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# CONSTITUTIONAL SUPREMACY IN INDIA

AUTHORED BY - SHEFALI SHUKLA

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## CHAPTER 1 INTRODUCTION

### I. INTRODUCTION AND HISTORICAL BACKGROUND

In India, the constitutional supremacy was explicitly reiterated in the *Minerva Mills* case<sup>1</sup> whereby the Supreme Court held that “government, legislature, executive and judiciary is all bound by the Constitution, and nobody, is above or beyond the Constitution.” Every law made by the parliament is subject to interpretation by supreme court in the light of ideals and objectives of the constitution and if they go beyond or above that, they can be held null and void. Indian Constitution does not have express provision of separation of judicial and parliamentary supremacy but it's not quite unclear also. It is the prerogative of the parliament to amend the constitution and make the laws; it is the duty of the judiciary to decide if basic structure of the constitution is transgressed by such laws. Once the parliament has done its job, its Supreme Court which decides its constitutionality through judicial review.

There have been conflicts between parliamentary supremacy and judicial supremacy. The best example is of National Judicial Appointment Commission when Supreme Court pronounced its verdict on the 99th Constitution Amendment Act and the National Judicial Appointments Commission (NJAC), declaring them to be ultra vires the Constitution. It is true that constitution has given superior powers of review to judiciary to decide the constitutionality of the acts passed by legislature. Discharge of the judicial functions should not be seen as against the will of the people for; constitution derives its authority to give this power to Judiciary. The SC enforced the power of judicial review in various cases, as for example, the *Golaknath* case (1967)<sup>2</sup>, the *Bank Nationalization* case (1970)<sup>3</sup>, the

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<sup>1</sup> AIR 1980 SC 1789

<sup>2</sup> AIR 1643, 1967 SCR (2) 762

<sup>3</sup> AIR 1970 SC 564; 1970 SCR (3) 530.



Privy Purses Abolition case (1971)<sup>4</sup>, the Keshavananda Bharati case (1973)<sup>5</sup>, the Minerva Mills case (1980) and Supreme Court AOR Association Vs. Union of India(2016)<sup>6</sup>. Judiciary should be free from the influence of the executive so that it could promote the ends of justice. If the government is one of the parties to a dispute the judges should protect the citizens against executive encroachment. No executive authority should interfere in or exercise control over the working of law courts. The judiciary protects the rights of people against the encroachment of the government or any other association or individual. The superior courts enforce the fundamental rights of the people through the appropriate writs Judicial order- in the nature of Habeas Corpus, Mandamus, Certiorari, Quo-Warranto etc. Both parliament and the judiciary should not exceed their limits as defined by the constitution of India so that harmony can be maintained between the legislature and judiciary. The new socio-economic trends are to be kept in mind before making the legal provisions and their interpretation both in strict and liberal sense.

Participatory democratic system must be made effective and there must be proper check on the active interaction between the people and their representatives is responsible for the conflict between the parliament and judicial system in India. Judiciary and the legislature must be strengthened in terms of its special power of judicial review to check and contain the excesses of other two wings of the government. The concept of Judicial Review<sup>7</sup> should not be impaired nor should the Fundamental Rights be reduced in their importance. A provision may be introduced in the Constitution on the lines of the American Constitution, giving supremacy to the Constitution and the laws made there under as is the case with the American Constitution.

On 26 January 1950, the Indian constitution came into effect. By this act, the Dominion of India transformed itself into the Republic of India. The constitution had been drafted, discussed, and finalized by the Constituent assembly between

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<sup>4</sup> 1971 AIR 530, 1971 SCR (3) 9

<sup>6</sup> (1973) 4 SCC 225; AIR 1973 SC 1461

Writ Petition (C) No.13 of 2016

7

Article 372(1)



December 1946 and December 1949. Comprising 395 articles and 8 schedules, this lengthy document set out the architecture of the new state. The deliberations of the Constituent assembly were comparably long and painstaking. They provide a fascinating window into the range of ideas and institutions that the makers of the constitution envisioned for the new India. But these debates, and the resultant constitution, also reflected the wider context in which the Constituent assembly met and functioned.

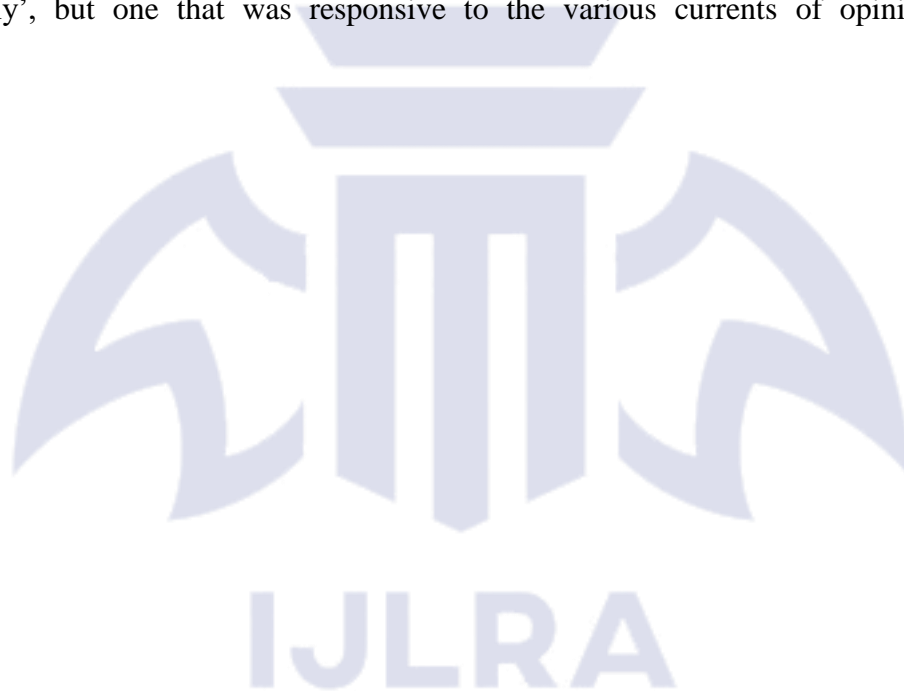
The Constituent Assembly of India was formed following the Cabinet Mission of 1946. The Mission's Plan rejected the idea of direct elections as too slow and provided for indirect elections by the provincial legislatures. The princely states were given a fixed number of seats in the Constituent Assembly.

Elections to the Assembly were held in July 1946. But, owing to the fall-out between the Congress and the Muslim League over the terms of grouping in the Cabinet Mission Plan, the Muslim League boycotted the Assembly. Some members of the League would join it after Partition had been announced, and then only because they were staying behind in India. Representatives of the princely states, too, took their time to join the Assembly. Thus, when the Constituent Assembly met for the first time on 9 December 1946, it was a remarkably small (numbering about 300) and unrepresentative body, dominated by the Congress Party. This trend, however, was kept in check by two factors. The Congress itself housed a variety of ideologies and viewpoints and included a substantial 'opposition' within itself. These, as one scholar has observed, 'ranged from a rabid Hindi-supporter to a secular socialist, from a strong advocate of the presidential system to a convinced parliamentarian, from a protagonist of a highly centralized state to a protagonist of loose federalism'. Second, the Constituent assembly sought submissions on various issues from the public at large. A draft of the constitution was also published in February 1948. The voluminous representations from practically every segment of Indian society might have



slowed down its proceedings, but the process broadened its outlook and strengthened its legitimacy.<sup>8</sup>

Much of the Constituent assembly's work was done in its numerous committees, subcommittees, and ad hoc committees. The drafting of the text was left to the seven-member Drafting Committee consisting mainly of lawyers and not politicians. The Committee was chaired by B.R. Ambedkar, the brilliant lawyer, and leader of the low-castes, who also ministered for law in the Union cabinet. The work of the Constituent assembly was largely facilitated by four Congress leaders: Jawaharlal Nehru, Vallabhbhai Patel, Rajendra Prasad, and Abul Kalam Azad. The foremost historian of the Indian Constitution, Granville Austin, calls them an 'oligarchy', but one that was responsive to the various currents of opinion within the Assembly.



<sup>8</sup> Ambedkar's Preamble – Aakash Singh Rathore.



B. N. Rau Among the influential ‘makers of the constitution’ was one individual who was not a member of the Constituent Assembly. B. N. Rau served as a constitutional advisor to the Government of India. After education at Trinity College, Cambridge, Rau joined the Indian Civil Service in 1910. He held a succession of legal appointments, including the post of the Reforms Commissioner in 1928. He had also been the prime minister of Kashmir in 1944-45. A gifted legalist and draftsman, Rau undertook a tour of western democracies to study their constitutional models. Thereafter he prepared a series of notes that informed the workings of Ambedkar’s committee. Subsequently, Rau also served as India’s representative to the UN and played an important role in the proceedings over Kashmir.<sup>9</sup>



<sup>9</sup> Guha, Ramachandra. 2007, India After Gandhi: The History of the World's Largest Democracy





## CHAPTER II

### FRAMING OF THE CONSTITUTION

The nature of political institutions The Constituent assembly set itself a lofty goal: the creation of conditions for a major social and economic transformation of India. Nehru told his colleagues 'The first task of this assembly is to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity'<sup>10</sup>.

Hence, the major question confronting the Assembly was what form of political institutions would enable and encourage such far-reaching change.

This led first to the consideration of the basic constitutional pattern of the new state. The experience of limited self-governance under colonial rule predisposed many members to look towards European-American constitutional tradition. Others, however, favored drawing on India's own indigenous traditions.

Advocates of a 'Gandhian' constitution called for the revival of the Panchayati raj system of village councils. In this scheme, the village would function as the basic unit of politics and governance. The second plan called for disbanding the Congress as a 'parliamentary machine' and turning it into a social service organization based on a country-wide network of panchayats. Each village panchayat would form a unit; two such units would constitute a working party with an elected leader. Fifty such leaders would elect a second-grade leader, who would coordinate their efforts and be available for national service. Second-grade leaders could elect a national chief to 'regulate and command all groups'. The Congress Working Committee, however, turned down these ideas. Its members held that the new state needed a centrally controlled, mass political party.<sup>11</sup>

In the event, the Constituent assembly settled for a parliamentary, federal

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Constituent Assembly Debates, vol. 2, p. 316

<sup>11</sup> Austin, Granville. 1998. The Indian Constitution: Cornerstone of a Nation. 2nd ed.



constitution in the Euro-American model. In contrast to the 'Gandhian' model, this political system would be much more centralized. In deference to the Gandhian view, the constitution would promote administrative (as opposed to political) decentralization below the level of the provinces. The state's duty to promote the development of panchayats was written into the Directive Principles of State Policy. In a more dramatic break with the past, the Assembly also settled for a direct election by adult suffrage. This was regarded as an essential prerequisite for socio-economic transformation. Many members of the Constituent assembly believed that universal suffrage would shift the balance of governmental power towards the poor, and encourage policies that would be beneficial to them.

The decision in favor of a parliamentary, federal constitution was also prompted by several immediate considerations. First, in the aftermath of the Second World War, there was a severe food shortage in the country. The rise in food prices, the low grain reserve, and the differences between provinces with surpluses and with shortages.

More broadly, the Assembly believed that economic progress required a centralized authority and centralized planning. Second, the massive blood-bath preceding and accompanying Partition underlined both the weaknesses of the provincial law and order machinery and the need for a central power to uphold order and stability.

Third, the Pakistan-abetted tribal invasion of Kashmir and the outbreak of the Communist rebellion in Telangana highlighted the importance of a strong central government capable of managing external defense and internal security.

The structure of political institutions, too, drew on European and American models. The American presidential system and the Swiss Executive model were debated and discarded. The Assembly chose a slightly modified version of the British cabinet system. A President, indirectly elected for a term of five years, would be constitutional head of state. The President would be commander-in-chief of the armed forces and could refer bills back to Parliament. The position,

as Nehru noted, had no 'real power' but 'great authority and dignity'.<sup>12</sup> As in Britain, there would be a council of ministers responsible collectively to the Parliament, to assist and advice the head of state. The Parliament would be elected by the British 'first-past-the-post' system. Given the diversity of interests and groupings in India, it was felt that this would make for strong government.

The Assembly provided for an independent election commission, and an independent comptroller general of accounts. To ensure the independence of the judiciary, judges of the Supreme Court and the High Courts would be appointed by the President in consultation with the chief justices. Their salaries would not be decided by Parliament but would be charged directly to the Treasury. The Supreme Court would have original jurisdiction in all 'federal' disputes between the units and the Union government. It would also have broad appellate jurisdiction. Any civil and criminal case could be appealed to it if an interpretation of the constitution was involved. The Supreme Court was thus seen as a guardian of the rights enshrined in the constitution.

The federal structure adopted by the Assembly was undoubtedly biased in favour of the centre as against the constituent units. The constitution provided for three areas of responsibility: Union, States, and Concurrent. Subjects in the first list were under the control of the central government, while those in the second fell under the remit of the provinces. The third list was the joint responsibility of the Centre and the provinces. The Union list, however, was much larger than those in other countries. The Centre's share in concurrent list, too, was more expansive. Further, Article 356 gave it power to take over a state's administration on the recommendation of the governor. Most significantly, the Centre was empowered with Emergency Provisions. The President might proclaim a state of emergency if he was satisfied that national security was threatened by external aggression or internal unrest. During an emergency, the Union government and Parliament could practically dictate terms to the states.

Historians have differed on the extent of resistance put up by the representatives

<sup>12</sup> Constituent Assembly Debates, vol. 4, p. 734



of the provinces. Granville Austin suggests that ‘states rights’ issues never assumed much importance in the deliberations of the Constituent assembly. This was because provinces had never worked in a truly federal system like the United States or Australia (Austin 1999, 188-89). Ramachandra Guha argues, however, that not only did provincial politicians fight “hard for the rights of states ... they mounted on the principle [of centralization] itself.”<sup>13</sup>

This set of decisions taken by the Assembly was influenced by wider concerns as well: communal violence during Partition and the need to resettle the massive flow of refugees; need to improve agricultural and industrial productivity. Three other factors contributed to this outcome. During the period when the constitution was being framed, the provinces of India were already functioning as part of a federal structure under the Government of India Act of 1935. Hence, their bargaining power was inherently limited. Furthermore, the creation of Pakistan convinced the Assembly that no new divisive forces should be encouraged. Finally, the Congress Party dominated the political landscape. The absence of strong regional or provincially-based parties eased the path to a strong Federal Centre. The representatives of the provinces were constrained by the fact that they were already operating in a federation created by the Government of India Act of 1935. Ambedkar reminded the Constituent assembly that ‘The Federation was not the result of an agreement by the States to join in a Federation ... the Federation not being the result of an agreement, no State has the right to secede from it.’<sup>14</sup>

The model of fiscal federalism adopted by the constitution drew on the Government of India Act of 1935. In the case of some taxes, such as customs duties and company taxes, the Centre would keep all the revenue. In other cases, such as income taxes and excise duties, the revenue would be shared with the states. Yet other sources, for instance estate duties, were assigned wholly to

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Guha 2007, 111

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Constituent Assembly Debates. 1999 (reprint), New Delhi: Lok Sabha Secretariat. Vol. 7, 43.



the states. The states, for their part, could levy their own taxes, including sales tax, land and property taxes. On the whole, though, the financial provisions favored the Union government. This trend towards fiscal centralization was strengthened by the unstable financial situation prevailing when the constitution was drawn up. Moreover, members of the Constituent assembly believed that the 'needs' of the provinces should determine how revenue was distributed. This was seen as a key to achieving socio-economic transformation. But it naturally required a greater role to be played by the Union government.

The core of the constitution's commitment to furthering socio-economic transformation lay in the Fundamental rights and Directive Principles of State Policy. Following the Bill of Rights of the American Constitution (and in contrast to the British model), the Constituent assembly outlined the rights of citizens that could not be abridged by the state.

These Fundamental rights include: the Right of Equality, the Right of Freedom, the Right against Exploitation, the Right to Freedom of Religion, Cultural and Educational Rights, the Right to Property, and the Right to Constitutional Remedies.

The Directive Principles went further and sought to ensure that the Indian people would be free in the positive sense—free from societal coercion and wretched physical conditions that prevented them from achieving all that they desired. These principles would not be justiciable, that is the courts could not enforce them. But they would be 'fundamental in the governance of the country'.

The Fundamental rights, however, were not considered to be absolute. The Constituent assembly considered in what ways and to what extent these rights should be limited.

Broadly, two considerations impacted on the question of limiting these rights: social reform and national unity. Some of the concerns raised by the former could be tackled in the drafting of the provisions. For instance, some members

opposed allowing free practice of religion since this could include retrograde



practices like sati, purdah, and the devadasi. In consequence, the constitution provided that the right to freedom of religion did not prevent the state from making laws for social welfare and reform.

