on three platforms first, that the amendment was passed when several Members of Parliament were under detention; secondly, that the amendment infringed the basic structure of the constitution and thirdly, that the amending power did not extend to deciding of private disputes.

Perhaps for the first time in constitutional history of India the amendment was challenged not in respect of social welfare programmes or right to property but with reference to the law guaranteeing free and fair elections which lie at the root of democratic form of government. The question was whether Parliament in its exercise of constituent power could exercise judicial power as was manifested by Article 329A. It was considered that the

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110. The Presidential assent to this Amendment was given on August, 1975.
Parliament through Article 329A was equating its amending power to the power of an absolute Ruler of Indian States to issue “famous” in which it was not possible to make any distinction between legislative, executive and judicial powers since the ruler’s word was law, and that it was travelling towards Acts of Attainder which once used to be passed by British Parliament. However, the challenge to Article 329A(4) succeeded but the appeal was allowed because of retrospective application of Election laws (Amendment) Act 1975. Mathew J. held that Article 329A(4) was *ultravires* because a resolution of an election dispute by the amending body was not a law and could not be regarded as an amendment of the constitution, but was either a judicial sentence or legislative judgement like an Act of Attainder and even if the validations of a disputed elections can be regarded as an amendment of the Constitution, it would damage essential features of the constitution. Khanna J. also took the same view. In the result Khanna, Mathew and Chandrachudd JJ held that Article 329A(4) was invalid. Ray, C.J. also associated himself with them although without using the term ‘void’.

The Election case held that the amending power did not extend to destroy the ‘basic feature of the constitution’ by submitting that “the ratio of the majority decision is not that some named features of the constitution are a part of its basic structure but that the power of amendment can not be exercised so as to damage or destroy the essential elements or the basic structure of the constitution, whatever these expression may comprehend. For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of particular feature in the scheme of the constitution, its object and purpose and the
consequence of its denial on the integrity of the constitution as a fundamental instrument of the country’s governance. There was a consensus among the judges that democracy was a basic structure of the constitution. Therefore, if by Article 329A(4) any essential feature of the democratic, republican structure of Indian polity, as visualized by the constitution, has been damaged or destroyed, it would be *ultravires* of the constitution.

Thus the Election case not only put a query on the scope of amending power under Article 368 but also put a question mark about the correctness of the need for having an unlimited and absolute amending power.

In *Minerva Mills Ltd. V. Union of India*¹¹¹ the scope and extent of the doctrine of basic structure was again considered by the Supreme Court. The court again reiterated the doctrine that under Art. 368, Parliament cannot so amend the constitution as to damage the basic or essential features of the Constitution and destroy its basic structure.

In the instant case, the petition was filed in the Supreme Court challenging the taking over of the management of the mill under the Silk Textile undertaking (Nationalisation) Act, 1974, and an order made under S. 18-A of the Industrial (Development and Regulation) Act, 1951. The petition challenged the constitutional validity of clauses (4) and (5) of Art. 368, introduced by S. 55 of the forty second Amendment. If these clauses were held valid then petitioner could not challenge the validity of the 39th Amendment which had placed the Nationalisation Act, 1974, in the IX schedule.

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¹¹¹ AIR 1980 SC 1789.
S. 55 of the Constitution (Fourty second Amendment) Act, 1976 inserted sub-sections (40 and (5) in Art. 368. In Minerva, this section was held to be beyond the amending power of the Parliament and void since it sought to remove all limitations on the power of Parliament to amend the constitution and confer a power on Parliament to amend the constitution so as to damage or destroy its basic or essential features or its basic structures. The true object of these clauses was to remove the limitations imposed on Parliament’s power to amend the constitution through the Keshavananda case.

The new introduced clause 4 in Art. 368 sought to deprive the courts of their power to call in question any amendment of the Constitution. The Court Stated in this connection: Our constitution is founded on a nice balance of power among the three wings of the States, namely, the executive, the legislature and the judiciary. It is the function of the judges, not their duty, to pronounce upon the validity of laws. Depriving the courts of the power of Judicial Review will mean making fundamental rights “a mere adornment” as they will be rights without remedies. A ‘controlled’ constitution will become ‘uncontrolled’.

