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# APPLICATION OF BASIC STRUCTURE DOCTRINE TO CONTEMPORARY ISSUES: A FOCUS ON JUDICIAL REVIEW

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## I. ABSTRACT

***“I BELIEVE THAT AN INDEPENDENT JUDICIARY IS THE CROWN JEWEL OF THE CONSTITUTIONAL REPUBLIC.***

***- BRETT KAVANAUGH”***

The Constitution of India, being the “mother law of the land,” is framed by the founding fathers with keeping in soul the parent patria concept to fetch the utmost good to its citizens (children). No other law of the land other than the constitution shall be supreme. Such a supreme power – our constitution adjusts itself and allows us to make alterations to run in parallel with our dynamic societal changes. Yet, some portions of the constitution should be touched to make any kind of alterations as it withholds the constitution as a basic pillar, as a balancing block, and so on to preserve the main purpose of the constitution. Such a static strong portion is called the name, “Basic structure of the Constitution.”

The concept was evolved in the many yesteryears, and through theories by eminent jurists and various precedents, it came into the contemporary shape to be called the doctrine of basic structure or doctrine of constitutionally controlled governance. There are various characteristic traits which fit in the purse of basic structure. And one such significant and paramount basic structure is the judicial review. In this article, we will know about the basics of basic structure, its origin, elements, its application with the contemporary issues, precedents which withheld those, judicial review, its relevance with stability and in synchronization with the basic structure with the relevant

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constitutional amendments and the contemporary tug of battle between the enacting and the interpretation wings of the Government.

## II. KEYWORDS:

Basic Structure, Judicial review, Indian Constitution, Widening elements.

## III. APPLICATION OF THE BASIC STRUCTURE DOCTRINE

### A. Doctrine Of Basic Structure

The basic structure doctrine is a common legal term used to mention that the Constitution of a country cannot be altered to the “**will of the rulers**”. The introduction of the basic structure doctrine by the Honourable Supreme Court was considered as the great revolution, made in order to protect the soul purpose of the Constitution. The Constitutional scholars considered the doctrine which was framed in “*Kesavananda Bharati v. State of Kerala*<sup>3</sup> in 1973”, by the Honourable Supreme Court as a great moral good. The doctrine act as a saviour of the intention of the framers by impliedly limiting the powers of the legislature. This doctrine was influenced from “the works of the **German Scholar, Professor Dietrich Conrad**, whose writings and lectures on *limiting the amending powers of the legislature towards the Constitution*” was one of the fascinating aspects.

In the early 20th century, the “German and French constitutional lawyers **Carl Schmitt** and **Maurice Hauriou** respectively, created the concept of *Implied constitutional restraints on constitutional amendments*” using the very two distinct theoretical frameworks. “Schmitt's idea of **the constituent power's mystical origins served as the foundation for his theory of implied restrictions on constitutional amendment**”. “Hauriou, on the other hand, contended that the constituent authority should be exercised by a constituent assembly based on the procedural approach and the notion that some fundamental principles were natural law, which constituted a restriction on amending and also in framing the constitution”.

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<sup>3</sup> AIR 1973 SC 1461

## B. Basic Structure Doctrine- Evolution

This doctrine evolved from time to time through various amendments and judicial precedents. “The concept was initially made in the Amendment Act (1951)'s constitutionality contested in *Shankari Prasad v. Union of India*.<sup>4</sup>” According to the Honourable Supreme Court, “the ability of the Parliament to change the Constitution under Article 368<sup>5</sup> also extends to changing Fundamental Rights. Additionally, it was decided that the term ‘law’ in Article 13<sup>6</sup> exclusively refers to regular legislation, not modifications to the constitution”. According to this judgement, the Parliament can infringe any of the “Fundamental Rights” by an amendment act which does not amount to be violative under Article 13<sup>7</sup>. This was subsequently observed in the *Sajjan Singh v. State of Rajasthan*<sup>8</sup>, along with that the two judges of the bench questioned that could the fundamental rights be a play thing to the ruling party.

In “*Golaknath v. State of Punjab*<sup>9</sup>, the Honourable Supreme Court reversed its earlier judgments and provide a new view that the Parliament cannot abridge any of the Fundamental Rights provided in the Constitution”. This case give rise to the concept of implied restrictions on the powers of the Parliament to amend the Constitution, as the rights and freedoms of the citizens were reserved from getting abridged or amended. In “*Kesavananda Bharati v. State of Kerala*<sup>10</sup> is a landmark judgment defining the scope of this doctrine. Succeeding to this judgement the Honourable Supreme Court applied the theory of basic structure in *Indira Nehru Gandhi v. Raj Narain*<sup>11</sup> and declared clause (4) of Article 329-A<sup>12</sup> as Unconstitutional, which was inserted by the 39th Amendment in 1975”. It was

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<sup>4</sup> 1951 AIR 458, 1952 SCR 89.