Other issues proved more difficult to deal with. The most protracted debates surrounded the right to property. Land-reform laws were being contemplated by many provinces, and the government wanted to prevent dispossessed landlords from approaching the courts.

Eventually, the right of due process was not allowed in property legislation. Considerations of national unity and public security also led to the curtailment of individual liberty. A majority in the Constituent assembly believed that public peace was essential to achieving social and economic progress. This stance was understandable against the backdrop of the communal violence that engulfed the country in 1947. But this led the Assembly to approve of provisions that went against liberal values.

These included the powers given to the government during a national emergency and the provision of 'preventive detention' without trial. The latter was seen as the only way to prevent or contain communal violence. But it also attracted the most public criticism of any provision in the draft constitution. Preventive detention, after all, had been a favored legal mechanism of the British Raj.

The Assembly paid considerable attention to the rights of the minorities. Initially, some Muslim members sought to retain separate electorates. The Congress leadership was staunchly opposed to this, believing that it had been instrumental in leading to Partition. However, there were other Muslim members who believed that it was in the best interests of Muslims to align their identity with that of other citizens. Eventually, Muslim members came round to the view that instead of seeking separate electorates, they should organize themselves as voting blocs, and so acquire political importance.

Female members of the Assembly, too, rejected the idea of reservation for

women. They argued that ensuring equality, rather than special privileges, was



the best way to protect women's rights.

Reservations were, however, extended for the Untouchables. This was in recognition for the historic injustices they had suffered. Seats were set aside in legislatures and jobs in government agencies. Similar provisions were also extended to the tribals. In the case of *Chebrolu Leela Prasad and Ors. v. the State of Andhra Pradesh*<sup>15</sup>, The Supreme Court by its decision in this case made it clear that the government can make a reservation as long as it is within the limit of 50 percent set down by the case of *Indra Sawhney* and it should be made in such a way that the benefit trickles down to the needy and is not misused by the people who don't need it. Although, in *Mukesh Kumar and Anr v. State of Uttarakhand and Ors. (2020)*<sup>16</sup>, The Hon'ble Apex court held that the state government is not bound to make a reservation for Scheduled Caste and Scheduled tribes promotion to public appointment or posts. No fundamental right can be claimed for reservation in promotions and no mandamus can be issued for the same.

There is no fundamental right which inheres in an individual to claim reservation in promotions. The data collected by the State government is only to justify to provide reservation to those classes of people and not otherwise. The question of a 'national language' provoked some of the most heated and contentious debates in the Constituent assembly. It assumed such importance because it mattered, like fundamental rights, to everyone. Almost from the outset, proponents of Hindi made it clear that they would press their case to the utmost. They demanded initially that the official version of the constitution be in Hindi rather than English. The Drafting Committee refused to accept this, arguing that the English language was more suitable for the technical and legal nature of the document. The advocates of Hindi then demanded that each clause of the draft constitution be discussed in Hindi.

The case for Hindi was given additional vigor by partition. Hitherto, Hindustani

<sup>15</sup> Civil Appeal No.3609 OF 2002, decided on 22/04/2020.

<sup>16</sup>

Civil Appeal No.1226 of 2020



rather than Hindi had been the lingua franca of much of Northern India. Hindustani was a mixture of Hindi (written in Devanagari script and drawing heavily on Sanskrit) and Urdu (written in modified Arabic script and drawing on Persian and Arabic). It could be written using either Hindi or Urdu script. Both Gandhi and Nehru had supported Hindustani as a bridge between north and south India, the Hindus and the Muslims. But partition more or less laid to rest. Hindi, on the other hand, began to turn increasingly Sanskritized.

The extreme advocates of Hindi not only wanted it to be the national language but also that it should replace English for official purposes in the central government. They also held that Hindi should soon replace English in the provincial governments. The militancy of the proponents of Hindi roused the ire of South Indian representatives. The latter bitterly opposed making Hindi the national language. Besides, there was a group of moderate Hindi speakers who believed that Hindi might be declared the 'official' language, but that it should only be the first among equals. Other regional languages should also have national status. English, they held, should be replaced very slowly and cautiously.

After months of heated debate, the moderates, led by Nehru, managed to get a majority to adopt most of their suggestions. Hindi in the Devanagari script would be the 'official language'. However, for an initial period of 15 years English would continue to serve as the official language. After this period Hindi would replace English, unless the Parliament legislated otherwise.

The provincial governments could conduct their affairs either in one of their own languages or in English. Further, the major regional languages were listed in a schedule to the constitution. This compromise enabled the Assembly to avoid a deadlock on the emotive issue of language.

The Constituent assembly completed its task in two years, eleven months and seventeen days. Given the size of the constitution and the gravity of the issues under consideration, this was celerity itself. Historical judgments on this unprecedented exercise have mostly been favourable. Granville Austin, for

instance, sees the constitution as a ‘seamless web’, which smoothly brought



together the strands of democracy, social reform, and unity. Other scholars have questioned this assessment. Sunil Khilnani, for instance, argues that the makers of the constitution were oblivious of the ways in which character of representation, rights and equality might change with time; and in the process change the character of Indian democracy itself.<sup>17</sup>

The makers of the constitution themselves seem to have regarded their task as just the beginning of a long journey. As Ambedkar observed in his brilliant closing address, the principles embodied in the constitution were the views of his generation, open to modification in the light of the experience of succeeding generations. This was the reason why relatively simple procedures had been introduced for amending the constitution. Working the constitution was the task of the Indian people.

On the 26th of January 1950, Ambedkar said in peroration, “we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value.

How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has laboriously built up.”<sup>18</sup>

17

The Idea Of India 1997

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Dr. Babasahib Ambedkar writings and speeches, partIII volume17, Dr. Ambedkar Foundation





## **CHAPTER III**

### **SALIENT FEATURES OF THE CONSTITUTION**

#### **1. The Longhiest Constitution:**

The Constitution of India is the lengthiest constitution of all the written Constitution in the world. It is Five Times bigger than the Constitution of USA and seven times bigger than the constitution of France. In its original form as on 26th Jan 1950, it consisted of 395 articles and 8 Schedules. The feature of its being lengthy is not just to make this document heavy but to be more precise and accurate to the then present India as well

as he forth coming developing and growing India.

2. Preamble:

According to the Preamble, the constitution of India has been adopted by the people themselves. WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to 32





all its citizens-

JUSTICE, Social, Economic, and Politics

LIBERTY, of thought, expression, belief, faith and worship EQUALITY of status and opportunity, and to promote them to all

FRATERNITY assuring the dignity of individual and the unity and integrity of the Nation.

A preamble is an introductory part of a document and when it comes to the constitution it is basically a manual as to how to operate the constitution, or in other words a key to a lock. In earlier times preamble was not considered as the part of the constitution but by the guidance of supreme court on numerous cases preamble came to conclusion as an integral part of the constitution. It is in clear declaration by words 'we the people of india' that this constitution is by the people of India and for the people of India.

### 3. The Fundamental Rights:

The Fundamental rights are guaranteed to every citizen of India, in Part III – (Articles 12-35) of the constitution and are deemed to be a Distinguishing Feature of a Democratic State.

These rights are prohibitions against the state and available to every citizen. These rights are enforceable by the judicial system as of a

Fundamental Right. Whenever these rights are violated, the aggrieved person can approach the Supreme Court, under article 32, which is itself is a fundamental right.

This shows us that constitution is supreme protector of its subject, and judiciary is further the inspector that makes sure these rights are guaranteed and again this power to judiciary is given by the constitution itself. Something similar was witnessed in the recent case of Anuradha Bhasin vs Union of India<sup>19</sup>, On 5 August 2019, the Government of India revoked the special status to Jammu and Kashmir, granted under Article 370 of the Indian Constitution.

Subsequent to which an order under section 144 of Code of

19

WRIT PETITION (CIVIL) NO. 1031 OF 2019



Criminal Procedure (hereinafter referred to as “CRPC”) was implemented by the District Magistrate which restricted unlawful gathering and internet in Jammu and Kashmir.

In the context of this, writ petitions were filed challenging the order. For which the Supreme Court addressed various issues such as the validity of order passed under section 144 of CRPC, right to internet under Article 19 and freedom of the press in such circumstances.

The court held the right to internet as one of the integral parts of Article 19(1) (a) and it also acknowledged the internet being the medium for modern terrorism. The court pointed out that the suspension of the internet service is a drastic measure which should not be done unless necessary. Regarding the freedom of Press, the court held that there is no concrete evidence from the petitioners establishing such infringement of freedom. The Court also held that Section 144 of CRPC can be exercised even when there exists an apprehension of danger where such order should state material facts to enable judicial review.

#### 4. Directive Principles of State Policy:

The Directive Principles of State Policy contained in Part IV (Acts 36-51) of the constitution set out the aims and objectives to be taken by the State in the governance of the country.

However, the Directive Principles are Politically Enforceable. If the state is not able to implement these provisions, no action can be taken against the state in the court of law. Even so it provides the basic guidelines on which a government operates and makes laws. The general public on its behalf can choose which leaders to be positioned and which to be removed.

#### 5. A Welfare State:

India is the largest democratic country in the world. The Fundamental Rights and the Directive Principles of Social Policy embody a scheme to make India a truly

welfare state. The essence of these provisions is the attainment of happiness and good of the people in every walk of the human life.

6. Parliamentary form of Government:

The Constitution of India has established a Parliamentary form of Government both at the Centre and the States. In this respect the Draft Man of the Constitution have followed the British model completely. The Government is responsible to the legislature. The President is the Constitutional Head of the State. The real executive power is vested in the Council of Ministers, whose head is the Prime Minister. The Council of Ministers is collectively responsible to the Lower House (Lok Sabha).

7. Unique Blend of Rigidity and Flexibility:

A written constitution is generally said to be rigid. The Indian Constitution, though written, is sufficiently flexible. There are only a few provisions, which can be amended by a special majority of the Parliament. That is why the Indian Constitution is amended 108 times so far.

8. A Federation with Strong Centralizing Tendency:

The Indian constitution is a Federal Constitution. But it acquires a "Unitary Character" during the time of emergency. The combination of the Federal and Unitary Character is a unique feature of our constitution. Article -1 of the Constitution declares that the Sovereign Democratic Republic of India 'the union of states'.

9. Adult Suffrage:

Under the Indian constitution, every man and woman above the age of eighteen years has been given the right to elect representatives of the legislature. The adoption of the Universal Adult Suffrage without any qualification either of sex, property, taxation or the like, is a bold experiment in India, having regard to the vast extent of the country and its population, with overwhelming illiteracy.



#### 10. An Independent Judiciary:

An independent judiciary and impartial judiciary with a power of judicial review has been established under the Constitution of India. The Judiciary is the custodian of the Fundamental Rights of citizens. Although, it has always been on high stake as to its biasedness, for instance, due to the COVID 19 pandemic, the courts were shut and all physical hearings were done online. This has made things difficult because there was already a huge pendency of cases. Hence the courts decided to deliver judgments on cases that are very urgent. However, the listing of urgent cases for hearing has been controversial. A petition was filed in the case of Jagdeep Chokkar v Union of India (2020)<sup>20</sup>, for the return of the migrant workers who were helpless and stranded amidst the lockdown to their homes. This matter was not heard immediately, whereas a petition filed in the case of Arnab Goswami v Union of India (2020)<sup>21</sup>, for quashing the FIRs against him, was heard on the next day. Hence this was controversial as to which case the court found more important.

#### 11. A Secular State:

A secular state has no religion of its own as recognized religion of State. It treats all religions equally. This is the beauty of this well written constitution. While there is no particular religion of the state, it ensures the people of India are at liberty to practice their own religion.

#### 12. Fundamental duties:

The Fundamental Duties are incorporated in Article – 51 – A of part IV A of the constitution, which has been inserted in the Constitution by the Constitution (Forty Second Amendment) Act 1976. They are intended to serve as a constant reminder to every citizen. According to them, citizens are required to observe certain basic norms of democratic conduct and democratic behavior.



<sup>20</sup> Writ Petition (CIVIL). Diary No(s).10947/2020

21

Writ Petition (Crl.) Diary No. 11189 of 2020



## CHAPTER IV

### THREE ORGANS OF GOVERNMENT

#### 13. legislature

The term legislature has been derived from the Latin word 'lex,' which means a 'distinct kind of legal rule mainly of general application'. This rule is named legislation, and the institution, which enacts it on behalf of the people, is known as legislature. Essentially, there are two models of legislative structure: the Parliamentary and the Presidential. In the parliamentary model, the executive is selected by the legislature from among its own members. Therefore, the executive is responsible to the legislature. The Presidential system is based on the theory of separation of powers and does not permit any person to serve simultaneously in both executive and legislature.

The Parliament of India, which is the creation of the Constitution, is the supreme representative authority of the people. It is the highest legislative organ. It is the national forum for the articulation of public opinion. Indian Parliament did not emerge overnight, it evolved gradually during the British rule, particularly since 1858 when the British Crown assumed sovereignty over India from the East India Company. By the Government of India Act of 1858, the powers of the Crown were to be exercised by the Secretary of State for India assisted by a Council of India. The Secretary of State, who was responsible to the British Parliament, governed India through the Governor General, assisted by an Executive Council consisting of high government officials.

There was no separation of powers; all the powers--legislative, executive, military and civil-- were vested in this Governor-General in Council.

The Indian Council Act of 1861 introduced little bit of popular element as it included some additional *non-official* members in the Executive Council and allowed them to participate in the transaction of legislative business. The Legislative Council was neither deliberative nor representative. Its members were



nominated and their role was limited only to the consideration of legislative proposals placed by the Governor-General.

Indian Councils Act of 1892 made two important improvements. First, non-official members of the Indian Legislative Council were henceforth to be nominated by the Bengal Chamber of Commerce and the Provincial Legislative Councils, while the non-official members of the Provincial Councils were to be nominated by certain local bodies such as universities, district boards, municipalities. Secondly, the Councils were empowered to discuss the budget and address questions to the Executive.

Indian Councils Act of 1909, based on Morley-Minto Reforms, for the first time, introduced both representative as well as popular features. At the Centre, election was introduced in the Legislative Council though the officials still retained the majority. But in the Provinces, the size of the Provincial Legislative Council was increased by including elected non-official members so that the officials no longer constituted the majority. This Act enhanced the deliberative functions of the Legislative Councils and provided them opportunity to move resolutions on the Budget and any other matter of public interest bearing certain specified subjects, such as the Armed Forces, Foreign Affairs and the India States. The Government of India Act of 1915 consolidated all the previous Acts so that the executive, legislative and judicial functions could be derived from a single Act.

The next phase of legislative reforms emerged out of the Government of India Act of 1919 brought further legislative reforms in the form of responsible government in the Provinces. At the Centre, the legislature was made bicameral and elected majority was introduced in both the Houses. However, no element of responsible government was introduced at the Centre. The Governor General in Council continued to be responsible as before to the British Parliament through the Secretary of State.

The Government of India Act of 1935 came into being after several parleys

between the Indian national leaders and Britain. It contemplated a federation



consisting of British Indian Provinces and native states. It introduced bicameral legislatures in six Provinces. It demarcated legislative power of the Centre and the Provinces through three lists: the Central List, the Provincial List and the Concurrent List. However, the Central Executive was not made responsible to the legislature. The Governor General as well as the Crown could veto bills passed by the Central Legislature. The Governor-General besides the Ordinance-making powers had independent powers of legislation or permanent Acts. Similar limitations existed in case of Provincial Legislatures as well.



The international political scene and the conditions in India and Britain led the British government to an unequivocal acceptance of India's claim to freedom. The Indian Independence Act of 1947 was passed setting up two independent dominions, India and Pakistan. The legislature of each dominion was to have full legislative sovereignty. The powers of the legislature of the dominion were exercisable without any limitations whatsoever by the Constituent Assembly formed in 1946. This

Constituent Assembly adopted the Constitution of India, which received the signature

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of the President on 26 November 1950. Under the provision of Article 79, the Parliament of India consists of the President and the two Houses - the Lower House or Lok Sabha (House of the People) and the Upper House or Rajya Sabha (Council of States). While the Lok Sabha is subject to dissolution, the Rajya Sabha is a permanent chamber which cannot be dissolved. The office of the President also never remains vacant. While the American President is not a part of the Legislature (Congress), the President of India is an integral part of the Indian Parliament. However, he cannot sit and participate in the deliberations in any of the two Houses.

