BALANCING THE TWO POLES: JUDICIAL REVIEW AND PARLIAMENTARY DEMOCRACY

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INTRODUCTION

In countries like India and U.S.A, which operate under a Federal system of Government, there is a division of functions between the central Government and the component state government. Such a division of functions is an essential feature in any federal system, and the process of judicial review makes the Courts responsible for enforcing the provisions of the constitution, statute and the Rules of the federal system. This power necessarily includes the authority to declare ultra vires any state legislation or other action of the instrumentality of the state, which infringes on the constitutional authority of the Central government or any other State in the federation. The Supreme Court of India and the U.S.A. have a power to declare the Acts of Parliament and Congress unconstitutional respectively. Courts call this the judicial review over the acts of the Legislative and Executive Departments of the Government. The Courts have the authority to declare actions of the other two wings Invalid as contrary to the Constitutional Law. This system is termed as 'Judicial supremacy'. This is enjoyed by the Indian and American courts. No such authority resided in the highest courts of England, France, Russia and Switzerland.[1] The principle of judicial review became an essential feature of written Constitutions of many countries. H.M. Seervai in his book Constitutional Law of India noted that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia and India, though 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 functions of another.[2]

American constitutional writes say it is judicial enforcement alone that makes the provisions of the American Constitution more than mere maxims of political morality. Regarding the

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[1] Sir Alexander and Sir Thomas Cockburn-Campbell By BONNIE HICKS, Available at: www.parliament.wa.gov.au/parliament/library/MPHistoricalData.nsf/bdcebf6403782d9448257cae002a1d9c/280245f50ad04cb64825773c001477ec/$FILE/MP250%20Campbell%20T%20C.pdf (Accessed on 10/11/2017)

[2] H M Seervai, Constituion of India, 4th Edition, Universal Law Publication

judicial review in America, it is said: "*The power of judicial review is based on the idea that the constitution created a government of limited powers*."[3] Such is the condition under the Indian Constitution also. In Australia, when the Federal Constitution was going to be established at the Convention of 1891, Justice Cockburn spoke of the necessity of judicial review in Federalism as "*all our experience hitherto has been under the condition of parliamentary sovereignty. Parliament has been the Supreme body. But when we embark on federation, we throw Parliamentary sovereignty overboard, parliament is no longer supreme. When parliamentary sovereignty is dispensed with, instead of there being a High Court of Parliament, you bring into existence a powerful judiciary which towers above all powers, legislative and executive and which is the sole arbiter and interpreter of the Constitution*."[4]

JUDICIAL PROCEDURE FOR JUDICIAL REVIEW

The power of judicial review has in itself the concept of separation of powers i.e. an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf, by the courts. The methods of judicial scrutiny are still inadequate in India. Though, the constitution makers of India have inserted a specific provision under Article 32 of the constitution to go directly to the Supreme Court regarding legislative lapses concerned with infringement of Fundamental Rights.[5] Article 32 itself is the fundamental right and according to Dr Ambedkar *"it is the soul of the constitution as without which there would be no meaning of inserting the other fundamental rights in the constitution".*[6] But there has been no any specific provision in the constitution to move the Supreme Court direct on the unconstitutionality arising out of the violation of the constitutional mandate relating to distribution of powers or separation of powers or other constitutional restrictions which is equally vital.[7] If the issue does not involve infringement of

[3] Parliament and the Judiciary Background Note for the Conference on Effective Legislatures, Available at: www.prsindia.org/uploads/media/Conference%202016/Parliament%20and%20Judiciary.pdf (Accessed on 10/11/2017)

[4] Federalism and Judicial Review: An Update Jesse H. Choper, Berkeley Law Scholarship Repository, Available at: www.scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1470&context=facpubs (Accessed on 10/11/2017)

[5] Available at: http://www.mcrhrdi.gov.in/crashcourse/presentations/SG%2008%20%20Artcile%2032%20&%20226.pdf (Accessed on 10/11/2017)

[6] Writs In Indian Constitution, Available at: www.legalservicesindia.com/article/article/writs-in-indian-constitution-1997-1.html (Accessed on 10/11/2017)

[7] Id.

fundamental rights guaranteed under part III of the constitution, the aggrieved party has to move first the High court under article 226 and then only in appeal he can go to the Supreme Court if relief is not given by the High Court.[8] Such pitfalls deserves rectification by a suitable provision in the constitution so as to enable an aggrieved person to move the Supreme court directly concerning the unconstitutionality relating to the distribution of powers or delegated legislation or other constitutional restriction. This speedy remedy would quicken the conscience of the citizen in a more fruitful manner in protection of his rights. Thus the Power of Judicial Review is incorporated in Articles 226 and 227 of the Constitution insofar as the High Courts are concerned. In regard to the Supreme Court Articles 32 and 136 of the Constitution, the judiciary in India has come to control by judicial review every aspect of governmental and public functions.[9]

The Judiciary has been assigned a superior position in relation to the legislature, but only in certain respects.[10] The constitution endows the judiciary with the power of declaring the laws as unconstitutional, if that is beyond the competence of the legislature according to the distribution of powers provided by the constitution or if that is in contravention of the constitution.[11] Thus, while the basic power of review by the judiciary was recognized and definitely established, significant restrictions were placed on such a power, especially in relation to the fundamental rights concerning freedom, and liberty.[12]

The constituent assembly was evidently keen on preventing judicial review from becoming an instrument of judicial policy-making judicial review from becoming an instrument of judicial policy-making and thereby upsetting governmental balance of power.[13] Limitations on Court could never hope to equal its American counterpart. It seems that, at 17 times, members were almost haunted by an imaginary ghost of judicial activism transplanted from the far-off America.[14]