<sup>5</sup> The Constitution of India, 1950

<sup>6</sup> The Constitution of India, 1950

<sup>7</sup> The Constitution of India, 1950

<sup>8</sup> AIR 1965 SC 845

<sup>9</sup> 1967 AIR 1643

<sup>10</sup> AIR 1973 SC 1461

<sup>11</sup> 1975 AIR 865

<sup>12</sup> The Constitution of India, 1950; Repealed under the Constitution (Thirty ninth Amendment) Act, 1975

adopted in “*Minerva Mills v. Union of India*<sup>13</sup>, *Waman Rao Case*<sup>14</sup>, *S.R. Bommai v. Union of India*<sup>15</sup> and *Indra Sawhney v. Union of India and Ors*<sup>16</sup> from time to time”.

### C. Doctrine Named – The Basic Structure Shields Articles

The basic structure doctrine acts as a shield in protecting the core subject matters and structure of the Constitution. This assures that the core subjects will not be altered in favour to the majority ruling party as per their own will at times. The will be superior even to the will of the general populace. This way of keeping certain provisions permanently away from the amending powers of the Legislature is done with the view to ensure the intention of the makers remains unchanged.

The Indian Judiciary has not exclusively defined the basic structure doctrine in any of its judgements. Some jurists felt that it is quite dangerous to leave the governing doctrine of the Constitution as undefined. The reason for their opinion is because, there is a chance for the authority to interpret it in their own way and also leaving it undefined may defeat its very purpose. According to Justice Chandrachud, C.J., “the harmony and maintenance of balance between the Fundamental rights and Directive Principles of State Policy is the basic features of Doctrine”.

In “*J&K; National Panthers Party v. Union Of India & Ors*<sup>17</sup>, the Honourable Supreme Court observes that *we must have a clear perception of what the Basic Structure is. It is hazardous to define what is the Basic Structure of the Constitution as what is basic does not remain static for all time to come*”. Thus, it remains as a tricky guideline over these many years and will be better if it continues so. Subsequently the undefining doctrine gives rise to a question that whether a violation of any fundamental rights and basic structure are one among

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<sup>13</sup> 1980 AIR 1789

<sup>14</sup> (1981) 2 SCC 362

<sup>15</sup> 1994 AIR 1918

<sup>16</sup> AIR 1993 SC 477

<sup>17</sup> AIR 2010 J&K 47

the same or not? In "*Glanrock Estate (P) Ltd vs The State Of Tamil Nadu*<sup>18</sup>, the Constitutional bench observed:

*Fundamental rights enshrined in Part III can be extinguished by Constitutional amendments and if it abrogates or abridges such rights, would not as such, abrogate or abridge the basic structure. The test is whether it has the effect of nullifying the overarching principles of equality, secularism, liberty and so on"*

Thus, this judgement of the Constitutional bench gives rise to a test of nullity that is to be made while analysing whether there is any abridge of basic structure.

#### **IV. ENUMERATING THE BASIC STRUCTURES OF INDIAN CONSTITUTION**

It was in the Kesavananda Bharati case<sup>19</sup> (1973) the focus of attention towards the basic structure came. It was held that no constitution amendment can infringe the building pillars, and which are as follows:

1. Constitution supremacy
2. Democratic and republican structure of government
3. Federal traits
4. Individual freedom
5. Unity and sovereignty of India
6. Secularism
7. Doctrine of separation of power

Over the years of time through subsequent judgements, some additions were made to the list, that includes the following:

- "Rule of law"
- "Judicial review"
- Ensure "free and fair election"

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<sup>18</sup> (1972) 2 SCC 133

<sup>19</sup> AIR 1973 SC 1461

- Representative model of system
- Rule/Principle of equality
- Maintenance of harmonious construction between the Part III and Part IV
- Powers of the Honourable Supreme Court of India provided under “Articles 32, 136, 142 and 147<sup>20</sup>”
- “Articles 226 and 227<sup>21</sup>” providing about the powers of the High Courts.

## V. CONTEMPORARY ISSUES AND THE BASIC STRUCTURE DOCTRINE

Whenever there arises any petition before the Court, key argument on the part of petitioner will be that the new amendment or legislation violated the basic structure doctrine. Some of such recent contemporary issues are as follows:

### A. Citizenship Amendment Act, 2019

The “Citizenship Amendment Act, 2019” which only granted benefits of naturalisation to unauthorised migrants who practised the Buddhists, Hindus, Parsi, Sikhs, Jains, and Christians, and were citizens of particular countries, did not apply to Muslims. The “**Citizenship Amendment Act, 2019**”, lowers the eligibility period for Indian citizenship from 11 to 5 years and provides citizenship to migrants who came illegally from Pakistan, Bangladesh, and Afghanistan who enter the country on or before December 31, 2014. The issue was that whether the new amendment stands inconsistent to the Basic structure doctrine by **violating the Secularism** of India.