The newly added Cl. 5 of Art. 368 sought to demolish the very pillars on which the Preamble rests by empowering the Parliament to exercise its constituent power without any limitation. This clause even empowered Parliament to “repeal the provisions of the Constitution”. “The power to destroy is not a power to amend”. The constitution confers only a limited power on Parliament to amend the constitution; Parliament cannot therefore by exercising that limited power enlarge that power into an absolute power.
A limited amending power is indeed one of the basic features of the constitution. Therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot under Art. 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the constitution or to destroy its basic and essential features. S. 4 of the 42nd Amendment amended Art. 31C as well, the unamended Art. 31C was upheld in Keshavananda upto an extent. But the new amendment vastly expanded the scope of Art. 31C and the extension was now declared to be invalid as being beyond the amending power of Parliament since it destroyed the basic or essential features of constitution, insofar as it totally excluded a challenge in a court to any law on the ground that it was inconsistent with, or took away or abridge any of the rights conferred by, Art. 14 or 19, if the law was for effectuating any of the Directive Principles.

The majority judges insisted that Fundamental Rights occupy a unique place in the lives of civilized societies; they constitute the ‘ark’ of the constitution “.... The Indian Constitution is founded on the bedrock of the balance between parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the constitution”.

Bhagwati, J., expressed the minority view. He agreed with the majority in holding amendments to Art. 368 as invalid and unconstitutional on the ground of damaging the basic structure of the constitution. In his view, Cl. (4) of Art. 368 was unconstitutional as the consequence of excluding Judicial Review of constitutional amendments would be to enlarge the amending power
of Parliament contrary to the decision in Keshavananda, and destroy the basic structure of the constitution. Cl. (5) could not remove the doubt which did not exist, and so it was outside the amending power of parliament. The two cls. (4) and (5) were interlinked. Bhagwati, J., failed to appreciate “how parliament, which has only a limited power of amendment and which cannot alter the basic structure of the constitution, can expand the power of amendment and which so as to confer itself the power to repeal or abrogate the constitution, or to damage or destroy its basic structure; “to convert it into absolute and unlimited power”.

For Justice Bhagwati, Article 31(c) only codified the existing constitutional position and provided immunity to a law enacted to give effect to a Directive Principle, so that futile and time consuming controversy whether such a law contravened Article 14 or 19 was eliminated. He saw the impugned section as a constitutional command to make laws for giving effect to the Directive Principles and not as a negative weapon to encroach upon the Fundamental Rights embodied in articles 14 and 19. Therefore he declared that “the amendment in Article 31(c) far from damaging the basic structure of the constitution strengthens and re-enforces it”.

It is clear that the vagueness of the doctrine of basic structure made the amending power dependent on the vagaries of judicial process. Whether or not an amendment damaged or destroyed the basic structure of the constitution became a matter of “value judgement”.

**Forty Second Amendment, 1976**

The Constitution (Forty second Amendment) Act, 1976 is the most controversial and debatable piece of constitutional amendment ever undertakes in India since 1950. After the decisions of the Supreme Court in Keshavnanda
Bharti and Indira Nehru Gandhi cases the constitution (Forty second Amendment) Act 1976, was passed which added two new clauses, namely, clause (4) and (5) to Art. 368 of the Constitution. Cl. (4) provided that “no constitutional amendment (including the provision of part III) or purporting to have been made under Art. 368 whether before or after the commencement of the constitution (Forty second Amendment) Act, 1976 shall be called in any court on any ground”. Cl. (5) removed any doubts about the scope of the amending power. It declared that there shall be no limitation whether on the constituent power of Parliament to amend by way of addition, variation or repeal of the provisions of the constitution under this Article. Thus by inserting cl.(5) it made it clear that even the “basic feature” of the constitution could be amended.

This amendment would, according to Mr. Swaran Singh, the Chairman, Congress Committee on Constitutional Amendments, put an end to any controversy as to which is supreme, Parliament or the Supreme Court. Clause (4) asserted the supremacy of Parliament. It was urged that Parliament represents the will of the people and if people desire to amend the constitution through Parliament there can be no limitation whatever on the exercise of this power.