The President of India performs certain important role vis-à-vis the Parliament. The President summons and prorogues the House from one session to another and has the power to dissolve the Lok Sabha. No bill passed by both the Houses can become a law without the President's assent. Further certain bills can be introduced only after the recommendation of the President has been obtained. The President also has the power to promulgate Ordinances when both the Houses are not in session. These Ordinances, though temporary in nature, have the same force and power as a law passed by Parliament.

The Lower House or the House of the People is popularly known as Lok Sabha. Its members are directly elected by the people. The maximum number of members to be elected which was fixed by the Constitution at 500. It was raised to 520 members by the Seventh Constitutional Amendment (1956) and to

545 members by the 42<sup>nd</sup> Constitutional Amendment (1976). This includes not



more than 525 members chosen by direct election from territorial constituencies in the States and not more than 20 members to represent the Union Territories. In addition, the President may nominate two members of the Anglo-Indian community if he is of the opinion that the community is not adequately represented in the Lok Sabha.

The distribution of seats among the States is based on the principle of territorial representation which means each State is allotted seats on the basis of its population in proportion to the total population of all the States. For election purpose, each State is divided into territorial units called constituencies which are more or less of the same size with regard to the population.

The election to the Lok Sabha is conducted on the basis of adult franchise; every adult who has attained 18 years of age is eligible to vote. The candidate who secures the largest number of votes gets elected. The Constitution provides for an independent organisation known as the Election Commission to conduct elections. The normal life of the Lower House is five years, though it can be dissolved earlier by the President.

To be a member of the Lok Sabha, a person should be an Indian citizen, must have completed 25 years of age and must possess all other qualifications that are prescribed by a law of the Parliament. A candidate seeking election to the Lok Sabha can contest from any parliamentary constituency from any of the States in India.

The Rajya Sabha or Council of States consists of not more than 250 members of which 12 members are nominated by the President from amongst persons having 'special knowledge or practical experience in literature, science, art, and social service.' The remaining members are elected by the members of the State Legislative Assemblies in accordance with the system of proportional representation by means of single transferable vote. Thus, unlike Lok Sabha, Rajya Sabha adopts the method of indirect election. For the purpose of this election, each State is allotted a number of seats, mainly on the basis of their



population. The Rajya Sabha, thus reflects the federal character by representing the States or the units of the federation. However, it does not follow the American principle of equality of State representation in the Second Chamber. Whereas every State of the United States sends two representatives to the Senate, in India, the number of representatives of the States to the Rajya Sabha varies from one (Nagaland) to 34 (Uttar Pradesh) depending upon the population of a state.

Rajya Sabha is a continuing chamber as it is a permanent body not subject to dissolution. One third of its members retire at the end of every two years and elections are held for the vacant positions. A member of Rajya Sabha has a six-year term, unless he resigns or is disqualified.

#### 14. Executive

The executive power of the government of India is vested in the President of India, who is both the formal head of the state and the symbol of the nation. The Constitution of India, however, bestows authority and dignity to the office of the President without providing adequate powers to rule. Instead, the President performs essentially a ceremonial role. The Prime Minister exercises real executive power. While the President is the head of the state, the Prime Minister is the head of the government. The President carries out the actual functions of the government only with the aid and advice of the Prime Minister. As one political scientist observed, for a President to use the executive powers formally vested in the office would be to misuse and abuse the trust reposed in the highest dignitary in the land.

The constitution has made detailed provisions to see that the President, the head of the state, is a ceremonial head and that he did not arrogate to himself any real power. The President is indirectly elected for term of five years and can be removed on the basis of impeachment proceedings brought against him by the Parliament. The Constitution also provides for the post of a Vice President, also indirectly elected, who would serve as head of the state in the event of the



President's incapacity or death.

Article 53 deals with the executive powers of the President of India. The powers of the President are broadly divided into two types, namely, ordinary and emergency powers. The ordinary powers of the President can be grouped as executive, legislative, financial and judicial powers.

The executive powers of the Union are vested in the President. Article 53 vests all executive powers in him and empowers him to exercise these powers directly by himself or through officers subordinate to him. Article 75 requires the Prime Minister to communicate to the President all decisions of the Union Council of Ministers. Article 77 holds that all executive powers of the Union government shall be exercised in the name of the President. The President has both administrative and military powers. The President has the power of appointment and removal of high dignitaries of the State. The President appoints the Prime Minister and, on the latter's advice, the council of ministers, the Attorney-General, the justices of the Supreme Court and High Courts, members of special commissions (such as the Union Public Service Commission and the Election Commission); and the governors of states. The choice of the Prime Minister is not a discretionary prerogative of the President but is usually dictated by the party commanding a majority following in the Lok Sabha.

The President of India is also the Commander-in-Chief of the Defence Forces. He appoints the Chiefs of the Army, the Navy and the Air Force. He has the power to declare war and conclude peace. But all these powers have to be exercised by him subject to the ratification of the Parliament. As pointed out, he exercises all the executive powers only with the aid and advice of the Council of Ministers headed by the Prime Ministers.

Even though the President is not a member of either house of Parliament, Article 79 states that the President is an integral part of the Union Parliament. The

President has the power to summon both the houses of Parliament, nominate



twelve members to the Rajya Sabha, has the right to address either house or their joint session at any time and the power to dissolve the Lok Sabha. All money bills to be introduced in the Parliament have to obtain the recommendation of the President. Such a prior recommendation is also necessary for introducing bills regarding the formation of new states, alteration of areas, boundaries, names of the existing states, etc. Finally, when any bill is passed by the Parliament, it can become an Act only when it has the assent of the President. The President can withhold or return a non-money bill for the reconsideration of the Parliament. However, if the same is passed by both the houses with or without modifications and returned to the President, the latter is bound to give his assent. When the Parliament is not in session, the President can promulgate ordinances in public interest. These ordinances have the same force and effect as the laws passed by the Parliament. However, they have to be placed before the Parliament within a period of six weeks from the day of the reassembling of Parliament. Without the Parliament's approval, the ordinance will become invalid.

Article 254 empowers the President to remove inconsistencies between laws passed by the Parliament and state Legislatures and the subjects included in the Concurrent list. Another legislative function of the President having a bearing on states is that the Governor of a state can reserve certain bills passed by the state Legislatures for the consideration of the President.

The judicial powers of the President of India include the appointment of the justices of the Supreme Court and High Courts, and the power to grant pardon, reprieve, suspension, remission or commutation of punishment or sentence of court. These powers of granting pardon are given to the President for removing the extreme rigidity in the criminal laws and for protecting the persons on humanitarian considerations. The President also has the right to seek the advice of the Supreme Court on some important constitutional, legal and diplomatic matters. In 1977, the President sought the advice of the Supreme Court for creating Special Courts to try the emergency excesses.



With the intention of safeguarding the sovereignty, independence and integrity of Union of India, the constitution bestows the President of India with emergency powers. The President is empowered to declare three types of emergencies, namely:

- i) national emergency arising out of war, external aggression or armed rebellion,
- ii) emergency arising due to the breakdown of the constitutional machinery in the States and
- iii) financial emergency.

The President can make a proclamation of national emergency at any time if he is satisfied that the security of Indian any part of the country is threatened by war, external aggression or armed rebellion. This proclamation must be submitted to the Parliament for its consideration and approval. It must be accepted within one month by both the houses of Parliament by two-third of the members present and voting. If the Parliament fails to approve the proclamation bill, it ceases to operate. If approved, it can continue for a period of six months. However, it can continue for any length of time if the President approves the proclamation for every six months. The Parliament however, has the power to revoke the emergency at any time by a resolution proposed by at least one tenth of the total members of the Lok Sabha and accepted by a simple majority of the members present and voting. National emergency under Article 352 was proclaimed for the first time in 1962 when the Chinese aggression took place<sup>22</sup>.

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The second proclamation was made in 1971 during the Bangladesh war. On 26 June 1975<sup>23</sup>, for the first time, the President proclaimed, on the advice of the Prime Minister, emergency in the name of grave danger to internal security.

When there is a breakdown of the constitutional machinery in the state, the President can impose emergency in that state. Article 356 provides that if the

<sup>22</sup> Indo-China war

<sup>23</sup> by then Prime Minister Indira Gandhi was to overrule the Allahabad High Court



President, on receipt of a report from the Governor of a state or otherwise, is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the constitutional provisions, he may proclaim constitutional emergency in the state. He can also declare state emergency if the state government refuses or fails to carry out certain directives given by the central government.

The proclamation of this type of emergency, popularly called as President Rule, can remain in force for a period of six months. By the 44 Amendment, the Parliament can extend the duration of the state emergency for a period of six months at one instance. Ordinarily, the total period of such emergency cannot exceed one year unless there is a national emergency in force. However, the total period of state emergency cannot go beyond three years.

The President can impose financial emergency. Article 360 states that if the President is satisfied that a situation has arisen where the financial stability or credit of India or any part of the country is threatened, he may declare financial emergency. Like the National emergency, such a proclamation has to be laid before the Parliament for its approval.

On its face value one can say that the President enjoys formidable powers. In reality however, he can exercise his powers only on the aid and advice of the Council of Ministers, headed by the Prime Minister. In this respect, the President's position is more like that of the British Monarch rather than that of the President of the United States of America. While the President of India may be the head of the state, the head of the government is the Prime Minister.

The real executive power under the constitution vests with the Union Council of Ministers with the Prime Minister at its head. The President is obliged to act according to the advice of the Council of Ministers which is responsible in the real sense of the term, not to the President but to the Lok Sabha.

As in Britain, the Prime Minister is usually a member of the lower house of

Parliament. When Mrs Indira Gandhi was selected as a Prime Minister in 1966,





she was a member of the Rajya Sabha. By getting elected to the Lok Sabha, she strengthened the convention of the Prime Minister being a member of the lower house.

The Prime Minister is appointed by the President. However, the President has hardly any choice in selecting the Prime Minister. He can only invite the leader of the party in majority in the Lok Sabha, or a person who is in a position to own the confidence of the majority in the house. The Prime Minister holds office during the pleasure of the President. The 'pleasure' of the President in this regard is related to the unwavering majority support which a Prime Minister receives in the Lok Sabha.

The President appoints the other members of the Council of Ministers on the advice of the Prime Minister. A minister may be chosen from either house and has a right to speak and take part in the proceedings of the other house, though he can vote only in the house to which he belongs. Even a person who is not a member of either house of Parliament can be appointed as minister but he has to qualify for it by being elected or nominated to either house within a period of six months.

The term 'cabinet' is used interchangeably with that of Council of Ministers. But they are different. The Council of Ministers, or the Ministry, consists of different categories of ministers. At the time of independence, there was no such institution as a cabinet in India. What existed then was the Executive Council. On 15 August 1947, the Executive Council was transformed into a Ministry or Council of Ministers that is responsible to the Parliament. The term 'cabinet' was used thereafter as an alternative to the Council of Ministers. At this stage, all the members of the ministry or the cabinet except the Prime Minister had the same status. But the situation changed once junior ministers were appointed to the Council of Ministers. In 1950, based on the recommendations of the Gopalswamy Ayyangar's report, a three-tier system of the ministry was established: with the cabinet ministers at the top; ministers of

the state at the middle and deputy ministers in the lowest rung.



The Cabinet, composed of the 'senior most ministers' whose responsibilities transcended departmental boundaries into the entire field of administration, is a smaller body and the most powerful body in the government. The Cabinet serves three major functions:

- i) It is the body which determines government policy for presentation to the Parliament.
- ii) It is responsible for implementing government policies.
- iii) It carries out interdepartmental coordination and cooperation.

The cabinet meets regularly, as it is a decision-making body. It is assisted by the cabinet secretariat that is headed by a senior member of the civil services, the cabinet secretary. To manage the volumes and complexities of work that comes before it the cabinet members have developed standing and ad hoc committees. There are four Standing Committees which are permanent in nature. These are the defence committee, economic committee, administrative organisation committee and parliamentary and legal affairs committee. Ad-hoc Committees are constituted from time to time. In the dark times of Covid-19, the hon'ble SC has dealt with the situation in suo- moto writ petition to keep the executive and legislative bodies in order, for instance, in

Distribution of essential supplies and services during pandemic<sup>24</sup> Amongst other things, the Court noted that paying for vaccination when it is by the State/UT Governments and private hospitals for persons between 18-44 years is arbitrary and irrational.

Next in rank are the ministers of state who hold independent charge of individual ministries and perform the same functions and exercise the same powers as a cabinet minister. The only difference between such a minister of state and a cabinet minister is that he/she is not a member of the cabinet, but attends cabinet meetings only when specially invited to do so in connection with the subject that he/she is given charge of. There are other ministers of state who

<sup>24</sup> Suo Motu Writ Petition (Civil) No.3 of 2021



work directly under cabinet ministers.

At the bottom of the hierarchy are the deputy-ministers who do not have specific administrative responsibilities. But their duties include:

- i) Answering of questions in parliament on behalf of the ministers concerned and helping to pilot bills.
- ii) Explaining policies and programmes to the general public and maintaining liaison with members of parliament, political parties and the press.
- iii) Undertaking special study or investigation of particular problems, which may be assigned to them by particular minister.

From the above it is clear that the Cabinet is the nucleus of the Council of Ministers. Precisely because of this reason Walter Bagehot calls the Cabinet 'the greatest committee of the legislature'. It is the 'connecting link between the executive and legislative power'.

## 15. judiciary

The Judiciary is the third organ of the government. It has the responsibility to apply the laws to specific cases and settle all disputes. The real 'meaning of law' is what the judges decide during the course of giving their judgments in various cases. From the citizen's point of view, Judiciary is the most important organ of the government because it acts as their protector against the possible excesses of legislative and executive organs. Role of Judiciary as the guardian-protector of the constitution and the fundamental rights of the people makes it more respectable than other two organs.

There are various levels of judiciary in India – different types of courts, each with varying powers depending on the tier and jurisdiction bestowed upon them. They form a strict hierarchy of importance, in line with the order of the courts in which they sit, with the Supreme Court of India at the top, followed by

High Courts of respective states with district judges sitting in District Courts and



Magistrates of Second Class and Civil Judge (Junior Division) at the bottom. There are also Tribunals, Tribunals can be understood as quasi-judicial institutions, established under various statutes, empowered to adjudicate specific disputes- e.g., tax or service-related matters, determine the rights and liabilities of the contesting parties, and make and review administrative decisions.

Constitutionally, Tribunals were not a part of the country's original Constitution and were introduced only in 1976, by the 42nd Amendment to the Indian Constitution, on the recommendations of the Swaran Singh Committee, in the form of Articles 323A and 323B. However, since their formation, they have been subjected to various judicial challenges, challenging their existence, methods of functioning, etc. One such recent judicial challenge, *Madras Bar Association v. Union of India & Anr*<sup>25</sup> wherein, the Central Legislature's attempt to determine and regulate the functioning of such institutions was challenged by the Madras Bar Association and the precedent laid down. A three-judge bench of the Supreme Court, comprising of Justices L Nageswara Rao, S Ravindra Bhat, and Hemant Gupta, on 14th July 2021 struck certain provisions of the Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 unconstitutional, which fixed the term of the members of the Tribunals to 4 years, by a 2:1 majority.

Bryce says that "If the law be dishonestly administered, the salt has lost its flavor."<sup>26</sup> It means if a lamp of justice goes out the judiciary gives a gloried about the importance, intendment and necessity of the judiciary in a government particularly in a democratic. It is legitimate said that the excellence of a country's judiciary is a measure of the excellence of its government.

'Justice' is an ivory for every country and is most important rule for every government. It has to perform a very important role in the government set-up. If

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<sup>26</sup> Writ Petition (Civil) No.502 of 2021

Page 556, Principals Of Political Science, Political Theory, VD Mahajan



the judiciary is prejudice or not independent then the light of justice will fadeaway and the life of the people will be diminished.

The Supreme Court is basically the living outlet of the Constitution- It is basically the will of the people which is expressed in the Fundamental Law that they have resolve to retain themselves from hasty and unjust action by placing their representative under the restriction of permanent law.<sup>27</sup> It is very well said that Fundamental Rights is meaningless unless there is an operative machinery for the enforcement of the rights. It is remedy that makes rights very effective and accurate. It is well said that if there is no remedy, there is no right at all. Fundamental Rights also provided an adequate remedy under Article 32 of the Constitution.

Under Article 226 it empowers all the High Courts to issue the writs for the enforcement of Fundamental Rights.

Fundamental rights guaranteed to citizens, which is as incorporated in Part III of the Constitution, constitute individual rights common to most people in liberal democracies. They are enforceable in a court of law, i.e.; their violations result in punishment. These rights are not absolute, they are exercised within the framework of the provisions of the constitution. They generally help us to remove or crimation on ground of religions, race, sex, region, or place of birth etc. These rights also protect and promotes the interest of the minorities, their religious, culture, and ethnic. They also guarantee us freedom to enjoy the right to life and personal liberty.