Union argued that it has maintained that the “Citizenship Amendment Act, 2019” (CAA) strives to preserve "**freedom of religion**<sup>22</sup>" of certain categorised communities facing persecution for precisely practising their individual religions or religious faith in the specific bordering nations, rather than violating any concept of "freedom of religion." Also submitted that India being a secularist country does not mean that it is

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<sup>20</sup> The Constitution of India, 1950

<sup>21</sup> The Constitution of India, 1950

<sup>22</sup> The Constitution of India, 1950, Art. 25

irreligious, it respects and recognises all religions and believes, and tries to develop brotherhood among all of them.

### **B. Reservation To EWS- 103<sup>rd</sup> Constitutional Amendment**

The 103<sup>rd</sup> Constitutional Amendment of 2019 was contested in front of the Honourable Supreme Court in "*Youth for Equality v. Union of India*"<sup>23</sup>. In order to make particular provisions and/or reservations for any economically underprivileged groups of people other than members of the Schedule Castes and Schedule Tribes, this amendment adds Articles 15(6) and 16(6)<sup>24</sup> into the Constitution. According to the petitioner, the 50% reservation ceiling has been included into the Constitution's equality code's fundamental foundation. It is against the "*equality code and the basic structure doctrine*" to exclude Schedule Castes, Schedule Tribes, or economically underprivileged portions of the backward classes from the scope of economic reservation.

The question of law was whether Articles 15(6) and 16(6)<sup>25</sup>, breached Article 14<sup>26</sup> ("Equality before the law") and eventually violated Basic Structure concept. The Apex Court has ruled that it is a major legal issue to establish whether the amendment violates the Constitution's fundamental principles by using the "width" and "identity" criteria in relation to its equal protection clauses. The court may be able to include the economically backward classes despite their inclusion in other reservations made by the government which only garners less credibility than the former by providing a majority judgement in the case of reservations for the economically weaker sections.

### **C. Dilution Of J&K's Special Status**

In "*Dr Shah Feasal v Union of India*"<sup>27</sup>, the imposition of the President's rule in J&K on 19<sup>th</sup> December, 2018, *the Constitution (Application to Jammu and Kashmir) Order 2019, Declaration under Article 370(3) of the Constitution, and the Jammu and Kashmir State Reorganisation Act, 2019* were challenged". One of the concerns addressed is that

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<sup>23</sup> W.P. (CIVIL) NO. 55 OF 2019

<sup>24</sup> The Constitution of India, 1950

<sup>25</sup> The Constitution of India, 1950

<sup>26</sup> The Constitution of India, 1950

<sup>27</sup> Writ Petition (Civil) no.1099 of 2019



replacing state cooperation with governor concurrence under President's authority is a serious violation to democracy. Furthermore, the “application of exceptions of Article 32<sup>8</sup> of the Constitution” contradicts the federal balance. Maintenance of “Federalism, democracy and rule of law are basic features” seen under consideration of the “basic structure doctrine”.

The interpretation done by the court towards for this doctrine must improve the core values of democracy and republican mode of government as provided in “*State (NCT of Delhi) v. Union of India*”<sup>29</sup>, the Honourable Supreme Court held:

*After the evolution of the basic structure doctrine post Kesavananda bharathi, the interpretation of the Constitution must be guided by those fundamental tenets which constitute the foundation and basic features of the document. Where a provision of the Constitution is intended to facilitate participatory governance, the interpretation which the court places must enhance the values of democracy and of republican form of Government which are part of the basic features.”*

#### **D. Electoral Bonds Case**

Under the Finance Act, 2017, the electoral bonds were introduced in India, which favours the funding to the Indian political parties from an unknown source. The petitioner challenged this by relying upon the previous judgement provided by the Honourable Supreme Court. In “*I.R. Coelho (Dead) By Lrs vs State Of Tamil Nadu & Ors*”<sup>30</sup>, the petitioner requires the State to justify the degree of invasion of fundamental rights”.

#### **E. Nikah-Halala Case**

In *Nafisa Khan v Union of India*<sup>31</sup>, the practise of Nikah-Halala was challenged and prayed to declare it as unconstitutional as it is “violative of Articles 14, 15, 21 and 25”<sup>32</sup> of the Indian Constitution. One of the primary issues in the case is that these practises are offensive to a woman's essential dignity as an individual and infringe fundamental

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<sup>28</sup> The Constitution of India, 1950

<sup>29</sup> (2018) 8 SCC 501

<sup>30</sup> (1999) 7 SCC 580

<sup>31</sup> WP (C) 222/2018 (Pending)

<sup>32</sup> The Constitution of India, 1950

rights. The primary issue in the case was that these practises are offensive to a woman's essential dignity as an individual and infringe against the fundamental rights protected by the Constitution

## F. Right Of Transgender Persons

In "*Grace Banu v Union of India*<sup>33</sup>, the petitioner challenged the validity of the *Transgender Persons (Protection of rights) Act 2019*". They felt that various sections of this Act infringe their "**right to life, dignity, and autonomy as well as the freedom of trans people to choose their own gender identification**". The maximum sentence under the Act for sexual assault on transgender people is two years in jail, although under the Indian Penal Code, the maximum sentence for comparable actions against women is from three years to life in prison.