This amendment removed the limitation imposed on the amending power of Parliament by the ruling of the Supreme Court in Keshavanda Bharti’s case. It was said that the theory of ‘basic structure’ as invented by the Supreme Court is vague and will create difficulties. The amendment was intended to rectify this situation. It was, however, not pointed out clearly as to what were the difficulties face by Parliament due to the basic structure theory.
Thus, the amended Articles provides that constitutional amendments shall not be challenged in any court on any grounds. The Amendment has not to pass judicial scrutiny at the hands of the Supreme Court of India, although many constitutional experts have expressed their views that the change effected by the 42\(^{nd}\) Amendment in Article 368 is meaningless and redundant and they shall continue to exercise its power of Judicial Review over constitutional amendments in the same way as before the 42\(^{nd}\) Amendment. They projected the view that the constitutional amendments made under Article 368 can still be challenged on the ground that they are destructive of any of the essential elements of the basic features of the constitution. In Keshavnanda’s case the Supreme Court has held that Parliament cannot alter the “basic structure” of the constitution exercise of amending power under Article 368 of the Constitution. The twenty fourth and forty second amendments were intended to bat the Judicial Review of constitutional amendments. But so long as the ruling in Keshavnanda Bhartis’ case stands constitutional amendments can be challenged on the ground that they destroy some of the basic features of the constitution.

In *Minerva Mills v. Union of India*\(^{112}\) the Supreme Court by 4 to 1 majority (Chandchud, C.J. and Gupta, Untawali and Kailasan, JJ for majority and Bhagwati, J. dissenting) struck down cls. (4) and (5) of Article 368 inserted by the forty second amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the constitution. “Limited amending power” is a basic structure of the constitution. Since these clauses removed all

\(^{112}\) AIR 1980 SC 1789.
limitations on the amending power and thereby conferred an unlimited amending power, it was destructive of the basic feature of the constitution.

The judgement of the Supreme Court thus makes it clear that the constitution, not the Parliament is supreme in India. This is in accordance with the intention of the framers who adopted a written Constitution for the country. Under the written constitution there is a clear distinction between the ordinary legislative power and the constituent power (amending power) of parliament. Parliament cannot have unlimited amending power so as to damage or destroy the constitution to which it owes existence and also derives its power. The parliament elected for a fixed period of five years is meant for certain specific purposes and cannot be vested with unlimited amending power. The court, however, held that the doctrine of basic structure is to be applied only in judging the validity of amendments to the constitution and it does not apply for judging the validity of amendments to the constitution and it does not apply for judging the validity of ordinary laws made by legislatures.

**Forty Fourth Amendment Act, 1978**

The Constitution (Forty Fourth Amendment) Act, passed in 1978, removed most of the aberrations and distortions introduced into the constitution by the Forty-Second Amendment of the constitution.

Forty second Amendment had deprived the Supreme Court of its jurisdiction to decide disputes concerning election of the President and Vice-President. Forty four Amendment cancelled this amendment and Article 71 “as originally enacted” gave jurisdiction to the Supreme Court to decide election disputes of the President and the vice-President.
The 44th Amendment Act has amended Article 132, 133 and 134 relating to appeals in the Supreme Court from the decisions of the High Courts. The 44th Amendment has inserted a new Article 134A under which the High Court can now grant a certificate for appeal to the supreme Court under Article 132, 133 and 134(1)(c) either *suo moto* or on an oral application by the aggrieved party immediately after the delivery of the judgement, decree, final order or sentence. It has also omitted clause (3) of Article 132 relating the grant of special leave by Supreme Court in cases where the High Court refuses to give a certificate cases of special leave to appeal by Supreme Court will thus be left to be regulated exclusively by Article 136 of the Constitution. This Amendment is intended to avoid delay in matters of appeal to the Supreme Court from High Courts.

Forty Second Amendment had added Art. 139A so as to enable the Supreme Court in certain circumstances, to withdraw cases from the High Courts and decide them itself. Forty fourth Amendment this provision subject to some modifications. Previously, the court could do so only on the application of the Attorney-General. Now, forty fourth Amendment enable the court to do so additionally either *suo motu* or on the application of a party to any such case.

The Amendment omits sub-clause (c) of clause (e) of Article 217 which was inserted by the fourth second Amendment. This clause made provision for appointing distinguished jurists as judges of the High Court.