The Fundamental rights are both natural as well as legal. They are necessary for the development of personality. And legal is for they are binding upon every government-central, provincial, district and local.

- Articles 32(1) guarantees the right to move the Supreme Court by “*appropriate proceedings*” for the enforcement of Fundamental Rights conferred by Part III of the Constitution.

27

Bryce, James, American Commonwealth London: he Macmillan Co.; 1960,p.68.



- Clause (2) of Article 32 confers power on the Supreme Court to issue appropriate directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any of the rights.
- Clause (3) of Article 32 states that Parliament may by law empower any court to exercise within the local limits of the jurisdiction all or of the powers exercised by the Supreme Court under Clause (2).
- Clause (4), the right guaranteed by Articles 32 shall not be suspended except as otherwise provided for the Constitution. Article 32 thus provides for an expeditious and inexpensive remedy for the protection of fundamental rights from legislative and executive interference.<sup>28</sup>

It is apparent from Article 32(1) that whenever there is a violation of Fundamental Rights, any person can move the Court for an appropriate remedy.

The Supreme Court has characterized the jurisdiction conferred on it by article 32 as 'an important and integral part of the basic structure of the Constitution' because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement if and when, they are violated.

'A right without a remedy is a legal conundrum of a most grotesque kind.' Article 32 confers a highly-cherished right.<sup>29</sup> The Supreme Court has given a dynamic interpretation to these constitutional provisions and has read therein the right to award compensation for breach of a fundamental rights when no other remedy was suitable in the fact situation to give redress and relief to the petitioner. The word compensation does not occur in Article 32 or 226. These articles merely speak of 'writs', 'orders' or 'directions' for the enforcement of fundamental rights.

Under Article 32 the Court refused to award monetary compensation before 1983, for infringement of Fundamental Rights. A major contribution by the court

<sup>28</sup> The Indian constitution

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Fertilizer Corporation Kamgar Union v Union India of AIR 1981 SC 344.



towards the protection of Fundamental Rights against undue interference by administrative authorities, as situations may arise when only compensation can provide some relief to the affected person; no writs or order could fill the bill. In *KHATRI V BIHAR*<sup>30</sup>, the Bhagalpur police had blinded certain accused persons. In this case, the Supreme Court for the first time raised the extremely significant constitutional question, namely, if the State deprives a person of his life or personal liberty in violation of the right guaranteed by Article 21, can the Supreme Court under Article 32 give monetary compensation to the aggrieved. The three-judge bench of the Supreme Court in the case of *Gujarat Mazdoor Sabha Vs State of Gujarat*<sup>31</sup>, after due consideration struck down the notification, holding that “the economic slowdown created by the COVID-19 pandemic does not qualify as an internal disturbance threatening the security of the State” which was a precondition for the imposition of Section 5.

Judicial review under article 32 and 226 is a basic feature of the Constitution beyond the light of amenability.

- Certiorari
  - a) This may be issued where the law under which the decision was void.
  - b) The decision itself violates a fundamental right.
  - c) The decision violates the law or which is without jurisdiction.
  - d) The decision is against natural justice, mala fide.

#### THE PERSON AGAINST WHOM THE WRIT CAN BE ISSUED

- Child prostitution- Court has promulgated directions to control the evil of child prostitution.
- Closure of industry- Supreme Court announced order for revival of a company having regard to the evidence that living had been denied to 10,000 workers for five years.

<sup>30</sup> Also see *Khatri v Bihar* AIR 1981 SC 928; *Sheela Barse v State of Maharashtra* AIR 1983 SC 378; *Ranjan Dwivedi v India* AIR 1983 SC 624.

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Writ Petition (Civil) No. 708 of 2020



- Commissioner- Court may appoint a person to act as Commissioner to examine into allegations made in contrast to Government officers for breach of fundamental right. A request made after an objective inquiry would not be rejected unless justification is shown to exist for rejection.
- Compensation- For deprivation of right to life and personal liberty. The compensation may be awarded.
- Locus standi- Any person those who are complaining of infringement of any fundamental rights guaranteed by the Constitution is at liberty to move to the Supreme Court but the rights that could be invoked under Art.32 must ordinarily be the rights of the person who complains of the infringement of such rights and approaches the court for relief and the proper subject for investigation would however be as to the nature of the rights that is stated to have been infringed.
- Mandamus- (a) It should be issued under article 32 where fundamental right is infringed by a statute. (b) Statutory Order  
(c) Executive Order
- Natural Justice- The Court can go under article 32 or article 226 refuse to exercise its direction of striking down the order. If such striking down will result in restoration of another order passed earlier in favor of the petitioner or against the opposition party for violation of principles of natural justice which is otherwise not in accordance with law.

#### Function of The Judiciary-:

- Administration of Justice
- It is one of the most important functions of the judiciary is to administration of justice. In fact, the existence of judiciary is justified for its function of administration of justice. While the judiciary hear and decide on the basis of different cases on civil, criminal, constitutional and other matters, the dedication remains for the administration of justice. In the case of *Gautam Navlakha v. National Investigation Agency*<sup>32</sup>, The Court held that under Section 167 of the

<sup>32</sup> Criminal Appeal No.510 OF 2021 [ARISING OUT OF SLP (CRIMINAL) NO. 1796/2021]



CrPC, in appropriate cases, it will be open to courts to order house arrest as well. Further, in order to house arrest a person, courts can consider criteria like age, health condition and the antecedents of the accused, the nature of the crime, the need for other forms of custody and the ability to enforce the terms of the house arrest.

- **Application of Law**

Basically, Judiciary has also the task of application of law. It has, to apply the law in specific cases like civil and criminal. Judiciary has a very significant role in the application of law because in many cases, law does not and may not provide clear hint and in such a situation the judiciary has to play a very delicate and supreme role.

- **Making of Law**

Making of law or task of legislation is fundamentally the business of the legislature, but the judiciary or the courts also make laws in various ways. While deciding the cases where there are clear laws, the judiciary has not to make a law. But in many of the cases, law may be ambiguous or vague, in such cases, the judiciary or the judges judge them in a different way within the existing framework. Hence, they provide a new dimension to the law. In fact, it is known as judge made law.

- **Interpretation of Constitution**

The judiciary is also assigned with the task of interpretation of the constitution of the country. In a democratic political set-up the judiciary is generally made the accredited interpreter of the constitution. There are many words and expressions in the constitution that might require interpretation in different situations and the judiciary perform the task in such cases. In a federal form of government, this task is of special significance because it involves the relationship of the center and the states concerning their allocation of jurisdiction.

- **Guardian of the Constitution**

The judiciary or the Court also act as the guardian of the constitution, especially



in a federal set-up. While performing the role as guardian of the constitution, the judiciary keeps a close eye over the activities of the legislature and that any part of legislation violates the constitution, the judiciary can declare the law as ultra vires or unconstitutional.

- Protector of Individual Rights

In a democratic political set-up, the judiciary is one who performs the important function of the protection of the individual rights. The judiciary, through its power of judicial review, works as a watch dog for the protection of individual rights and in case of any violation, it takes immediate action for the infringement of any such fundamental rights.

- Render Advice

The courts or the judiciary also maintain the function of rendering advice whenever it is sought for. In case, some of the constitutional provisions seem to be vague on the part of the government of a country; In a particular situation the executive branch may seek advice from the judicial branch; And in such cases, the judiciary performs a very important task.

## HISTORICAL BACKGROUND

Part III of the Indian Constitution constitutes the Charter of Freedom of The Citizens of the India. It is what The Magna Carta is the essential freedoms of the Indian people. The framers of the Indian Constitution did not leave their task only by laying down Fundamental Rights, because a right without adequate measure of protection would be a heap of sands. They also arranged certain measures to protect them, because they knew that all power corrupts, and absolute power corrupts absolutely.<sup>33</sup> Again, basic human rights of the citizens be arbitrarily curtailed by the executive or by the legislature. Hence, it is necessary to provide an effective machinery of their protection.<sup>34</sup>

The Supreme Court acts as a laboratory where the validity of the laws and

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AIR1965 SC395.

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Seervai, H.M.; The position of the Judiciary under the Constitution of India (Bombay: University of Bombay, 1970);p.2.



executive actions are tested in the light of the relevant constitutional provisions.<sup>35</sup> In other way, this court acts as perpetual watch dog and keeps an unceasing vigil to protect the Fundamental Rights of the citizens. Right to constitutional remedies constitute the anchor of democracy of India. Dr. B.R. Ambedkar, while commenting on the provisions of Articles- 32, opined. "If I wish to make a particular article as the most important without which this Constitution would be a nullity, I would not refer to another article except this."

Therefore, Article 32 declares all laws contravening Fundamental Rights void, and Art. 32 makes this declaration effective by giving the aggrieved person a Fundamental Right to obtain from the Supreme Court appropriate directions, orders or writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warrant, and Certiorari, restraining the violation of his Fundamental Rights.

It is by virtue of the powers conferred by these two articles that the Supreme Court and High Courts have been functioning as the custodian of the Fundamental Rights. In course of its functioning for the last Thirty years, the Supreme Court of India had many opportunities to elucidated the scope, amplitude and mode of operation of its judicial review; specially under Art.32 of the Constitution which makes the Court the protector and guarantor of the Fundamental Rights enshrined in the Constitution. The Court can apply several writs. They are as follows;

- Habeas Corpus- It literally means bring the body. In legal terms, habeas corpus is simply the name for the procedure by which the court inquire into the legality of a citizen's detention.

The reason is very straight forward. The availability of habeas corpus means that if an individual is found to have been imprisonment unlawfully the court can release him or her, thus enforcing the law and frustrating governmental oppression.

The writ of habeas corpus will be issued if the confinement is prima facie

<sup>35</sup> Reddy, Sarojini P., *Judicial Review of Fundamental Rights* (Delhi: National Publishing House, 1976),p.30.



illegal.

1. Kanu Sanyal v. District Magistrate<sup>36</sup>- In the case, the court may examine the legality of the detention without requiring the person detained to produce before it.

2. Sheela Barse v. State of Maharashtra<sup>37</sup>- If the detained person is unable to pray for the writ of habeas corpus, someone else may pray for such writ on his behalf.

- Mandamus- This writ is usually in the form of a command which is issued by Supreme Court to the Government, inferior court, tribunal, public authority, corporation or any other person having public duty to perform asking such Government, inferior, public authority, corporation or to refrain from doing illegal act.

A mandamus is available against any public authority having administrative and local bodies and it would rely to any person who is under a duty imposed by statute or the common law to do a particular act. The writ can be granted against a public authority if;

1. Acted against the law.
2. Exceeded his limits of power.
3. Acted with mala fides.
4. Abused his discretionary powers.
5. Has taken into account irrelevant consideration.

- Certiorari- It is a writ which is issued by Supreme Court (i.e., the High Court or the Supreme Court) to the inferior Court or Tribunal or body exercising judicial or quasi-judicial functions to remove the proceedings from such Court, Tribunal or body for examining the legality of the proceedings. It means "To be Certified" These writs are issued by the superior court in the exercise of its supervisory function and not in the exercise

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<sup>36</sup> 1983 AIR 378, 1983 SCR (2) 337

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1974 AIR 510, 1974 SCR (3) 279



of its appellate function.<sup>38</sup>

In Hari Vishnu Kamath v. Ahmad Ishaque<sup>39</sup> the proposition laid in issuing this writ by the High Court is issued to correct the errors of Jurisdiction.

1. When court or tribunal acts illegal in its jurisdiction.
2. Order against principles of natural justice.
3. Court acts in exercise of its supervisory and not appellate Jurisdiction.
4. An error in the decision or determination itself may also be amended to a writ of Certiorari.

- Prohibition- Prohibition is a writ and that is issued by a superior Court to inferior Court or tribunal or body exercising judicial functions preventing such inferior Court or Tribunal or body from usurping jurisdiction which is not legally vested therein or from acting in violation of the principles of natural justice or from acting under unconstitutional law. It is an order directed to an inferior Court which forbids the Court to continue proceedings therein in excess of its jurisdiction or in contravention of the law of the land.<sup>40</sup>

- Quo-Warranto- Basically meaning of 'Quo-Warranto' is 'by what authority'. According to Halsbury "An information in the nature of quo-warranto took the place of the obsolete writ of quo-warrento which lay against a person who claimed or usurped an office, franchise or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined."

The procedure of quo-warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of appointment to public office against the relevant statutory provision.<sup>41</sup>

Difference between Article 32 and Article 226.

<sup>38</sup> (1950) 1 SCR 1104.

<sup>39</sup> 1955-I S 1104: (s) AIR 1955 SC 233);

East India Commercial Co. v. Collector of Customs, AIR 1962 SC 1893.

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University of Mysore v. Govind Rao, AIR 1965 SC 491.



There are many differences which are discussed here. It assembled clearly in Article 226, that the High Court effectiveness throughout the territories in alliance to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases any Government within those territories' directions, orders or writs for enforcement of the Fundamental Right. Article 32 is itself a Fundamental Right and guarantees the right to move the Supreme Court by appropriate proceeding for the enforcement of Fundamental Right. There is some difference between Article 32 and Article 226 and they are following;

1. Under Article 32, the remedy is indulged only for enforcement of the Fundamental Right which are guaranteed in Part III of the constitution whereas Article 226 permits the High Court to issue directions, orders and writs for the enforcement of the Fundamental Rights and also for the enforcement of any other purpose.
2. In under Article 32, if petition filed is removed by Supreme Court on the merit, a subsequent petition under Article 226 would be barred.
3. The territorial jurisdiction of the High Court is not as wide as that of the Supreme Court. The jurisdiction of the Supreme Court prolongs to the whole territory of India, but High Court does not enjoy such jurisdiction.
4. During the period of emergency article 32 can be suspended whereas President of India cannot suspend articles 226.
5. Article 32 empowers the Supreme Court to issue writs whereas Article 226 empowers every High Court to issue the writs.
6. When the Fundamental Rights are infringed or threatened, Article 32 empowers the Supreme Court to issue the writs but only article 226 enables the High Court to issue orders to writs in the nature of habeas corpus, mandamus, prohibition, certiorari, quo-warranto and to protect aggrieved.

Under Article 32 When the Supreme Court can refuse to permit remedy.

While having infringement of the rights and Supreme Court has itself duty to prosecute the fundamental rights guaranteed by the Constitution. Normally, the



Supreme Court cannot refuse to grant this remedy. Anyhow, here is same condition in which Supreme Court refuse to grant the remedy under Article 32. These are mentioned below;

- Res judicata- The principle of res judicata put on even in the case of petition under Article 32. However, a petition under Article 32 for Habeas Corpus is an exception to this general rule. The Supreme Court cannot be moved more than once on the same facts.<sup>42</sup>

It has been held by the Supreme Court that in the unavailability of new circumstances arising because the dismissal of the petition filed in Supreme Court under Article 32, a fresh petition under Article 32 on the same matter cannot be filed in the Supreme Court.<sup>43</sup> It is to be notable that a petition filed in the Supreme Court under Article 32 and dismissed by it on suit by a speaking order will also be operative as res judicata, even though order has been made ex- parte.

- Delay- The Court may refuse to grant relief where there is no reasonable explanation for the delay. However, this is not a rule of law but a rule of practice based on the Court's discretion and this discretion is to be exercised in the light of the circumstances of each case.<sup>44</sup>
- Malicious petition- Under Article 32, if the petition filed in the Supreme Court is found to be malicious or ill-motivated, it may be dismissed by the Supreme Court.<sup>45</sup>
- Misrepresentation or Suppression of Material facts- The Supreme Court may dismiss the petition at any stage, where the petitioner is found to have made it clear misrepresentation as to the material facts.<sup>46</sup>
- Existence of adequate alternative remedy- It does not bar the

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<sup>42</sup> Niranjan v. State of M.P.; (1972) 2 SCC 542.

<sup>43</sup> Lakhnupal v. Union of India, AIR 1967 SC 908. 88

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Ram Chandra v. State of Maharashtra, AIR 1974 SC 259.

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Kini v. Union of India, AIR 1985 SC 893.

<sup>46</sup> Welcome Hotel v. State of A.P., AIR 1983 SC 2237.



Supreme Court to entertain a petition under Article 32.<sup>47</sup> That's why the Supreme Court has held that in the case of adequate alternative remedy it may exercise its discretion to entertain a petition filed under Article 32.