This has been contested by the petitioners as an arbitrary difference in penalty that is against "Article 14<sup>34</sup> of the constitution provides equality before the law and equal protection of the laws". The intended beneficiaries have been frustrated by the act being silent on categorising these people as socially and educationally underprivileged classes for the purposes of reservations. Even though the petitioners haven't invoked the basic structure doctrine, it is obvious that it may at the case's hearing.

## G. Digital Personal Data Protection Bill, 2023

The "Digital Personal Date Protection Bill<sup>35</sup>" is planned to be introduced in the upcoming sessions of the Parliament, for which warming alarms are given by some scholars. The important goal of the Bill is to establish rules for handling digital personal data in a way harmoniously taking into consideration of both individuals' rights to privacy and security. They contend that this complex clause strikes a compromise between the "right to privacy" (Article 21<sup>36</sup>) and the "right to knowledge" (RTI). The government is extending the reach of this exclusion with the

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<sup>33</sup> WP (C) 406 of 2020 (Pending)

<sup>34</sup> The Constitution of India, 1950

<sup>35</sup> The Digital Personal Data Protection Bill, 2023

<sup>36</sup> The Constitution of India, 1950

data protection bill. The “Digital Personal Data Protection bill” is incorporated with provisions arbitrary to violation of Right to Privacy, as provided in the *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors*<sup>37</sup>.

## VI. CHALLENGES FACED BY THE DOCTRINE

The pathways crossed by this doctrine in India was full of hardships. Years over years through various cases, the doctrine was scrutinised by the apex court. The Court desire the separation power to be a part of the basic structure, but they were contradictory to each other. In “*I.R. Coelho case*<sup>38</sup>, the court observed that the any Constitutional Amendment will be considered as valid only after carrying out a test regarding its consistence with the basic Structure doctrine”. Another peculiar criticism is that its vagueness. Some contented that the Kesavananda Bharati Judgement substantially shifted the balance of power from the Parliament to the judiciary.

### A. Doctrine of basic structure- doctrine of constitutionally controlled governance.

According to the "Basic Structure theory", which was established by judges, made several aspects outside the scope of the Parliament's ability to amend. Judiciary knowingly omitted to clarify the basic structure doctrine for a very crucial reason.

With careful diligence, the Constitution's creators took great care to give citizens the greatest possible document.

However, they did not include an express language under Article 368<sup>39</sup> to place restrictions on the use of the Parliament's power of amendment. As a result, in order to accommodate agrarian reforms by excluding judicial review, the 9th Schedule was introduced. The 9th Schedule<sup>40</sup> gradually transformed the regulated Constitution into the uncontrolled one. The Honourable Supreme Court created

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<sup>37</sup> (2017) 10 SCC 1

<sup>38</sup> AIR 2007 SC 861

<sup>39</sup> The Constitution of India, 1950

<sup>40</sup> The Constitution of India, 1950, Schedule IX, inserted vide The Constitution (First Amendment) Act,1951 (w.e.f. June 18, 1951).

the new theory known as "Basic Structure" in the Keshavanada Bharathi case in 1973 as a result, placing implicit restrictions on the Parliament's power towards amendments. As a result, an uncontrolled Constitution became regulated.

## **VII. LIST OF CONSTITUTIONAL AMENDMENT ACTS RELATING TO THE DOCTRINE OF BASIC STRUCTURE.**

### **1. First Constitutional Amendment Act, 1951**

- Addition of 9th schedule in order to prevent the land reforms statutes from judicial review.

### **2. 16<sup>th</sup> Constitutional Amendment Act, 1963**

- Empowered the state to impose further restrictions on the "right to freedom of speech and expression, to assemble peaceably and to form associations<sup>41</sup>" in the interest of the unity of India.

### **3. 17<sup>th</sup> Constitutional Amendment Act, 1964**

- Inclusion of some enactments to the 9<sup>th</sup> schedule<sup>42</sup>.

### **4. 24<sup>th</sup> Constitutional Amendment Act, 1971**

- Confirmed that the Parliament can alter any provision of the Constitution, including the "Part III of the Constitution".
- President's concern is mandatory for the Constitutional Amendment Bill.

### **5. 25<sup>th</sup> Constitutional Amendment Act, 1972**

- Provided, however, that no law passed to carry out the "Directive Principles set forth in Article 39(b) or (c)<sup>43</sup>" may be contested on the grounds that it violates the rights imbibed in "Articles 14, 19, and 31".