Forty second Amendment had amended Article 225 so as to reimpose on the original jurisdiction of the High Courts restriction regarding matters
concerning revenue or acts done in collection thereof. Fourty fourth Amendment again amended Art. 225 so as to remove this bar on the High Courts original jurisdiction. Thus, the position as it obtained prior to fourty second Amendment has been restored in this respect.

Subject to a modification this amendment restores Art. 226 as it existed prior to the fourth second Amendment Act, 1976. The provisions relating to the issue of an interim order as introduced by the fourty second Amendment was very cumbersome and detrimental to litigants. Article 226(3), was introduced. It seeks to provide that where an interim order is passed against a party without giving him all opportunity of being heard, that party may apply to the court for the vacation of such an order and that such an application should be disposed of by the High Court within two weeks. If not so disposed of, the interim order will lapse automatically after two weeks.

Article 227 was amended again by forty fourth Amendment so as to restore it to the form in which it stood prior to forty second amendment. The High Courts thus got back their power of superintendence over the tribunals existing within their territorial jurisdiction.

3. NINTH SCHEDULE

In the constitution founded on popular sovereignty the power of Judicial Review is inherent and natural. A right which is natural and inherent can not be destroyed by the Constitutional Amendments. There are implied limitations on such amending power in India. Exercise of such wide amending power destroys the natural rights of the citizens. By incorporating various legislative statutes in Schedule Nine of the Constitution as introduced by Art. 31B, an attempt has
been made to completely destroy the power of Judicial Review in regard to these statutes, but it must be realized that these amendments themselves have to be tested on the touchstone of reasonableness, the will of the sovereign people, intention of the constitution makers and the spirit of the constitution. It appears apparently clear that power to annihilate the right of Judicial Review is beyond the jurisdiction of the Indian Parliament.

The constitutional amendments by which certain legislative Acts have been included in Schedule IX of the Constitution, intend also to include all the antecedent and subsequent amendments of these legislative Acts. But in many cases the principal Acts alone have been incorporated in Schedule Nine of the Constitution and the amending acts have not been included therein. The Supreme Court has held that amending acts as well as the original statutes would be deemed to be included in Schedule Nine. The reason is that ordinarily if an Act is referred to by its title it is intended to refer to that Act with all the amendments made in it up to the date of reference.\(^{113}\)

Article 31-A was inserted as an immunity from Judicial Review of the acquisition law regarding State and also the law regarding management of any property for a limited period, extinguishment or modification of any property for a management and amalgamation of corporation etc. This Articles debars Judicial Review of a legislative Act relating to agrarian reform.\(^{114}\)

Article 31-B is a mechanical Article which provides that any legislative Act or its provision, which is added in Schedule Nine, is immune from Judicial Review. This Article is very drastic and is a political device to fetter the hands

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\(^{113}\) State of Maharashtra v. Madhav Rao, AIR 1968 SC 1395, Paras 12 and 11, Sikai J.

\(^{114}\) K.W. Estate v. State of Madras, AIR 1971 SC 161 (Hegde, J.)
of the court in determining legislative lapses. The rulers made under such statutes and Regulations are immune from judicial scrutiny.\textsuperscript{115}

\textbf{Growing Dimensions of Judicial Review}

The strength of the Indian Republic can be said to rest on the doctrine of separation of powers between the legislature and the executive on the one hand and the judiciary on the other. On 11 January 2007, the dynamics of this doctrine revealed a clear tilt in favour of the judiciary, with the Supreme Court appropriating to itself the power to pronounce on the legality of laws enacted by Parliament with inbuilt immunity from the consequences of their impact on fundamental rights. The Court did so when a nine judge Bench sought to resolve a constitutional issue involving the nature and character of the protection provided by Art. 31B of the Constitution of India to laws added to the Ninth Schedule of Constitution in \textit{I.R. Coelho v. State of Tamil Nadu}\textsuperscript{116} and others. Article 31B, inserted by the first Amendment to the Constitution in 1951, says that none of the Acts and Regulations specified in the Ninth Schedule shall be void on the grounds of inconsistency with the fundamental rights guaranteed under the Constitution.

The Bench unanimously held that there could not be any immunity from Judicial Review of laws inserted in the Ninth Schedule of the Constitution. Once a law is enacted and included in the Ninth Schedule, it get protection under Article 31-B (Validation of certain Acts and Regulations) and is not subject to judicial scrutiny.