Article 32 of Indian Constitution be amended under Article 368

Firstly, Article 32 is a part of the basic structure of the constitution and that cannot be restricted or seized away even by way of modification of the constitution, that had ruled by Supreme Court. So, Article 32 cannot be amended by Parliament under Article 368. If we noticed that it can be amended but here the point is that it will be subject to judicial review by Supreme Court of India. If Court disclose that is contradict with the basic structure of our constitution at that time it will be stated null and void by the Supreme Court. In *Keshavananda Bharti v. State of Kerala*<sup>48</sup> once again there are amendable of fundamental rights came before the court, is that the court will now rule by majority and that Parliament is competent to amend under Article 368

fundamental rights just as any other part of the Constitution, subject to the doctrine that the 'basic' or 'fundamental' features of the Constitution which cannot be amended.

- The majority ruled that while Parliament can amend any constitutional provision by virtue of article 368, such power is not unrestricted and unlimited. And the Court can still arise question that whether or not an amendment violates a 'fundamental' or 'basic' feature of the constitution. An amendment which does so will be constitutionally worthless.

- Article 368 account the expression 'amend' and which has a restrictive essence and cannot comprises a fundamental transition in the Constitution.

- So, that article 368 the amendment of the constitution could not have the effect of wrecking or abrogating the basic

structure of the

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48 S.H. Kachuni v. State of Madras, 1959 SCR 725.(1973) 4 SCC 225; AIR 1973 SC 1461



constitution.

In *Minerva Mills v. Union of India*<sup>49</sup>; The Supreme Court by 4:1 majority struck down clause 4 and clause 5 of Article 368 as these clauses destroyed the basic structure of the constitution and held that there are four basic structure of the Constitution and areas follows;

- Limited power of Parliament to amend the constitution.
- Harmony and balance between the Fundamental Right and Directive Principle of State Policy.
- Fundamental Right in certain cases.
- Power of judicial review in certain cases.

In *Golaknath v. State of Punjab*<sup>50</sup>; The Supreme Court overruled its earlier decision. The Apex Court held that no authority including the parliament can amend the Fundamental Rights.

As we know that India has the longest written constitution. There must be fundamental rights which are applicable on the citizen of India. But after doing research the researcher found that there is also provided same remedy for the protection of fundamental rights. Supreme Court of India acts as protector and guarantor of fundamental rights. Supreme Court has given supreme power to control and protect the infringement of fundamental rights.

Article 32 is a right guaranteed by the constitution to move in the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. It is to be noted that an application under article 32 cannot lie where no fundamental right has been violated. That is why the supreme court has duty to enforce the fundamental rights and also it is known as the protector and guarantor of the fundamental right.

It is also mentioned that while the infringement of the fundamental right is in the condition precedent for presenting a petition to move supreme court under



<sup>49</sup> AIR 1980 SC 1789

<sup>50</sup>  
1967 AIR 1643, 1967 SCR (2) 762



article 32 but here there is no need to justify actual violation of fundamental right. At a moment a petition will lie if there is imminent danger of the infringement of fundamental right.

It is very interesting to know about the fact that article 32 gives power to the supreme court to issue writ in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of the fundamental rights. It is also noticed while doing this research article 266 makes it clear that the High Court has power throughout the territories in relation to which it exercises jurisdiction which is issued on any person or authority including in appropriate cases by any Government within those territories' directions, orders or writs for the enforcement of the fundamental right. It is also clearly expressed that the Supreme Court has been constituted as the defender and guarantor of the fundamental rights of the citizens.

It is mentioned under article 226 of constitution, High Court has power to issue such writs and order which are necessary for administrative action and judicial or quasi-judicial action. Power of High Courts to issue any person or authority, including in appropriate case any Government, orders and writs, for the enforcement of any of the rights conferred by Part III. It is a constitutional right.

“Justice consists not in being neutral between right and wrong, But in finding out the right and upholding it wherever found, against the wrong.” Theodore Roosevelt.

By enlarging the scope of Article 32 and Article 226, judiciary has brought justice and revolutionized constitutional jurisprudence. Judiciary should act as a lighthouse, not a destination in itself. It should also work in a self-reliant and self-restrained manner. It makes the Constitution a living, dynamic document. Judicial review in constitution interpretation is a healthy trend. Also Check and balances is also applicable to Judiciary for a healthy democracy.

## CHAPTER V

### DOCTRINE OF SEPARATION OF POWERS

The doctrine of Separation of Powers deals with the mutual relations among the three organs of the Government namely legislature, executive and judiciary. The origin of this principle goes back to the period of Plato and Aristotle. It was Aristotle who for the first time classified the functions of the Government into three categories viz., deliberative, magisterial and judicial. Locke categorized the powers of the Government into three parts namely: continuous executive power, discontinuous legislative power and federative power. 'Continuous executive power' implies the executive and the judicial power, 'discontinuous legislative power', implies the rule making power, 'federative power' signifies the power regulating the foreign affairs.<sup>51</sup> The French Jurist Montesquieu in his book *L'Esprit Des Lois* (Spirit of Laws) published in 1748, for the first time enunciated the principle of separation of powers. That's why he is known as modern exponent of this theory. Montesquieu's doctrine, in essence, signifies the fact that one person or body of persons should not exercise all the three powers of the Government viz. legislative, executive and judiciary. In other words, each organ should restrict itself to its own sphere and restrain from transgressing the province of the other. In the view of Montesquieu: "When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the Legislative and Executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything where the same man or the same body to exercise these three powers..."<sup>52</sup>

Montesquieu's 'Separation' took the form, not of impassable barriers and

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<sup>51</sup> I.P. Massey: Administrative Law, Edn. 1970, p. 35.

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Montesquieu, De L' Esprit des lois, 1748 quoted in Justice D.D. Basu: Administrative Law, Edn. 199, p. 23.



unalterable frontiers, but of mutual restraints, or of what afterwards came to be known as 'checks and balances'. The three organs much act in concert, not that their respective functions should not ever touch one another. If this limitation is respected and preserved, it is impossible for that situation to arise which Locke and Montesquieu regarded as the eclipse of liberty- the monopoly, or disproportionate accumulation of power in one sphere.<sup>53</sup>

The man behind the principles is to protect the people again capricious tyrannical and whimsical powers of the State.

United Kingdom: The famous English Jurist Blackstone supported the doctrine of Montesquieu. According to him, "where ever the right of making and enforcing the Law is vested in the same man or in the same body of men there can be

no liberty". During the 17<sup>th</sup> century in England Parliament exercised legislative

powers. The King exercised executive powers, and the Courts exercised judicial powers, but with the emergence of cabinet system of Government i.e. Parliamentary form of Government, the doctrine remains no good. The renowned constitutional Bagehot observed. "The cabinet is a hyphen which joins, buckle which fastens, the legislative part of the State to the executive part of the State."

According to Wade and Phillips the doctrine of separation of powers implies:

- (i) The same person should not form more than one organ of the Government.
- (ii) One organ of the Government should not exercise the function of other organs of the Government.
- (iii) One organ of the Government should not encroach with the function of the other two organs of the Government.

Now the question in subject is whether this doctrine finds a place in England?

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Carleton K. Alien: Law and Orders, Edn. 1965, p. 10,19.



In England the King being the executive head also an integral part of the legislature. His ministers are also members of one or the other Houses of Parliament. This concept goes against the idea that same person should not form part of more than one organ of the Government.

In England House of Commons control the executive. So far as judiciary is concerned, in theory House of Lords is the highest Court of the country but in practice judicial functions are discharged by persons who are appointed specially for this purpose, they are known as Law Lords and other persons who held judicial post. Thus, we can say that doctrine of separation of powers is not an essential feature of British Constitution.

Donoughmore Committee has aptly remarked: “In the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers”

U.S.A.: Usually it is said that the principle of separation of powers finds a good mention in the Constitution of United States; while the Federal Constitution of the United States of America does not expressly provide for the principle of separation of powers. Having reliance on the doctrine of Montesquieu, Madison, the Federalist observed; “The accumulation of all powers legislative, executive and judicial, in the same hands whether of one, a few or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.” The same ideas were expressed by Hamilton in 1788.

In American Constitution we find that legislative, executive and judicial powers are vested in separate entities.

Section 1 of Article I declares: “All legislative powers herein granted shall be vested in a Congress of the United States”.

Section 1 of Article II says: “The executive power shall be vested in a President of the United States of America.”

Section 1 of Article III reads: “The judicial power of the United States, shall be



vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.”

Let us see the actual position prevailing in America. It is clear from the above- mentioned provisions that the President is the head of the executive in U.S.A. Besides he (The President) possesses the power to veto bills<sup>54</sup> passed by the Congress and such bills cannot become law unless they are subsequently passed again by each House, with a two third, majority. The character of veto power vested in the President is purely legislative. It is true that the power is one of negation only, but the history of its origin shows that even in its qualified form, it is legislative in its nature.<sup>55</sup> The President also exercises legislative power in making of treaties regarding foreign affairs. As John Marshall said in his great argument of March 7, 1800, in the House of Representative, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations”<sup>56</sup> The President in his legislative capacity gives information of the state of the Union to the Congress.<sup>57</sup> Likewise the Congress interferes with the powers of President by casting vote on Budget. The Budget and Accounting Act, 1921 established the principle and practice of the executive budget, under which the President is responsible for formulating and presenting to Congress a complete and detailed expenditure plan for the following fiscal year.<sup>58</sup> Congress also plays important role in ratification of treaties, as well as in appointments through its senators. Congress has also judicial powers. Each house may expel its members by a two third votes or punish them for ‘disorderly behavior’. Congress is the sole judge of the reason for expulsion. Not only this, American judges may be removed from the office only by impeachment proceedings instituted before the Congress. So far as judicial organ is concerned the Courts have supervisory control over both the Congress and the President, by way of judicial review. It is true that

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<sup>54</sup> Article 1, Section 7(2) of U.S.A. Constitution.

<sup>55</sup> Bernard Schwartz: American Constitution of Law, 1955 p.99.

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United States v. Curtiss-Wright Export Corp; 229 U.S. 304, 319 (1936).

<sup>57</sup> Article II, Section 2 of Constitution of U.S.A.

<sup>58</sup> C. Herman Pritchett: The American Constitution 3<sup>rd</sup> Edn. p.163.



legislature enacts the Law, but it is also true that in dealing with the new problems, where Law is silent, the Courts have to create the Law. The Chief Justice Hughes's remarks are most pertinent in this connection, as he candidly said- "The Constitution is what the judges say it is."<sup>59</sup>

The amendments which have been incorporated in American Constitution, all are not by Congress itself, but most of the amendments have been incorporated in Constitution by American Supreme Court. In this way it can be said that in

U.S.A. there is also not any possibility to have a rigid personal separation of powers.

France: Under the despotic Rule of Louis XIV (1643-1715) France enjoyed a commanding influence in European affairs. Louis XIV had the same Kingship that James I had tried in vain to induce the English people to accept. It was the thinking of Louis XIV that the subject should obey the King absolutely without asking any question or making any criticism. because of this capricious behavior he was known as autocratruler.

On the other hand, Montesquieu, the most profound of the political writers of the eighteenth century, being impressed by the thoughts of Locke propounded his theory of separation of powers, based on British Constitution. He pointed out that the freedom which Englishmen enjoyed was due to the fact that the three powers of the Government- legislative, executive and judicial- were not as in France in the same hands. Parliament made the Laws, the King executed them, and the Courts independent of both, saw that they were observed. He believed that the English would lose their liberties so soon as these powers fell under the control of one person or body of persons. His doctrine of separation of powers was also incorporated in French 'Declaration of Rights of Man'. Article

16 of this declaration declares that there could be

no constitutional or democratic government without separation of powers, but in practice this attempt has proved unsuccessful.

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Hendel, Charles Evans Hughes and the Supreme Court (1951), II quoted by Bernard Schwartz in American Constitutional Law 1955 page 130.



India: The doctrine of separation of powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the function of another.

In Constituent Assembly Debates Prof. K.T. Shah a member of Constituent Assembly laid emphasis to insert by amendment a new Article 40-A concerned with doctrine of separation of powers. This Article reads: "There shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial."<sup>60</sup> Kazi Syed Karimuddin (a member of Constituent Assembly) was entirely in agreement with the amendment of Prof.

K.T. Shah.

Shri K. Hanumanthiya, a member of Constituent Assembly dissented with the proposal of Prof. K.T. Shah. He stated that Drafting Committee has given approval to Parliamentary system of Government suitable to this country and Prof. Shah sponsors in his amendment the Presidential Executive. He further commented: "Instead of having a conflicting trinity it is better to have a harmonious governmental structure. If we completely separate the executive, judiciary and the legislature conflicts are bound to arise between these three departments of Government. In any country or in any government, conflicts are suicidal to the peace and progress of the country. Therefore in a governmental structure it is necessary to have what is called "harmony" and not this three-fold conflict."

Prof. Shibban Lal Saksena also agreed with the view of Shri K. Hanumanthiya.

Dr. B.R. Ambedkar, one of the important architects of Indian Constitution, disagreeing with the argument of Prof. K.T. Shah, advocated thus:

"There is no dispute whatsoever that the executive should be separated from the judiciary. With regard to the separation of the executive from the legislature, it is true that such a separation does exist in the Constitution of United States; but

<sup>60</sup>

Constituent Assembly Debates Book No.2, Vol. No. 411 Second Print 1989, p. 959.





many Americans themselves were quite dissatisfied with the rigid separation embodied in the American Constitution between the executive and legislature... There is not slightest doubt in my mind and in the minds of many students of Political Science, that the work of Parliament is so complicated, so vast that unless and until the members of the Legislature receive direct guidance and initiative from the members of the Executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the Legislature. I personally therefore, do not think that there is any very great loss that is likely to occur if we do not adopt the American method of separating the Executive from the Legislature.”

With the aforesaid observations the motion to insert a new Article 40-A dealing with the separation of powers was negated i.e. turned down.

In Indian Constitution there is express provision that “Executive power of the Union shall be vested in the President,<sup>61</sup> and the executive power of the State shall be vested in Governor.” (Article 154(1) of Indian Constitution). But there is no express provision that legislative and judicial powers shall be vested in any person or organ.

President being the executive head is also empowered to exercise legislative powers. In his legislative capacity he may promulgate Ordinances in order to meet the situation as Article 123(1) says “If at any time, except when both Houses of Parliament are in Session, President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require”. When Proclamation of emergency has been declared by the President due to failure of Constitutional machinery the President has been given legislative power under Article 357 of our Constitution to make any Law in order to meet the situations. A power has also been conferred on the President of India under Article 372 and 372-A to adapt any Law in country by making such adaptations and modifications, whether by way of repeal or amendment as may be necessary or

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<sup>61</sup> Article 53(1) of Indian Constitution.



expedient for the purpose or bringing the provisions of such Law into accord with the provisions of the Constitution.

The President of India also exercises judicial function. Article 103(1) of the Constitution is notable in this connection. According to this Article “If any question arises as to whether a member or either of House of Parliament has become subject to disqualification mentioned in clause (1) of Article 102, the questions shall be referred for the decision of the President and his decision shall be final”.

Article 50 lays emphasis to separate judiciary from executive. But in practice we find that the executive also exercises the powers of judiciary as in appointment of judges. (Articles 124, 126 & Article 127). The legislative (either House of Parliament) also exercises Judicial function in removal of President (Article 56) in the prescribed manner.<sup>62</sup> Judiciary also exercises legislative power, High Court and Supreme Court are empowered to make certain rules legislative in character. Whenever High Court or the Supreme Court finds a certain provision of law against the Constitution or public policy it declares the same null and void, and then amendments may be incorporated in the Legal System. Sometimes High Court and Supreme Court formulate the principles on the point where law is silent. This power is also legislative in character.

Separation of powers and Judicial opinion:

The following cases explain the real position of doctrine of separation of powers prevailing in our country. In re Delhi Law Act case<sup>63</sup> Hon’ble Chief Justice Kania observed:

“Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. It is then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the legislature? Does it not imply that unless it can be gathered from other

<sup>62</sup> Article 61 of the Indian Constitution.

<sup>63</sup>

AIR 1951 S.C. 332 at p.346 = (1951)S.C.R. 747.



provisions of the Constitution, other bodies executive or judicial are not intended to discharge legislative functions?". To the same effect another case is *Rai Sahib Ram Jawaya v. State of Punjab*<sup>64</sup> in which Hon'ble Chief Justice B.K. Mukherjee observed:

"The Indian Constitution has not indeed recognized the doctrine of separation of powers in the absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State of the functions that essentially belong to another."