### **6. 34<sup>th</sup> Constitutional Amendment Act, 1974**

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<sup>41</sup> The Constitution of India, 1950, Art.19(1)

<sup>42</sup> The Constitution of India, 1950, Schedule IX, inserted vide The Constitution (First Amendment) Act,1951 (w.e.f. June 18, 1951).

<sup>43</sup> The Constitution of India, 1950

- Inclusion of twenty more land tenures and land reforms acts of various other states in the 9th Schedule<sup>44</sup>.

**7. 39<sup>th</sup> Constitutional Amendment Act , 1975**

- Included specific Union acts in the 9th Schedule.

**8. 42<sup>nd</sup> Constitutional Amendment Act , 1976**

- Added three neo particulars to the Preamble.
- Fundamental duties (“ Article 51A<sup>45</sup>”) were imbibed.
- Restricted the powers of judicial review and writ jurisdictions of the Court.

**9. 43<sup>rd</sup> Constitutional Amendment Act , 1977**

- Restored the powers of judicial review and writ jurisdictions of the Court.

**VIII. ELEMENTS OF BASIC STRUCTURE (ADJUDGED BY PRECEDENT)**

- In “**Kesavananda Bharati v. State of Kerala**<sup>46</sup>, the Supreme Court upheld with the principles of Supremacy of the Constitution, Separation of power, Republic and democratic form of Government, Secularism, Federalism, Sovereignty and integrity of India, Parliamentary system”.
- In “**Central Coal Fields Ltd., v. Jaiswal Coal Co** <sup>47</sup>, the Supreme Court upheld with the Effective access to justice”.
- In “**S.P. Sampath Kumar v. Union of India**<sup>48</sup>, the Court held with the concepts of Rule of law and Judicial review”.

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<sup>44</sup> The Constitution of India, 1950, Schedule IX, inserted vide The Constitution (First Amendment) Act,1951 (w.e.f. June 18, 1951).

<sup>45</sup> The Constitution of India, 1950; inserted under the Constitution (Forty Second Amendment) Act, 1976

<sup>46</sup> AIR 1973 SC 1461

<sup>47</sup> AIR 1980 SC 2125

<sup>48</sup> 1987 SCR (1) 435

- In “**Delhi Judicial Service Association v. State of Gujarat**<sup>49</sup>, the Supreme Court deals with the powers of Supreme Court under Article 32,136,141 and 142”.
- In “**Kihoto Hollohon v. Zachilhu**<sup>50</sup>, the basic structure of Free and fair elections was challenged”
- In “**All India Judge’s Association v. Union of India**<sup>51</sup>, the Court observed the Independence judicial system in India”

## **IX. MEANING, SCOPE AND DEFINITION OF JUDICIAL REVIEW**

### **A. Meaning And Scope**

The notion of judicial review describes how the Court evaluate and decide whether the activities of the other Branches are lawful as long as they are consistent with the Constitution, and if they are not, they are declared invalid. In “I.R. Coelho case<sup>52</sup>, the Honourable Supreme Court observed that the most appropriate procedure for amending the constitution would be terminated from the side of judiciary, at times when judiciary comes to interpret the validity of such amendment comprehensively”. Judicial review stands as an important reason for the maintenance of check and balance in governance as a result of which it is called as the “Guardian of the Constitution”.

In India the “*Constitution is the ‘Grundnorm’ of the nation*”. Therefore, none of the enactments shall be inconsistent with the Constitution. The test whether the laws, are in accordance with our Constitution is vested with the Judiciary, thus the following inconsistent clause shall be invalid, if judged to be unlawful. Thus, the Judiciary stands as the saviour and the watchdog of the democracy. This concept is not expressly in any provisions of the Constitution whereas impliedly provided in many provisions.

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<sup>49</sup> AIR 1991 SC 2176

<sup>50</sup> 1992 SCR (1) 686

<sup>51</sup> (1993) 4 SCC 288

<sup>52</sup> AIR 2007 SC 861

## B. Definition

As per “*Black’s Law Dictionary*”<sup>53</sup> Judicial review is a court’s power to review the actions of other branches or levels of government; especially the court’s power to invalidate legislative and executive actions as being unconstitutional”.

## C. Purpose

Judicial review is used by the judiciary to fulfil the following purposes:

- To safeguard the fundamental rights.
- Preventing the misuse and abuse of power

## D. In order to ensure the legitimacy of the legislative, executive, and administrative authorities' acts.

- To check whether all the laws enacted coexists with the Constitution and also to declare the laws which are inconsistent as void or null.
- To act as a supervisory body to ensure whether legislative, executive and administrative organs comply with the essence of the Indian Constitution.
- Helps Judiciary in performing duties assigned to it, that is to interpret the Constitution.
- Gives effect to concepts like Suo moto and Public Interest Litigations (PIL), that makes the Judiciary to intervene into the serious public issues, without receiving complaint from the aggrieved party.