\textsuperscript{115} Krishnaraju v. A.O. Land Reforms, AIR 1967 Mad 352, Para 6, Veeraswami, J.
\textsuperscript{116} AIR 2007 SC 861.
The Bench, after examining the scope and powers of Parliament to enact laws and include them in the Ninth Schedule, held that the power of Judicial Review could not be taken away by putting a law under the Ninth Schedule.

In its unanimous verdict, the Bench, while recognizing the supremacy of the court to examine the validity of inclusion of a law in the Ninth Schedule, did not accept the argument that introduction of Article 31-B was just a one time measure to protect agrarian laws after the abolition of the Zamindari system and that it outlived its purpose. The Bench did not go into the question of validity of Art. 31-B as it was not under challenge.

“The Power to grant absolute unity at will is not compatible with the basic structure doctrine, therefore, after April 24, 1973 the laws included in the Ninth Schedule would not have absolute immunity. The validity of such laws can be challenged on the touchstone of basic structure such as reflected in Art. 21 read with Art. 14 and Art. 19. Art. 15 the principles underlying these Articles”. The Bench said, “Insertion in the Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated”.

The consequence of the insertion is that it nullifies entire part III (relating to fundamental rights) of the constitution. There is no constitutional control on such nullification. It was unlimited power to totally nullify part III insofar as Ninth Schedule legislation are concerned. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through all independent organ, viz. the judiciary.
The Bench held that all such law included in the Ninth Schedule after April 24, 1973 would be tested individually on the touchstone of violation of fundamental rights or the basic structure doctrine.

The power of Parliament to make any law at will and put it in the protective umbrella of Ninth Schedule will transgress fundamental rights in their entirety and will be incompatible with the basic structure doctrine of the constitution.

“The object of the fundamental rights is to foster social revolution by creating a society egalitarian to the extent that all citizens will be equally free from coercion or restriction by the State. Fundamental rights and Directive Principles had to be balanced. That balance can be tilted in favour of the Public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution”, said a nine-judge Bench headed by chief justice Y.K. Sabharwal. It was examining the validity of inclusion of central and State laws in the Ninth schedule.

Writing the judgement for the Bench, Justice Sabharwal said, “The framers of the Constitution have built a wall around certain parts of fundamental rights, which have to remain forever, limiting the ability of the majority to intrude upon them. That wall is the basic structure doctrine, it cannot be said the same constitution that provides for a check on the legislative power will decide whether such a check is necessary or not. It would be a negation of the Constitution”.

The Bench said, “The unchecked and rampant exercise of this power (to include laws in the Ninth Schedule), the number having gone up from 13 to
284, shows that it is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in the destruction of constitutional control which results in the destruction of constitutional supremacy and creation of a parliamentary hegemony and absence of full power of Judicial Review to determine the constitutionality of such exercise”.

Recognising the supremacy of Parliament to expell a member for misconduct, the Supreme Court upheld the termination of the membership of 11 MPs in 2005 for their involvement in cash for query scan.

They are Raja Ram Pal, Suresh Chandel, Pradeep Gandhi, Yeshwant Giridhar, Mahajan Anna Saheb, M.K. Patil, Chandra P. Singh, Manoj Kumar, Narendra Kumar Kushwhaha, Ram Sewak Singh, Lal Chandra Kor (all Lok sabha) and Chatrapal Singh Lodha (Rajya sabha).

A five-judge constitution Bench, by a majority of 4:1 verdict said: “On a perusal of the inquiry report we find that there is no violation of any of the fundamental rights (of the petitioners) in general and Articles 14 (equality before law), 20 (protection in respect of conviction for offences) or 21 (Protection of life and personal liberty) in particular”.

While chief Justice Y.K. Sabharwal, Justice K.G. Balakrishna and justice D.K. Jain gave the majority judgement, justice C.K. Thakker agreed with the findings of Mr. Justice Sabharwal but gave a different reasoning. Justice R.V. Raveendran, in his dissenting judgement, held that Parliament had no power to terminate the membership of an MP.
Justice Sabharwal said the powers and privileges of Parliament under Article 105 included the power of expulsion. “Parliament is empowered to define, by law, the powers, privileges and immunities of each House and of its members and committees in respects other than those specified in the constitutional provisions”.