In *Ram Krishna Dalmia v. Justice Tendolkar*<sup>65</sup>, Hon'ble Chief Justice S.R. Das opined that in the absence of specific provision for separation of powers in our Constitution, such as there is under the American Constitution, some such division of powers legislative, executive and judicial is nevertheless implicit in our Constitution. Same view was expressed in *Jayanti Lal Amrit Lal v. S.M. Ram*.<sup>66</sup> The judiciary is independent and separate wing of the Government. The executive or legislature has no concern with the day-to-day functioning of the judiciary. In terms of Biblical apologue, Francis Bacon in his 'Essay of Judicature' showing the importance of 'Temple of Justice' has expressed thus: 'Solomon's Throne was supported by lions on both sides; Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.'" (Quoted in *S.C. Advocates- on-Record Association v. Union of India*.<sup>67</sup>)

Here the expression 'Solomon's Throne. symbolizes the majesty of our justice system and the word 'Lions' represents the Legislature and the Executive. Briefly it may be stated as, 'Majesty of Justice system' is supported by the Legislature and the Executive from both sides, nevertheless, these Legislature and Executive are under the control of Judiciary. Legislature and Executive must not

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<sup>64</sup> AIR 1955 S.C. 549 at p.556

<sup>65</sup> AIR 1958 S.C. 538 at p. 546

<sup>66</sup> AIR 1964 SC 649.

<sup>67</sup> AIR 1994 SC 268 at p. 301



go against any point of Sovereignty. As regards 'Sovereignty' it is enough to state that in a democracy it vests in the will of people.

Showing the importance of judiciary, Supreme Court in the same case has also observed: "Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged."

In *Chandra Mohan v. State of U.P.*<sup>68</sup>, Supreme Court held: "The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States... but at the time the direct control of the executive. Indeed, it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive and that the agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the power levels would be a mockery." (See also *S.C. Advocates-on-Record Case*)<sup>69</sup>.

The State in the present day has become the major litigant and the superior courts, particularly the Supreme Court, have become centers for turbulent controversies some of which with a flavor of political repercussions and the courts have to face tempest and storm because their vitality is a national imperative. In such circumstances, therefore, can the Government, namely, the major litigant be justified in enjoying absolute authority in nominating and appointing its arbitrators. The answer would be in the negative. If such a process is allowed to continue, the independence of judiciary in the long run will sink without any trace. (*S.C. Advocates-on-Record Case*)<sup>70</sup>. In *Udai Ram Sharma v. Union of India*<sup>71</sup>, Supreme Court held that "The American doctrine of well-defined separation of legislative and judicial powers

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AIR 1966 SC 1987 at p. 1993

<sup>69</sup> AIR 1994 S.C. 268 at p. 272

<sup>70</sup> AIR 1994 S.C. 268 at p. 344

<sup>71</sup> AIR 1968 S.C. 1138 at p. 1152



has no application to India.”

In *Keshavananda Bharti v. State of Kerala*<sup>72</sup>, Hon’ble Chief Justice Sikri observed: “Separation of powers between the legislature, the executive and the judiciary is a part of the basic structure of the Constitution; this structure cannot be destroyed by any form of amendment.”

In *Smt. Indira Nehru Gandhi v. Raj Narain*<sup>73</sup>, Hon’ble Justice Chandrachud observed: “The American Constitution provides for a rigid separation of governmental powers into three basic divisions the executive, legislative and judicial. It is essential principle of that Constitution that powers entrusted to one department should not be exercised by any other department. The Australian Constitution follows the same pattern of distribution of powers. Unlike these Constitutions, the Indian Constitution does not expressly vest the three kinds of power in three different organs of the State. But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions.”

In *Hari Shankar Nagla v. State of M.P.*<sup>74</sup> It was observed: “The Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislature function consists in the determination of the choice of the legislative policy and of formally enacting that policy into a binding rule of conduct.”

Virtually, absolute separation of powers is not possible in any form of Government. In view of the variety of situations, the legislature cannot fore-see or anticipate all the circumstances to which a legislative measure should be extended and applied.

Therefore, legislature is empowered to delegate some of its functions to

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73 AIR 1973 SC 1461 at p. 1535

74 AIR 1975 SC 2299 at p. 2470

AIR 1954 SC 465 at p. 468 = (1955) SCR 380.



administrative authority (executive). But one thing is notable that legislature cannot delegate its essential legislative power. On this point following cases are notable:

- (1) Sri Ram v. State of Bombay<sup>75</sup>
- (2) Makhan Singh v. State of Punjab<sup>76</sup>
- (3) Laxmi Narayan v. Union of India<sup>77</sup>

In these cases, the Supreme Court held that excessive delegation is not permissible. So many other cases are also notable on the point.

In *Sita Ram v. State of U.P.*<sup>78</sup>, Hon'ble Hegde J. expressed the current attitude of the Court regarding delegation of legislative power in following words: "However much one might deplore the New Despotism of the executive, the very complexity of the modern society and the demand it makes on its government have set in motion forces which have made it absolutely necessary for the legislatures to entrust more and more powers to the executive.

Text book doctrines evolved in the 19<sup>th</sup> century have become out of date. Present position as regards delegation of legislative power may not be ideal, but in the absence of any better alternative, there is no escape from it."

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In *Asif Hameed v. State of Jammu and Kashmir* the Supreme Court observed:

"Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each

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<sup>75</sup> AIR 1959 S.C. 459,473,474

<sup>76</sup> AIR 1964 S.C. 381,401

<sup>77</sup> AIR 1976 S.C. 554.

<sup>78</sup> AIR 1972 S.C. 1168 at p. 1169.





of its organs.”

In the beginning public interest litigation cases were filed against violation of human rights, to protect the condition of laborers (as in *Asiad Case*<sup>79</sup>). Then emerged the period of environmental litigation. The Courts are taking one of the topbureaucracies and the politicians. The Apex Court has begun to realize that by not acting on a matter of public concern, it could lead to a state of political anarchy.”<sup>80</sup>

The Government (State) cannot escape from its prime duty (i.e., rendering services for the welfare of the citizens) showing that is over-burdened with day-to-day functioning.

The functions of a modern State unlike the police States of old are not confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community. (*RamJawaya v. State of Punjab*<sup>81</sup>).

Nowadays in response to public interest litigation writs, the courts have begun to direct the Government on everything from clearing garbage off the streets to cleansing the polity of political sleaze.

With the widening of the horizons of “Judicial Activism” criticism emanated from a few percent of the people that the judiciary is overstepping its bounds and taking over the Government functions, but this is not a justifiable thought. The Supreme Court and the High Courts act as a watch-dogs to keep Executive and Legislature within the bounds of law. Today millions of the people are suffering in the country. It is the judiciary which is holding out hope for them.

Evaluation of the Doctrine:

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<sup>79</sup> AIR 1982 SC 1473

The Sunday Times of India February 4, 1996 (Lucknow City edition).



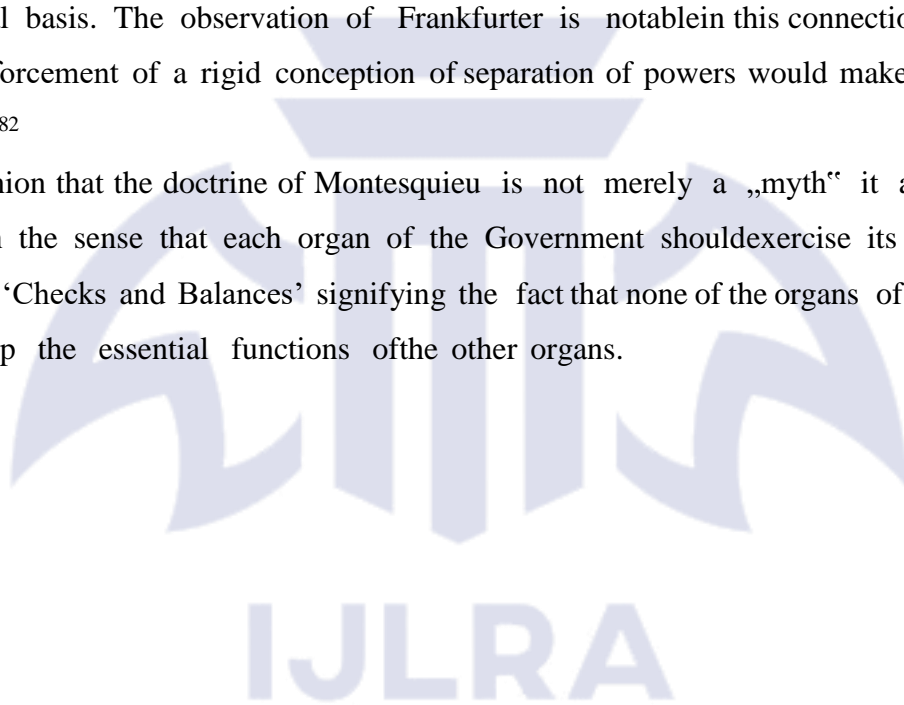


In strict sense the principle of separation of powers cannot be applied in any modern Government either may be U.K., U.S.A., France, India or Australia. But it does not mean that the principle has no relevance now a days. Government is an organic unity. It cannot be divided into water tight compartments.

History proves this fact. If there is a complete separation of powers the government cannot run smoothly and effectively. Smooth running of government is possible only by co-operation and mutual adjustment of all the three organs of the government. Prof.

Garner has rightly said, “the doctrine is impracticable as a working principle of Government.” It is not possible to categorize the functions of all three branches of Government on mathematical basis. The observation of Frankfurter is notable in this connection. According to him “Enforcement of a rigid conception of separation of powers would make Government impossible.”<sup>82</sup>

It is my opinion that the doctrine of Montesquieu is not merely a „myth“ it also carries a truth, but in the sense that each organ of the Government should exercise its power on the principle of ‘Checks and Balances’ signifying the fact that none of the organs of Government should usurp the essential functions of the other organs.



Frankfurter – The Public and its Government (1930) quoted by B. Schwartz, in American Constitutional Law,



1955Page 286.



## CHAPTER VI DOCTRINE OF BASIC STRUCTRE

### Introduction:

The debate on the 'basic structure' of the Constitution, lying somnolent in the archives of India's constitutional history during the last decade of the 20th century, has reappeared in the public realm. While, setting up the National Commission to Review the Working of the Constitution (the Commission), the National Democratic Alliance government (formed by a coalition of 24 national and regional level parties) stated that the basic structure of the Constitution would not be tampered with. Justice M.N. Venkatachalaiah, Chairman of the Commission, has emphasized on several occasions that an inquiry into the basic structure of the Constitution lay beyond the scope of the Commission's work.

Several political parties -- notably the Congress and the two Communist parties which are in the opposition -- have made it clear that the review exercise was the government's ploy to seek legitimacy for its design to adopt radical constitutional reforms thus destroying the basic structure of the document.

Much of the public debate has been a victim of partial amnesia as even literate circles of urban India are unsure of the ramifications of this concept, which was hotly debated during the 1970s and 1980s. The following discussion is an attempt to chart the waters of that period rendered turbulent by the power struggle between the legislative and the judicial arms of the State.

According to the Constitution, Parliament and the state legislatures in India have the power to make laws within their respective jurisdictions. This power is not absolute in nature. The Constitution vests in the judiciary, the power to adjudicate upon the constitutional validity of all laws. If a law made by Parliament or the state legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such a law invalid or ultra vires. This check

notwithstanding, the founding fathers wanted the Constitution to be an



adaptable document rather than a rigid framework for governance. Hence Parliament was invested with the power to amend the Constitution. Article 368 of the Constitution gives the impression that Parliament's amending powers are absolute and encompass all parts of the document. But the Supreme Court has acted as a brake to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisioned by the constitution-makers, the apex court pronounced that Parliament could not distort, damage or alter the basic features of the Constitution under the pretext of amending it. The phrase 'basic structure' itself cannot be found in the Constitution. The Supreme Court recognized this concept for the first time in the historic *Keshavananda Bharati* case in 1973. Ever since the Supreme Court has been the interpreter of the Constitution and the arbiter of all amendments made by Parliament.

a. The pre-Kesavanada position:

Parliament's authority to amend the Constitution, particularly the chapter on the fundamental rights of citizens, was challenged as early as in 1951. After independence, several laws were enacted in the states with the aim of reforming landownership and tenancy structures. This was in keeping with the ruling Congress party's electoral promise of implementing the socialistic goals of the Constitution [contained in Article 39 (b) and (c) of the Directive Principles of State Policy] that required equitable distribution of resources of production among all citizens and prevention of concentration of wealth in the hands of a few. Property owners -- adversely affected by these laws -- petitioned the courts. The courts struck down the land reforms laws saying that they transgressed the fundamental right to property guaranteed by the Constitution. Piqued by the unfavorable judgements, Parliament placed these laws in the Ninth Schedule of the Constitution through the First and Fourth amendments (1951 and 1952 respectively), thereby effectively removing them from the scope of judicial review.

Parliament added the Ninth Schedule to the Constitution through the very first amendment in 1951 as a means of immunizing certain laws against judicial review. Under the provisions of Article 31, which themselves were amended several times later, laws placed in the Ninth Schedule - pertaining to acquisition of private property and compensation payable for such acquisition - cannot be challenged in a court of law on the ground that they violated the fundamental rights of citizens. This protective umbrella covers more than 250 laws passed by state legislatures with the aim of regulating the size of land holdings and abolishing various tenancy systems. The Ninth Schedule was created with the primary objective of preventing the judiciary - which upheld the citizen's right to property on several occasions - from derailing the Congress party led government's agenda for a social revolution.

Property owners again challenged the constitutional amendments which placed land reforms laws in the Ninth Schedule before the Supreme Court, saying that they violated Article 13 (2) of the Constitution.

Article 13 (2) provides for the protection of the fundamental rights of the citizen. Parliament and the state legislatures are clearly prohibited from making laws that may take away or abridge the fundamental rights guaranteed to the citizen. They argued that any amendment to the Constitution had the status of a law as understood by Article 13 (2). In 1952 (*Sankari Prasad Singh Deo v. Union of India*<sup>83</sup>) and 1955 (*Sajjan Singh v. Rajasthan*<sup>84</sup>), the Supreme Court rejected both arguments and upheld the power of Parliament to amend any part of the Constitution including that which affects the fundamental rights of citizens. Significantly though, two dissenting judges in *Sajjan Singh v. Rajasthan* case raised doubts whether the fundamental rights of citizens could become a plaything of the majority party in Parliament.

b. The Golaknath verdict:

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<sup>84</sup> 1965 AIR 845, 1965 SCR (1) 933

<sup>83</sup> 1951 SCR 89; AIR 1951 SC 458



<sup>84</sup> 1965 AIR 845, 1965 SCR (1) 933

In 1967 an eleven-judge bench of the Supreme Court reversed its position. Delivering its 6:5 majority judgement in the *Golaknath v. State of Punjab* case<sup>85</sup>, Chief Justice Subba Rao put forth the curious position that Article 368, that contained provisions related to the amendment of the Constitution, merely laid down the amending procedure. Article 368 did not confer upon Parliament the power to amend the Constitution. The amending power (constituent power) of Parliament arose from other provisions contained in the Constitution (Articles 245, 246, 248) which gave it the power to make laws (plenary legislative power). Thus, the apex court held that the amending power and legislative powers of Parliament were essentially the same. Therefore, any amendment of the Constitution must be deemed law as understood in Article 13 (2).

The majority judgement invoked the concept of implied limitations on Parliament's power to amend the Constitution. This view held that the Constitution gives a place of permanence to the fundamental freedoms of the citizen. In giving the Constitution to themselves, the people had reserved the fundamental rights for themselves. Article 13, according to the majority view, expressed this limitation on the powers of Parliament.

Parliament could not modify, restrict or impair fundamental freedoms due to this very scheme of the Constitution and the nature of the freedoms granted under it. The judges stated that the fundamental rights were so sacrosanct and transcendental in importance that they could not be restricted even if such a move were to receive unanimous approval of both houses of Parliament. They observed that a Constituent Assembly might be summoned by Parliament for the purpose of amending the fundamental rights if necessary.

In other words, the apex court held that some features of the Constitution lay at its core and required much more than the usual procedures to change them.

The phrase 'basic structure' was introduced for the first time by M.K. Nambiar<sup>85</sup> and other counsels while arguing for the petitioners in the *Golaknath* case, but it



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1967 AIR 1643, 1967 SCR (2) 762



was only in 1973 that the concept surfaced in the text of the apex court's verdict.

a. Nationalization of Banks and Abolition of Privy Purses

Within a few weeks of the Golaknath verdict the Congress party suffered heavy losses in the parliamentary elections and lost power in several states. Though a private member's bill - tabled by Barrister Nath Pai - seeking to restore the supremacy of Parliament's power to amend the Constitution was introduced and debated both on the floor of the house and in the Select Committee, it could not be passed due to political compulsions of the time. But the opportunity to test parliamentary supremacy presented itself once again when Parliament introduced laws to provide greater access to bank credit for the agricultural sector and ensure equitable distribution of wealth and resources of production and by:

i) nationalizing banks and

ii) derecognizing erstwhile princes in a bid to take away their Privy purses, which were promised in perpetuity - as a sop to accede to the Union - at the time of India's independence.