## X. ORIGIN OF JUDICIAL REVIEW

The United States of America is where it emerged. It is regarded as one of the US Constitution's distinctive qualities. In “*Marbury v. Madison*”<sup>54</sup> (1803), the Supreme Court of the United States established the **power of judicial review and limited congressional authority by declaring the legislation to be unconstitutional**”.

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<sup>53</sup> BLACK’S LAW DICTIONARY (5<sup>th</sup> edition, 1979) Page no.852

<sup>54</sup> 5 U.S. (1 Cranch) 137 (1803)

The idea of judicial review was first put out at the time by Sir John Marshall, Chief Justice of the United States. In support to that the Honourable Supreme Court mentioned about "Article VI, Section 2<sup>55</sup> of the Constitution which states, *this Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*"

This article was interpreted in that way to suggest that courts have the authority and responsibility to preserve the supremacy of the Constitution by refusing to allow any federal laws to be contravene to its provisions. Chief Justice Marshall stated this concept in his decision in this case, which concerned an interpretation of the "Judiciary Act of 1789". In addition to that the "Apex court observed that *the Federal Courts of United States have a sworn obligation to uphold the constitution and decide which law will take precedence in cases of inconsistency*". Subsequent to this judgement, till today the Federal Courts of United States have declared nearly more than hundred judgments as unconstitutional.

The framers of the Constitution adopted this concept from US Constitution. Indian Constitution tilted more towards US Constitution than of the British Constitution. According to Britain the Parliament is the Supreme Power. No courts can declare any legislations enacted by the Parliament as void. Whereas in India the Parliament is not the Supreme as like UK, thus every law comes under the purview of the Judiciary. Thus, the Honourable Supreme Court is given the authority to review, despite the fact that the phrase "judicial review" is not expressly contained in the Constitution provisions. The judicial review system is governed by Article 13 of the Constitution.

Therefore, a legislative act or presidential order's constitutionality may be contested before the Honourable Supreme Court on the following grounds:

- Infringement of fundamental rights.

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<sup>55</sup> The Constitution of the United States, 1787



- Exclusion of purview of the institution that framed it.
- Infringing the requirements of the Constitution.

## XI. JUDICIAL REVIEW – CLASSIFICATION

### 1. Reviewing Legislative actions:

The Indian judiciary has the power to review the decisions and legislatives enacted by the legislative, comes within the ambit of the ideals of the Constitution.

“Mr. Alladi Krishna Swamy Ayyer has stated that *the future evolution Indian Constitution will thus depend it to a large extent upon the working of the Honourable Supreme Court and direction given to it by the court, while its function may be one of interpreting the constitution, it cannot in the discharge of its duties afford to ignore the Social, economic and work tendencies of time which furnishes the necessary background*<sup>56</sup>”.

In *Union of India vs. Saklchand H.Seth*<sup>57</sup>, Justice Untwallia observed, “The Judiciary is watching tower above all the big structures of other limbs of the State from which it keeps a watch like a sentinel”

### 2. Reviewing Executive actions:

The Judiciary on other hand reviews whether any abuse and misuse of power been carried by the executive and the administrative authority.

### 3. Reviewing Constitutional Amendments:

“Under Article 13<sup>58</sup> of Indian Constitution, *all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void*”.

### 4. Reviewing Judicial actions:

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<sup>56</sup> CONSTITUENT ASSEMBLY DEBATES, 1946 *speech by ALLADI KRISHNA SWAMY AYYER*

<sup>57</sup> (1977) SCC ,193

<sup>58</sup> The Constitution of India, 1950

The Judiciary may also review its previous decisions, in order to improve or amend if it seems to inconsistency with the Constitution.

## XII. LANDMARK JUDGEMENTS IN JUDICIAL REVIEW

1. In “**Shankari Prasad v. Union of India**<sup>59</sup>, the First Constitution Amendment Act, 1951 was challenged. The petitioner alleged that the amendment act violates the fundamental right ‘*Right to Property*’ guaranteed in the Constitution”. The Court held, “*Article 368<sup>60</sup> of the Constitution empowers the Parliament to amend any provision without exceptions. Therefore, this cannot be fall under the purview of Article 13(2)*”.
2. In “**Sajjan Singh v. State of Rajasthan**<sup>61</sup>, the 17<sup>th</sup> Constitutional Amendment was challenged before the Supreme Court”. The Petitioner contented that Article 368 of the Constitution was not followed at the time of amendment. The Apex Court with 5:6 majority reversed the previous judgement issued by it in the Shankari Prasad v. Union of India, it held that Article 368<sup>62</sup> comes within the ambit of Judicial review.
3. In “**Golaknath v. State of Punjab**<sup>63</sup>, the Court observed that the amendment is just an ordinary law which has to pass the test under Article 13<sup>64</sup> of the Constitution”. Thus, the Court came to a conclusion that Article 368<sup>65</sup> cannot be applied for infringement of the Fundamental rights.
4. **24<sup>th</sup> Constitutional Amendment, 1971**: The Honourable Supreme Court in “*I.C. Golaknath case*<sup>66</sup> held that Article 368 does not provide powers to the Parliament to amend the Constitution, whereas in lieu of that it laid down the procedure to amend the Constitution. In addition, Parliament cannot abridge any Fundamental rights provided under Part III of the Constitution, by