The Bench rejected the contentions that the termination of membership would be effected only as laid down under Article 101 and 102. “Expulsion is only an additional cause for the shortening of the term of a member. While Article 101 and 102 do speak of disqualification for and continuation of membership, Parliament’s power to expel under Article 105(3) does by no means amount to adding a new ground for disqualification”.

Parliament “could use its power for protective purposes not only for acts done within the House but also upon anything that lowers the dignity of the House”. The Supreme Court has held that the actions of Parliament are subject to Judicial Review and no absolute immunity can be claimed to usurp the jurisdiction of the court.

Writing the majority judgement upholding the expulsion of MPs in the cash for query scam, chief justice Y.K. Sabharwal said: “Parliament is co-ordinate organ and its views do deserve deference them while its acts are amenable to judicial scrutiny”.

A five judge constitution Bench said: “Constitutional system of government abhors absolutism and it being the cardinal principle of the constitution that no one, however lofty, can claim to be the sole judge of the power given under the constitution. Mere co-ordinate constitutional status, or
even the status of an exalted constitutional functionary, does not disentitle this court from exercising its jurisdiction of Judicial Review of action which partakes the character of judicial or quasi judicial decision”.

The Bench said: “The fact that Parliament is an august body of coordinate constitutional position does not mean that there can be no judicially manageable standards to review exercise of its power. The judicature is not prevented from scrutinizing the validity of the action of the legislature trespassing on the fundamental rights conferred on the citizens”.

Rejecting the arguments of the union Government, the Bench said: “The contention that the exercise of privileges by legislature can’t be decided against the touchstone of fundamental rights or the constitutional provisions are not correct”.

The Bench said: “If a citizen, whether a non member or a member of the legislatures, complains that his fundamental rights under Art. 20 or 21 had been contravened, it is the duty of this court to examine the merit of the said contention, especially when the impugned action entails civil consequences. There is no basis to claim of bar of exclusive cognizance or absolute immunity to the parliamentary proceedings in Art. 105(3) of the Constitution”.

It further said: “The rules which the legislature has to make for regulating its procedure and the conduct of its business have to be subject to the provisions of the constitution. Mere availability of the Rules of procedure and conduct of Business is never a guarantee that have been duly followed. The proceedings which may be tainted on account of substantive or gross illegality or unconstitutionality are not protected from judicial scrutiny”.

The Bench did not agree with the allegation of malafide exercise of power or that the principles of natural justice were violated in the expulsion of the petitioners. On the contention that the quantum of punishment was disproportionate to the charges, it said: “that is a matter which must be left to the prerogative and sole discretion of the legislative body”. Eminent jurist and senior lawyer Fali Nariman has welcomed the Supreme Court verdict, upholding the termination of the membership of 11 MPs in December 2005, saying, “the court has showed great judicial Statesmanship”.

He said that the judgement showed, “there is no area in the constitution, which is beyond Judicial Review. The constitution reposes final authority on the Supreme Court Judicial Review on all matters concerning the constitution can be gone into by the Supreme Court not because it is supreme but the function is entrusted to it by the constitution. I do not see, any friction between the judiciary and the executive or Parliament. Even if there is friction it shows a healthy democracy”.

While upholding the expulsion of the MPs, the court has rightly pointed out that Parliament’s action are subject to Judicial Review. This is absolutely necessary when more and more politicians with animal cases pending against them are entering the sacred precincts of Parliament. Politicians who claim that the judiciary is overreaching its powers should understand that the constitution has vested the power of review in the judiciary only to guard against the violation of constitutional provisions. There should be checks and balances among the three organs of government. The constitution has given the judiciary the power to scrutinize the actions of the legislature to determine whether any
of them violates the fundamental rights of the citizens. Parliament derives its powers only from the constitutions of which the judiciary is the custodian. In a parliamentary form of government, the legislature and the executive works in coordination. So there is every possibility of the legislature becoming despotic based on the principle of majority rule. Judicial Review may be viewed as one of the fundamental rights of the citizen. The Constitution is supreme as the judiciary is its interpreter and protect any act of the other two organs may be subject to Judicial Review.