Parliament reasoned that it was implementing the Directive Principles of State Policy but the Supreme Court struck down both moves. By now, it was clear that the Supreme Court and Parliament were at loggerheads over the relative position of the fundamental rights vis-à-vis the Directive Principles of State Policy. At one level, the battle was about the supremacy of Parliament vis-à-vis the power of the courts to interpret and uphold the Constitution.

At another level the contention was over the sanctity of property as a fundamental right jealously guarded by an affluent class much smaller than that of the large impoverished masses for whose benefit the Congress government claimed to implement its socialist development program.

Less than two weeks after the Supreme Court struck down the President's order



derecognizing the princes, in a quick move to secure the mandate of the people and to bolster her own stature Prime Minister Indira Gandhi dissolved the Lok Sabha and called a snap poll.

For the first time, the Constitution itself became the electoral issue in India. Eight of the ten manifestos in the 1971 elections called for changes in the Constitution in order to restore the supremacy of Parliament. A.K. Gopalan of the Communist Party of India (Marxist) went to the extent of saying that the Constitution be done away with lock stock and barrel and be replaced with one that enshrined the real sovereignty of the people.

The Congress party returned to power with a two-thirds majority. The electorate had endorsed the Congress party's socialist agenda, which among other things spoke of making basic changes to the Constitution in order to restore Parliament's supremacy.

Through a spate of amendments made between July 1971 and June 1972 Parliament sought to regain lost ground. It restored for itself the absolute power to amend any part of the Constitution including Part III, dealing with fundamental rights. Even the President was made duty bound to give his assent to any amendment bill passed by both houses of Parliament. Several curbs on the right property were passed into law. The right to equality before the law and equal protection of the laws (Article 14) and the fundamental freedoms guaranteed under Article 19 were made subordinate to Article 39 (b) & (c) in the Directive Principles of State Policy. Privy purses of erstwhile princes were abolished and an entire category of legislation dealing with land reforms was placed in the Ninth Schedule beyond the scope of judicial review.

b. Emergence of the Basic Structure Concept- the Keshavanada milestone

Inevitably, the constitutional validity of these amendments was challenged before a full bench of the Supreme Court (thirteen judges). Their verdict can be found in eleven separate judgements. Nine<sup>75</sup> judges signed a summary statement which

records the most important conclusions reached by them in this case. Granville



Austin notes that there are several discrepancies between the points contained in the summary signed by the judges and the opinions expressed by them in their separate judgements. Nevertheless, the seminal concept of 'basic structure' of the Constitution gained recognition in the majority verdict.

All judges upheld the validity of the Twenty-fourth amendment saying that Parliament had the power to amend any or all provisions of the Constitution. All signatories to the summary held that the Golaknath case had been decided wrongly and that Article 368 contained both the power and the procedure for amending the Constitution.

However, they were clear that an amendment to the Constitution was not the same as a law as understood by Article 13 (2).

It is necessary to point out the subtle difference that exists between two kinds of functions performed by the Indian Parliament:

- i) it can make laws for the country by exercising its legislative power and
- ii) it can amend the Constitution by exercising its constituent power.

Constituent power is superior to ordinary legislative power. Unlike the British Parliament which is a sovereign body (in the absence of a written constitution), the powers and functions of the Indian Parliament and State legislatures are subject to limitations laid down in the Constitution. The Constitution does not contain all the laws that govern the country. Parliament and the state legislatures make laws from time to time on various subjects, within their respective jurisdictions. The general framework for making these laws is provided by the Constitution. Parliament alone is given the power to make changes to this framework under Article 368. Unlike ordinary laws, amendments to constitutional provisions require a special majority vote in Parliament.

Another illustration is useful to demonstrate the difference between Parliament's constituent power and law-making powers. According to Article 21 of the

Constitution, no person in the country maybe deprived of his life or personal



liberty

except according to procedure established by law. The Constitution does not lay down the details of the procedure as that responsibility is vested with the legislatures and the executive. Parliament and the state legislatures make the necessary laws identifying offensive activities for which a person may be imprisoned or sentenced to death. The executive lays down the procedure of implementing these laws and the accused person is tried in a court of law. Changes to these laws may be incorporated by a simple majority vote in the concerned state legislature. There is no need to amend the Constitution in order to incorporate changes to these laws. However, if there is a demand to convert Article 21 into the fundamental right to life by abolishing death penalty, the Constitution may have to be suitably amended by Parliament using its constituent power.

Most importantly seven of the thirteen judges in the Keshavananda Bharati case, including Chief Justice Sikri who signed the summary statement, declared that Parliament's constituent power was subject to inherent limitations. Parliament could not use its amending powers under Article 368 to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution.

c. Basic Features of the Constitution according to the Keshavananda verdict

Each judge laid out separately, what he thought were the basic or essential features of the Constitution. There was no unanimity of opinion within the majority view either.

Sikri, C.J. explained that the concept of basic structure included:

- supremacy of the Constitution
- republican and democratic form of government
- secular character of the Constitution

- separation of powers between the legislature, executive and the judiciary
- federal character of the Constitution

Shelat, J. and Grover, J. added two more basic features to this list:

- the mandate to build a welfare state contained in the Directive Principles of State Policy
- unity and integrity of the nation

Hegde, J. and Mukherjea, J. identified a separate and shorter list of basic features:

- sovereignty of India
- democratic character of the polity
- unity of the country
- essential features of the individual freedoms secured to the citizens
- mandate to build a welfare state

Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as:

- sovereign democratic republic

- parliamentary democracy
- three organs of the State

He said that “the Constitution would not be itself without the fundamental freedoms and the directive principles”.



Only six judges on the bench (therefore a minority view) agreed that the



fundamental rights of the citizen belonged to the basic structure and Parliament could not amend it.

d. The minority view:

The minority view delivered by Justice A.N. Ray (whose appointment to the position of Chief Justice over and above the heads of three senior judges, soon after the pronouncement of the Keshavananda verdict, was widely considered to be politically motivated), Justice M.H. Beg, Justice K.K. Mathew and Justice S.N. Dwivedi also agreed that Golaknath had been decided wrongly. They upheld the validity of all three amendments challenged before the court. Ray, J. held that all parts of the Constitution were essential and no distinction could be made between its essential and non-essential parts. All of them agreed that Parliament could make fundamental changes in the Constitution by exercising its power under Article 368.

In summary the majority verdict in Keshavananda Bharati recognized the power of Parliament to amend any or all provisions of the Constitution provided such an act did not destroy its basic structure. But there was no unanimity of opinion about what appoints to that basic structure. Though the Supreme Court very nearly returned to the position of Sankari Prasad (1952) by restoring the supremacy of Parliament's amending power, in effect it strengthened the power of judicial review much more.

e. Basic Structure concept reaffirmed- the Indira Gandhi Election case

In 1975, The Supreme Court again had the opportunity to pronounce on the basic structure of the Constitution. A challenge to Prime Minister Indira Gandhi's election victory was upheld by the Allahabad High Court on grounds of electoral malpractice in 1975. Pending appeal, the vacation judge- Justice Krishna Iyer, granted a stay that allowed Smt. Indira Gandhi to function as Prime Minister on the condition that she should not draw a salary and speak or vote in Parliament until the case was decided. Meanwhile, Parliament passed the Thirty-ninth



amendment to the Constitution which removed the authority of the Supreme Court to adjudicate petitions regarding elections of the President, Vice President, Prime Minister and Speaker of the Lok Sabha. Instead, a body constituted by Parliament would be vested with the power to resolve such election disputes. Section 4 of the Amendment Bill effectively thwarted any attempt to challenge the election of an incumbent, occupying any of the above offices in a court of law. This was clearly a pre-emptive action designed to benefit Smt. Indira Gandhi whose election was the object of the ongoing dispute.

Amendments were also made to the Representation of Peoples Acts of 1951 and 1974 and placed in the Ninth Schedule along with the Election Laws Amendment Act, 1975 in order to save the Prime Minister from embarrassment if the apex court delivered an unfavorable verdict. The mala-fide intention of the government was proved by the haste in which the Thirty-ninth amendment was passed. The bill was introduced on August 7, 1975 and passed by the Lok Sabha the same day.

The Rajya Sabha (Upper House or House of Elders) passed it the next day and the President gave his assent two days later. The amendment was ratified by the state legislatures in special Saturday sessions. It was gazetted on August 10.

When the Supreme Court opened the case for hearing the next day, the Attorney General asked the Court to throw out the case in the light of the new amendment.

Counsel for Raj Narain who was the political opponent challenging Mrs. Gandhi's election argued that the amendment was against the basic structure of the Constitution as it affected the conduct of free and fair elections and the power of judicial review.

Counsel also argued that Parliament was not competent to use its constituent power for validating an election that was declared void by the High Court.

Four out of five judges on the bench upheld the Thirty-ninth amendment, but only after striking down that part which sought to curb the power of the judiciary to adjudicate in the current election dispute. One judge, Beg, J. upheld

the amendment in its entirety. Mrs. Gandhi's election was declared valid on the



basis of the amended election laws. The judges grudgingly accepted Parliament's power to pass laws that have a retrospective effect.

f. Basic Features of the Constitution according to the Election case verdict

Again, each judge expressed views about what amounts to the basic structure of the Constitution: According to Justice H.R. Khanna, democracy is a basic feature of the Constitution and includes free and fair elections.

Justice K.K. Thomas held that the power of judicial review is an essential feature. Justice Y.V. Chandrachud listed four basic features which he considered unamendable:

- sovereign democratic republic status
- equality of status and opportunity of an individual
- secularism and freedom of conscience and religion
- 'government of laws and not of men' i.e. the rule of law

According to Chief Justice A.N. Ray, the constituent power of Parliament was above the Constitution itself and therefore not bound by the principle of separation of powers.

Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections. Ray, C.J. held that ordinary legislation was not within the scope of basic features.

Justice K.K. Mathew agreed with Ray, C.J. that ordinary laws did not fall within the purview of basic structure. But he held that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary.

Justice M.H. Beg disagreed with Ray, C.J. on the grounds that it would be unnecessary to have a constitution if Parliament's constituent power were said to be above it. Judicial powers were vested in the Supreme Court and the High Courts and Parliament could not perform them. He contended that supremacy of the Constitution and separation of powers were basic features as understood by the majority in the Keshavananda Bharati case. Beg, J. emphasized that the doctrine of basic structure included within its scope ordinary legislation also.

Despite the disagreement between the judges on what constituted the basic structure of the Constitution, the idea that the Constitution had a core content which was sacrosanct was upheld by the majority view.

#### g. The Keshavananda Review Bench

Within three days of the decision on the Election case, a thirteen judge bench convened to review the Keshavananda verdict on the pretext of hearing a number of petitions relating to land ceiling laws which had been languishing in high courts. The petitions contended that the application of land ceiling laws violated the basic structure of the Constitution. In effect the Review bench was to decide whether or not the basic structure doctrine restricted Parliament's power to amend the Constitution. The decision in the Bank Nationalization case was also up for review.

Meanwhile Prime Minister Indira Gandhi, in a speech in Parliament, refused to accept the dogma of basic structure.

It must be remembered that no specific petition seeking a review of the Keshavananda verdict filed before the apex court - a fact noted with much chagrin



by several members of the bench. N.N.Palkhivala appearing for on behalf of a coal mining company eloquently argued against the move to review the Keshavananda decision.

Ultimately, Ray, C.J. dissolved the bench after two days of hearings. Many people have



suspected the government's indirect involvement in this episode seeking to undo an unfavorable judicial precedent set by the Keshavananda decision. However no concerted efforts were made to pursue the case.

The declaration of a National Emergency in June 1975 and the consequent suspension of fundamental freedoms, including the right to move courts against preventive detention, diverted the attention of the country from this issue.

#### h. Sardar Swaran Singh Committee and the Forty-second amendment

Soon after the declaration of National Emergency, the Congress party constituted a committee under the Chairmanship of Sardar Swaran Singh to study the question of amending the Constitution in the light of past experiences. Based on its recommendations, the government incorporated several changes to the Constitution including the Preamble, through the Forty-second amendment (passed in 1976 and came into effect on January 3, 1977). Among other things the amendment:

i) Gave the Directive Principles of State Policy precedence over the Fundamental Rights contained in Article 14 (right to equality before the law and equal protection of the laws), Article 19 (various freedoms like freedom of speech and expression, right to assemble peacefully, right to form associations and unions, right to move about and reside freely in any part of the country and the right to pursue any trade or profession) and Article 21 (right to life and personal liberty). Article 31C was amended to prohibit any challenge to laws made under any of the Directive Principles of State Policy;

b) Laid down that amendments to the Constitution made in the past or those likely to be made in future could not be questioned in any court on any ground;

c) removed all amendments to fundamental rights from the scope of judicial review and



d) removed all limits on Parliament's power to amend the Constitution under Article 368.

k. Basic structure doctrine reaffirmed- the Minerva Mills and Waman Rao cases

Within less than two years of the restoration of Parliament's amending powers to near absolute terms, the Forty-second amendment was challenged before the Supreme Court by the owners of Minerva Mills (Bangalore) a sick industrial firm which was nationalized by the government in 1974.

Mr. N.A. Palkhivala, renowned constitutional lawyer and counsel for the petitioners, chose not to challenge the government's action merely in terms of an infringement of the fundamental right to property. Instead, he framed the challenge in terms of Parliament's power to amend the Constitution.

Mr. Palkhivala argued that Section 55 of the amendment had placed unlimited amending power in the hands of Parliament. The attempt to immunize constitutional amendments against judicial review violated the doctrine of basic structure which had been recognized by the Supreme Court in the Keshavananda Bharati and Indira Gandhi Election Cases. He further contended that the amended Article 31C was constitutionally bad as it violated the Preamble of the Constitution and the fundamental rights of citizens. It also took away the power of judicial review.

Chief Justice Y.V. Chandrachud, delivering the majority judgement (4:1), upheld both contentions. The majority view upheld the power of judicial review of constitutional amendments. They maintained that clauses (4) and (5) of Article 368 conferred unlimited power on Parliament to amend the Constitution. They said that this deprived courts of the ability to question the amendment even if it damaged or destroyed the Constitution's basic structure.

The judges, who concurred with Chandrachud, C.J. ruled that a limited amending power itself is a basic feature of the Constitution.

Bhagwati, J. the dissenting judge also agreed with this view stating that no authority howsoever lofty, could claim to be the sole judge of its power and actions under the Constitution.

The majority held the amendment to Article 31C unconstitutional as it destroyed the harmony and balance between fundamental rights and directive principles which is an essential or basic feature of the Constitution. The amendment to Article 31C remains a dead letter as it has not been repealed or deleted by Parliament. Nevertheless, cases under it are decided as it existed prior to the Forty- second amendment.

In another case relating to a similar dispute involving agricultural property the apex court, held that all constitutional amendments made after the date of the Keshavananda Bharati judgement were open to judicial review. All laws placed in the Ninth Schedule after the date of the Keshavananda Bharati judgement were also open to review in the courts. They can be challenged on the ground that they are beyond Parliament's constituent power or that they have damaged the basic structure of the Constitution. In essence, the Supreme Court struck a balance between its authority to interpret the Constitution and Parliament's power to amend it.

#### The Independence Of Judiciary

Article 50 directs the State for Separation of Judiciary from Executive. It means independence to judiciary in decision making. It also means that the Executive should not interfere with the function of the Judiciary.

## CHAPTER VII

# ROLE OF JUDICIARY TO MAINTAIN CONSTITUTIONAL SUPREMACY

With the assist of the numerous provisions of the constitutionalism role of the judiciaryare:

(i) Preamble and responsibility of the judiciary for the Supremacy of Constitution:

Judicial Activism is also alleged to have taken a form of judicial legislation. But it is through this tool, the judiciary has also taken up the responsibility to fillup the legislativevacuum in order to uphold the preamble.

The silence of the Constitution and the abeyances left to be filled by the growth of conventions within the meaning of the enacted provisions and under the groundof preamble. This exercise has been performed by the Supreme Court of India in consonance with the constitutional preamble and scheme.