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<sup>59</sup> 1951AIR 458

<sup>60</sup> The Constitution of India, 1950

<sup>61</sup> AIR 1965 SC 845

<sup>62</sup> The Constitution of India, 1950

<sup>63</sup> 1967 AIR 1643

<sup>64</sup> The Constitution of India, 1950

<sup>65</sup> The Constitution of India, 1950

<sup>66</sup> 1967 AIR 1643

applying Article 368". In order overcome this judgement, the Parliament passed the 24th Amendment Act.

5. The **Kesavananda Bharati v. State of Kerala**<sup>67</sup>, the Honourable Supreme Court focused on the concept of basic Structure. By adopting judicial review, the Court held, "*the Parliament cannot amend the basic structure of the Constitution*". Subsequent to it in "**Minerva Mills v. Union of India**<sup>68</sup>, the Honourable Supreme Court held *judicial review is one of the elements of the basic structure*".
6. **Nineth Schedule vs Judicial review**: The 9th schedule<sup>69</sup> stands an immune against judicial review. The laws that are placed in the 9th scheduled are exempted from judicial review even if it violates the Fundamental rights. However, this immune was absolute only till 2007. In "**I R Coelho v. State of Tamilnadu**<sup>70</sup>, the Honourable Supreme Court ruled that the laws placed in the 9th schedule are not exempted from judicial review, if they abridge the Fundamental rights".

### XIII. ARTICLE 368 VS ARTICLE 13

Article 368 vs Article 13 impliedly means the clash between the Legislative and the Judiciary. "Part XX, Article 368<sup>71</sup> of the Constitution laid down the procedures for amendment in the Constitution", which was adopted from the Constitution of South Africa. During the Constituent Assembly debate regarding the Amendment procedure, the members had different views. Some felt that a solid and permanent Constitution could be made if the amendment procedure is rigid, whereas some argued that it should be flexible in order to serve the latter.

Eventually we could see a combination of both flexibility and rigidity in the Amendment procedure. Article 368<sup>72</sup> provides three ways of amendment procedures based on the subject matter to be amended. Any amendment to the Federal structure

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<sup>67</sup> AIR 1973 SC 1461

<sup>68</sup> AIR 1980 SC 1789

<sup>69</sup> The Constitution of India, 1950, Schedule IX, inserted vide The Constitution (First Amendment) Act, 1951 (w.e.f. June 18, 1951).

<sup>70</sup> AIR 2007 SC 861

<sup>71</sup> The Constitution of India, 1950

<sup>72</sup> The Constitution of India, 1950

of the Constitution demands special majority and ratification by half of the state legislature, this is just because the complete flexibility leads to alteration of the entire Constitution in accordance to the ideology of the rulers.

In many times there arises a question that which organ has the supreme power over the Country, either the Legislature or the Judiciary. The Constitution makers amicably settles the issue by incorporating the “Doctrine of Separation of powers” and “Checks and balance”. All the three organs accomplish their duties independently without any interventions, but at the same time one monitors the other.

For example, Article 121 and 211<sup>73</sup> imposes a restriction to the Legislature from discussing about the actions or workings of the Judges except at the time of impeachment. Similar to it, any law enacted by the legislature may be ruled as unconstitutional or arbitrary under Article 13<sup>74</sup> (if it abridges “Part III of the Constitution”) by Judiciary. In United Kingdom, the Court cannot struck down any law formulated by the Parliament. But it may overturn the secondary law, if it is ultra vires to the parent law formulated by the Parliament. Whereas the situation in the USA totally differs a lot from UK. In US, the courts have the power to review the laws formulated by the Congress and declare it as void, if it is inconsistent with the Constitution.

While both the Parliament and the Honourable Supreme Court are powerful institutions in India, they operate independently, and each has its specific role in the good administration of the country. Judiciary plays a vital role in upholding the “Rule of law” and protecting the “Fundamental rights”. In cases of conflict or constitutional disputes, the Judiciary has the authority to settle disputes and make binding judgments, thus making it a significant force in shaping the legal and political landscape of India. However, it is essential to recognize that the power and effectiveness of any institution contingent on how well it functions within the overall system of checks and balances and how it upholds the other principles of the

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<sup>73</sup> The Constitution of India, 1950

<sup>74</sup> The Constitution of India, 1950

Constitution. By that way the role of judiciary through Judicial review upholds the Constitution.