All these goals of the Constitution have been comprehensively incorporated into its provisions. It is worth noting that unlike the Preamble of the statutes the Preamble of the Constitution is part of it and can be invoked just like any other provision for direct application. Therefore, any change in the Preamble may also be the subject matter of litigation on the ground of violation of basic structureof the Constitution And this is the case Kesavananda Bharati v State of Kerala<sup>86</sup> where court is tried to implement the concept of the constitutionalism. And this is one of the role of the judiciary upholding constitutionalism on the basis of preamble of the India.

(ii) Judicial Review by the judiciary for the Supremacy of Constitution:

Judicial Review refers to supervising the exercise of power by the judiciary of other government coordinating bodies with a view to ensuring that they remain within the limits set by the Constitution on their powers.

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<sup>86</sup> AIR 1973 SC 1461.

It is the court's right to review legislative and executive decisions, and even review judicial acts. It is the power to scrutinize the validity of legislation, or any practice, whether or not it is legitimate. Judicial review doctrine is based on the principle of rule of law and separation of powers. Judicial review is the process for testing and balancing the separation of powers.

Judicial Review's key purposes are as follows:

- to determine the unconstitutionality of Legislative Acts
- to maintain supremacy of the Constitutional Law
- to protect the Fundamental Rights
- to maintain federal equilibrium between Centre and the States
- to check arbitrariness, unjust harassing and unconstitutional laws

In India, judicial power is a power given to the court to create a mechanism of regulation and balance between the legislature and the executive.

There are various provisions in the Indian Constitution explicitly laying down the power of judicial review to the courts, such as Articles 13, 32, 131-136, 141, 143, 226, 227, 245, 246 and 372.

The Supreme Court of India has declared it as Supreme Court's and High Court's power as a fundamental constitutional structure which cannot be taken away by a Constitutional amendment. If any legislative act / executive order of either state government or central government is found to be in violation of the Constitution, it will be declared unconstitutional during the judicial review.

In the article 13 of the Indian constitution, the law explicitly mentioned about the power of Judicial Review to be endowed to the high court and Supreme Court.

Chief Justice Kania in the landmark case of A.K. Gopalan vs. State of Madras<sup>87</sup>, stated that: It was only through caution and care that the framers of our constitution added the specific provisions mentioned in Art 13. In a country like India, it is the constitution which is the most supreme and hence all statute laws should be in conformity with it and it should be for the interpreters to decide whether any law is constitutional or not.

The doctrine was further brought into confidence through several landmark cases which would be

discussed in the article further.

(iii) Landmark judgements for the implement of the constitutionalism are:

After the A.K Gopalan case, in another case of L. Chandra vs. Union of India<sup>88</sup> the court gave certain facets to the Judicial Review and also claimed that while interpreting the legislation, it must be made sure that the law is in coherence with the constitution. This case emphasizes on the need of coherence.

In the case of Shankari Prasad vs. Union of India<sup>89</sup> the amendment was challenged on the reason that it is violating the Part-III of the Indian constitution and hence, the amendment should be considered not valid. The Supreme Court claimed that the legislative organ, under Article 368, has the power to change any part of the constitution including the fundamental rights. Here the court used its power of Judicial Review.

Similarly, in the case of Sajjan Singh vs. State of Rajasthan<sup>90</sup> where the validity of the 17th Amendment Act of 1964 was in question, the court followed the provision laid in the Shankari Prasad vs. Union of India<sup>91</sup> under article 368, the parliament has the power to amend the constitution.

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<sup>87</sup> AIR 1950 SC 27

<sup>88</sup> AIR 1997 SC 1125

<sup>89</sup> AIR 1951, SC 455

<sup>90</sup> AIR 1965 SC 845

<sup>91</sup> AIR 1951, SC 455

But in case of Golaknath Vs. state of Punjab<sup>92</sup>, the courts changed its decision when amendment in question in the case of Sajjan Singh vs. State of Rajasthan was again challenged. The court this time stated that under article 368 there is only the procedure to amend laid down but not the power for the parliament.

With time the doctrine of Judicial review came more into application by the courts the

deeper its roots were embedded in the law. In the case of Ramesh Thapper vs. State of Madras<sup>93</sup>, the Supreme Court under its power of Judicial review struck down the Madras Maintenance of Public Safety Act 1949, on the fact that unless any certain law which is restricting freedom of speech and expression is pointed against eroding the security of the state or to topple it, any such law will not fall within the reservation of clause mentioned in Article 1749(2) of the Indian Constitution.

(iv) Rule of law by the judiciary for the Supremacy of Constitution:

Responding to the changing times and aspirations of the people, the judiciary, with a view to see that the fundamental rights embodied in the Constitution of India have a meaning for the down-trodden and the under-privileged classes, pronounced in Madhav Haskot's case<sup>94</sup> that providing free legal service to the poor and needy was an essential element of Indra Sawhney v. Union of India<sup>95</sup>, Rule Of Law & Access to Justice the reasonable, fair and just procedure'. Again, in Hussainara Khatoon's case<sup>96</sup> while considering the plight of the undertrials in jail, speedy trial was held to be an integral and essential part of the right to life and liberty contained in Article 21 of the Constitution.

In Nandini Satpathy v. D.L. Dani<sup>97</sup>, the Supreme Court held that an accused has the right to consult a lawyer during interrogation and that the right not to make

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<sup>92</sup> AIR 1643, 1967 SCR (2) 762

<sup>93</sup> AIR 1965 SC 845

<sup>94</sup> AIR 1950 SC 124



<sup>95</sup> 1 SCC 168 1616 AIR 1978 SC 1548 6

<sup>96</sup>

AIR 1979 SC 1819

<sup>97</sup> AIR 1978 SC 1025



self-incriminatory statements should be widely interpreted to cover the pre-trial stage also. Again, in *Sheela Barse v. State of Maharashtra*<sup>98</sup>, the Supreme Court laid down certain safeguards for arrested persons. Separation of power by the judiciary for the Supremacy of Constitution:

In India, a separation of functions rather than of powers is followed. Unlike in the US, in India, the concept of separation of powers is not adhered to strictly. However, a system of checks and balances have been put in place in such a manner that the judiciary has the power to strike down any unconstitutional laws passed by the legislature.

Today, most of the constitutional systems do not have a strict separation of powers between the various organs in the classical sense because it is impractical. In the following sections, we will see the prevailing system in India, what the relationship between each organ is, and the constitutional provisions thereof.

(v) Judicial Pronouncements of the Separation of Powers Doctrine to create Constitutional Supremacy:

*Kesavananda Bharati Case (1973)*: In this case, the SC held that the amending power of the Parliament is subject to the basic features of the Constitution. So, any amendment violating the basic features will be declared unconstitutional.

*Swaran Singh Case (1998)*: In this case, the SC held the UP Governor's pardon of a convict unconstitutional.

The Honourable Supreme Court in *Ram Jawaya Kapoor V State of Punjab* held that the Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption by one organ or part of the state of functions that essentially belong to another.

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<sup>98</sup> 1983 (2) SCC 96

In *Indira Nehru Gandhi V Raj Narain, Ray, CJ* observed that in the Indian Constitution there is a separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. The Court further held that adjudication of a specific dispute is a judicial function which Parliament even acting under a constitutional amending power cannot exercise. Apart from difficulties inherent in the enforcement of the strict doctrine of separation of powers in the functioning of the modern government, there is also an inherent difficulty in defining, in workable terms, the division of powers into executive, legislative and judicial.

In *P Kannadasan V State of Tamil Nadu*, it was held, the Constitution has invested the Constitutional Courts with the power to invalidate laws made by Parliament and the state legislatures transgressing Constitutional limitations. Where an Act made by the legislature is invalidated by the Courts on the basis of legislative incompetence, the legislature cannot enact a law declaring that the judgement of the Court shall not operate; it cannot overrule or annul the decision of the Court.

(vi) Checks and Balances by the judiciary for the Supremacy of Constitution:

The strict separation of powers that was envisaged in the classical sense is not practicable anymore, but the logic behind this doctrine is still valid. The logic behind this doctrine is of polarity rather than strict classification meaning thereby that the center of authority must be dispersed to avoid absolutism. Hence, the doctrine can be better appreciated as a doctrine of checks and balances.

In the early years, the Supreme Court held twice, in *Sankari Prasad (1951)* and *Sajjan Singh (1965)*, that there were no restrictions in amending powers of Parliament. As a result, all official reviews of the Constitution First Amendment (1951), Fourth Amendment (1954), and Forty Second Amendment (1976) were ways governments found to get around the original Constitution. It was only in the 1973 *Kesavananda* case that the court began to enforce the doctrine of basic structure, limiting the powers of government. As for limiting the power of government over appointment of judges, in 1993 the court presumed that role as well. But now India has a system of judges appointing judges behind a veil of secrecy. There is no public scrutiny of their appointment or their performance. In *Indira Nehru Gandhi's* case, *Chandrachud J.* observed: No Constitution can survive without a conscious adherence

to its fine checks and balances. Just as courts ought not to enter into problems intertwined in the political thicket, Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which has in it the precept, innate in the prudence of self-preservation; that discretion is the better part of valour.

The doctrine of separation of powers in today's context of liberalization, privatization and globalization cannot be interpreted to mean either separation of powers or checks and balance or principles of restraint, but community of powers exercised in the spirit of cooperation by various organs of the state in the best interest of the people.

(vii) Sanctity of the judiciary for maintaining constitutionalism

The rule of law doesn't exist unless there is an independent judiciary to help protect it. Independent and impartial judiciary is indisputably believed as one of the hallmarks of a vibrant democracy.

However, the elected governments often perceive an independent and strong judiciary with suspicion. The political class as well as the top brasses desire a weak and obedient judiciary which will scot-free them to implement any policies. Even there are scores of incidents which project that the judges were threatened by the government of the day.

At this background, a potent weapon in the hands of judiciary could be the power of judicial review to establish the supremacy of Constitution. Judicial review is the procedure established in Britain where the courts have been

conferred power to supervise the exercise of public power. In US, the Supreme Court can set aside any order pronounced or action taken by the administrative authority if it contravenes with due process' clause of the Constitution. Similarly, in India the concept of judicial review is not championed by a single Article. There is plethora of Articles which include Articles 13, 32, 131 to 136, 142, 143,

226 or 246 to activate the cause of judicial review in India.

So, The Indian judiciary has always been active in the sense of implementation of the constitution right and that whenever approached it has responded and has hardly decided not to decide. Instead, it denotes a phenomenon when the judiciary departs from its role

as a conventional adjudicator and acts in innovative manners by entering into policy issues normally assigned to the other organs of the government.

While assuming this responsibility as a custodian of the Constitution, it has interpreted FRs in the light of DPs, reminded the executive and legislature of their constitutional obligations, issued appropriate directions to concerned authorities, monitored working of government institutions, and has even filled in the legislative gaps by laying down guidelines. In many such cases the judiciary has either acted without being activated, i.e., suo motu, or enabled its activation in simple and speedy manner by relaxing the substantive and procedural requirements of locus standi. This is way judicial authority or judiciary of the India going to implementation of the right of people of India under the concept of constitutionalism.

As judicial activism is primarily a post-emergency 1977 onwards phenomenon, it is often providing that the judiciary tried to regain its constitutional place and people's trust through judicial activism. Though this could be one of the reasons, this cannot be sole or even primary reason. The judiciary fought a long struggle for its place in the governance since its initiative. It sustained and strengthened its power to act in activist manner over a period of time through various steps.

Most notable amongst them are: the evolution of basic structure doctrine in Kesavananda Bharati; insistence on due process requirement in post-Maneka Gandhi era; integrated reading of FRs and DPs; liberalization of substantive and procedural requirements of locus standi; vigilant safeguard of the power of judicial review; and establishing legitimacy amongst 'We, the people of India' by championing the rights of powerless ignorant masses. Besides, the weak executive at the Centre since 1989 and the growing gulf between the constitutional promise and reality has led to the fast growth of judicial activism.

## CHAPTER VIII CONCLUSION AND SUGGESTIONS

(i) It may be said that the final word on the issue of the supremacy of the constitution is direct derivative from the basic structure of the Constitution, which has not been pronounced by the Supreme Court- a scenario that is unlikely to change in the near future. While the idea that there is such a thing as a basic structure to the Constitution is well established its contents cannot be completely determined with any measure of finality until a judgement of the Supreme Court spells it out. Nevertheless, the sovereign, democratic and secular character of the polity, rule of law, independence of the judiciary, fundamental rights of citizens etc. are some of the essential features of the Constitution that have appeared time and again in the apex court's pronouncements. One certainty that emerged out of this tussle between Parliament and the judiciary is that all laws and constitutional amendments are now subject to judicial review and laws that transgress the basic structure are likely to be struck down by the Supreme Court. In essence Parliament's power to amend the Constitution is not absolute and the Supreme Court is the final arbiter over and interpreter of all constitutional amendments.

(ii) Originally, the Constitution guaranteed a citizen, the fundamental right to acquire hold and dispose of property under Article 19f.

Under Article

31 he could not be deprived of his property unless it was acquired by the State, under a law that determined the amount of compensation he ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law. Article 31 has been modified six times -

- beginning with the First amendment in 1951 --progressively curtailing this fundamental right. Finally in 1978, Article 19f was omitted and Article 31 repealed by the Forty fourth amendment. Instead, Article 300A was introduced in Part XII making the right to property only a legal right. This provision implies that the executive arm of the government (civil servants and the police) could not interfere with the citizen's right to property. However, Parliament and state legislatures had the power to make laws affecting the citizens' right to

property.

(iii) Later on, laws relating to the nationalization of certain sick industrial undertakings, the regulation of monopolies and restrictive trade practices, transactions in foreign exchange, abolition of bonded labor, ceiling on urban land holdings, the supply and distribution of essential commodities and reservation benefits provided for Scheduled Castes and Tribes in Tamil Nadu were added to the Ninth Schedule through various constitutional amendments.

(iv) Article 13 (2) states- "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." The term Part refers to Part III of the Constitution which lists the fundamental rights of the citizen.

(v) Freedom of speech and expression, the right to assemble peacefully, the right to form unions and associations, the right to move freely and reside in any part of India and the right to practice any profession or trade are the six fundamental freedoms guaranteed under Article 19. The right to property was also guaranteed in this section until 1979 when it was omitted by the Forty-fourth amendment during the Janata party regime.

(vi) By virtue of the powers conferred upon it in Articles 245 and 246, Parliament can make laws relating to any of the 97 subjects mentioned in the Union List and 47 subjects mentioned in the Concurrent List, contained in the Seventh Schedule of the Constitution. Upon the recommendation of the Rajya Sabha (Council of States or the Upper House in Parliament) Parliament can also make laws in the national interest, relating to any of the 66 subjects contained in the State List.

(vii) However certain constitutional amendments must be ratified by at least half of the State legislatures before they can come into force. Matters such as the election of the President of the republic, the executive and legislative powers of the Union and the States, the High Courts in the States and Union Territories, representation of States in Parliament and the Constitution amending provisions themselves, contained in Article 368, must be amended by following this procedure.

(viii) The majority view declared certain parts of the Twenty-fifth amendment invalid especially those relating to Article 31 (c) and

upheld the Twenty-ninth amendment- for a detailed account see Austin, Working of a Democratic Constitution..., pp.265ff.

(ix) A comparison with the Westminster model would bring out the subtleties involved in this matter more clearly. The United Kingdom does not have a written Constitution like India or the USA. The British Parliament is a sovereign body and there is very little difference between constitutional law and ordinary law in that country. The Indian Parliament owes its existence to a written Constitution that was put together by another sovereign body, namely, the Constituent Assembly. Parliament's powers (including the power to amend) are not sui juris but essentially derived from this Constitution. Therefore, it cannot be said to occupy a position superior to the Constitution.

(x) Article 31C stated that laws passed to implement the Directive Principles of State Policy could not be challenged in court on the ground that they violated any fundamental right. Prior to the Forty-second amendment this clause was applicable only to Article 39 (b) & (c) of the Directive Principles which dealt with equitable distribution of wealth and resources of production.

(xi) Such a position seems contrary to the philosophy of separation of powers that characterize the structure of governance in India. The Constitution provides for a scheme of checks and balances between the three organs of government namely, the legislature, the executive and the judiciary, against any potential abuse of power. For example, the judges of the Supreme Court and the High Courts in the States are appointed by the executive i.e., the President acting on the advice of the Prime Minister and the Chief Justice of the Supreme Court. But they may be removed from office only if they are impeached by Parliament. This measure helps the judiciary to function without any fear of the

executive. Similarly, the executive is responsible to Parliament in its day-to-day functioning. While the President appoints the leader of the majority party or a person who he believes commands a majority in the Lok Sabha (House of the People or the Lower House) a government is duty bound to lay down power if the House adopts a motion expressing no confidence in the government.

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