According to Article 368<sup>75</sup>, only the Parliament has the sole authority to add new provisions to the Constitution, as well as abolish or change any existing ones. Contrarily, Article 13<sup>76</sup> specifies that any law that infringes against a citizen's fundamental rights shall be ruled void. Article 368<sup>77</sup> specifies that none of the requirements indicated in Article 13<sup>78</sup> should have an impact on those mentioned in Article 368.

#### **XIV. OUSTER CLAUSE VS JUDICIAL REVIEW**

In countries with common law legal systems, an ouster clause is a provision inserted to any part of legislation to prevent judicial scrutiny upon it. There are two types Ouster clauses, they are Partial ouster or time limit clause and Total ouster or finality clause. Ouster clause eliminates the jurisdiction of Judicial review of the Honourable Supreme Court and High Courts. Such ouster clauses are made in certain provisions enabling the act of the agency of the Government as final. The primary legal question surrounding the ouster clause is whether it is indeed possible to abolish judicial jurisdiction by way of statues enacted by the Legislature.

#### **XV. JUDICIAL REVIEW - AN UNAMENDABLE TRAITS**

In simple words judicial review is the process by which the judiciary declares the actions of the other two organs as void, if it is inconsistent with the Constitution. Though the makers of the Constitution adopted it from the US Constitution, the Indian judiciary take a lot of time than the judiciary of the United States, to fix it as basic structure of the Constitution.

The Honourable Supreme Court has ruled the right to judicial review as a fundamental aspect in its various judgements. Even a constitutional amendment

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<sup>75</sup> The Constitution of India, 1950

<sup>76</sup> The Constitution of India, 1950

<sup>77</sup> The Constitution of India, 1950

<sup>78</sup> The Constitution of India, 1950

made under Article 368<sup>79</sup> with absolute majority, cannot limit or abolish the authority of judicial review. “In *Indira Nehru Gandhi v. Raj Narain*<sup>80</sup>, the Honourable Supreme Court observed the judicial review as an integral part of the Indian Constitution”. Subsequently, as per the “Doctrine of Separation of power”, the judiciary is vested with the duty of interpretation of law. The judiciary may carry out its duty only if the Article 13<sup>81</sup> prevails over Article 368<sup>82</sup> of the Constitution.

There are still some clauses in the Constitution that are not subject to judicial review, despite the fact that judicial review is the foundation of the Indian judiciary. The provisions that are excluded from judicial review are “Articles 53, 72, 74(1), 74(2), 77, 78, 80, 130, 161 and 361<sup>83</sup>”. Additionally, the President's or Governor's use of their powers cannot be subject to court scrutiny based on merit.<sup>84</sup> Furthermore, as stated in the 1981 decision of *Maru Ram v. Union of India*<sup>85</sup>, the courts are not permitted to make any rulings about the interests of such matters. Such exclusions are made in favour of the executive and the Legislature.

Hence, with the firmness of judicial review, being an unamendable trait, the importance, significance and in evident nature of the doctrine of basic structure can be unleashed.

## XVI. SUGGESTIONS AND CONCLUSION

We have embraced the idea of separation of powers here in India, thus we are unable to use full, expanded judicial review authority. If the courts assume full, arbitrary control over judicial review, it will result in subpar work from all branches of government. Every time a matter comes up for review before the judiciary, it should be thoroughly examined to see whether there is a hidden agenda or if it works against

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<sup>79</sup> The Constitution of India, 1950.

<sup>80</sup> 1975 AIR 1590, 1975 SCC (2) 159.

<sup>81</sup> The Constitution of India, 1950.

<sup>82</sup> The Constitution of India, 1950.

<sup>83</sup> The Constitution of India, 1950.

<sup>84</sup> *State of UP v. Swaran Singh*, 1998 (4) SCC 75.

<sup>85</sup> 1981 1 SCC 107.

the interests of the general populace. ***“Judicial review is not an appeal from a decision but a review of the manner in which the decision is made.”***<sup>86</sup>

Therefore, the Judicial review acts as a custodian of the individual rights and also a watchdog in averting the misuse of powers and unjust activities. The *Kesavananda Bharati*<sup>87</sup> ruling, which established the fundamental structure concept, has made the Indian Constitution stronger. In tie with the battle between the amendment procedure under article 368<sup>88</sup> and perspective of law under article 13<sup>89</sup>, various arguments and contentions were kept forth and against its superiority and relevance. Therefore, to realize the powers of the guardian of the law, the procedure of executing their decisions shall be in a more stringent manner to prevent subsequent overriding actions of the enactors of the law, thereby, in my perspective, the judiciary will be acting as the ultimate neutral protective organ for the citizens and exemplarily performs its functions to the mankind.

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<sup>86</sup> B. C. Chaturvedi vs. Union of India and ors. (1995).

<sup>87</sup> (1973) 4 SCC 225; AIR 1973 SC 1461.

<sup>88</sup> The Constitution of India, 1950.

<sup>89</sup> The Constitution of India, 1950.