DEMOCRATIC ELEMENTS IN JUDICIAL REVIEW

[8] Id.
[9] Mukherjee, A. K; *The Indian High Courts and the writs of Certiorari and Prohibition*; The Indian Journal of Political Science, Vol. 4, no. 1, 1942, pp. 101–110.
[10] Id.
[11] Sharma, J. C; *Fundamental Rights In The Draft Constitution Of India*; The Indian Journal of Political Science, Vol. 10, no. 3, 1949, pp. 32–37.,
[12] Id.
[13] Kumar, C. Raj; *Legal Education, Globalization, and Institutional Excellence: Challenges for the Rule of Law and Access to Justice in India*; Indiana Journal of Global Legal Studies, vol. 20, no. 1, 2013, pp. 221–252.
[14] Id.

The future of democracy in this country will depend upon the preservation and maintains of the Rule of Law. One of the important achievements of democracy is that law must be just for human safety and it must be subservient to the human needs. A federal republican country in order to establish an ideal democratic rule and to create confidence in the mind of the people about democratic federalism must allow Judicial Review to thrive so as to eliminate unjust and unconstitutional laws and to relieve the people from legislative tyranny.[15]

We are living in an age of constitutional and limited democracy which imposes limitations on the power of the Government and banks on majority rule to avoid tyranny and arbitrariness. But democracy cannot thrive in the absence of an all pervading justice.[16] The Preamble of the Indian Constitution has promised equality and justice to all citizen of India and has the laws of India liable to be tested judicially. The majority rule, though the best rule is found generally to be addicted to tyranny. That why the existence of some impartial body is essential for the maintenance of democracy.[17]

Even Pandit Jawaharlal Nehru, who possessed a very large political and constitutional experience, said: "*With all my admiration and love for democracy, I am not prepared to accept the statement that the largest number of people is always right*. *The danger of oppression by majority is so obvious that the history of modern democracy is hunted by the ambition of including the minority in the controlling electoral body*."[18] But this solution of inclusion of minority is not the real solution. It is the judicial review which has tried to relieve political tension and tyranny to a greater degree. The democratic aspect of judicial review has been summarized "If democracy means very simply that the majority is to have whatever it at present hankers after, then judicial review is an intrusive body in democracy. If democracy means that the majority is generally to have its way because human beings are to be respected and the conception of their own interests not disregarded, then the commitment of the majority to limits set by law is of the essence of democracy".[19]

Adrienne Stone shows that constitutional provisions concerned with institutional structures are sometimes just as abstract and vague as those concerning rights; that their interpretation

[15] Shue, Vivienne; *Sovereignty, Rule of Law, and Ideologies of the Nation*; The Journal of Asian Studies, Vol. 68, no. 1, 2009, pp. 101–106
[16] Id.
[17] Id.
[18] Available at: http://www.celebratingnehru.org/english/quotations-of-nehru.aspx (Accessed on 10/11/2017)
[19] Id.

can therefore give rise to just as much reasonable and intractable disagreement; and that the resolution of these disagreements may require just as much judicial discretion, based on just as much evaluative judgement.[20] I do not dissent from any of this. Nevertheless, I believe that some kinds of structural review are distinguishable from rights review and not susceptible to the objection from democracy.

EXTENT OF JUDICIAL REVIEW IN INDIA

The initial years of the Supreme Court of India saw the adoption of an approach characterized by caution and circumspection. Being steeped in the British tradition of limited judicial review, the Court generally adopted a pro-legislature stance. This is evident form the rulings such as A.K. Gopalan, but however it did not take long for judges to break their shackles and this led to a series of right to property cases in which the judiciary was loggerhead with the parliament. The nation witnessed a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect, followed by another decision reaffirming the earlier position, and so on.[21] The struggle between the two wings of government continued on other issues such as the power of amending the Constitution. During this era, the Legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court.[22] At the time, an effort was made to project the Supreme Court as being concerned only with the interests of propertied classes and being insensitive to the needs of the masses. Between 1950 and 1975, the Indian Supreme Court had held a mere one hundred Union and State laws, in whole or in part, to be unconstitutional.[23]

The Supreme Court's interpretation of legislative acts to maintain the supremacy of the constitution, under the constitution of India, the scope of judicial review has been extremely widened. Unlike the U.S.A., the constitution of India has made express provision for judicial review. The scope of judicial review is present in several articles of the constitution, such as, 13, 32,131-136,143, 226 and 246. Thus, the doctrine of judicial review is firmly rooted in India and in this sense it is on a more solid footing than it is in America. Judicial review in India is based on the assumption that the constitution is the supreme law of the land and all

[20] Jeffrey Goldsworthy, Structural Judicial Review and the Objection from Democracy, The University of Toronto Law Journal, Vol. 60, No. 1, The Role of the Courts in Constitutional Law (Winter, 2010), pp. 137-154
[21] *A.K.Gopalan* v *State of Madras*, AIR 1950 SC 27
[22] Id.
[23] Id.

the governmental organs, which owe their origin to the constitution and derive their powers from its provisions, must function within the framework of the constitution. Under the Indian constitution there is a specific provision in Article 13(2) that "*the state shall not make any law which takes away or abridges the rights conferred by Part III of the constitution containing fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void*". The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to any constitutional provisions. It can be appreciated that the protection of the judicial review is crucially inter-connected with that of protection of Fundamental Rights, for depriving the court of its power of judicial review would be tantamount to making Fundamental Rights non-enforceable 'a mere paper provision' as they will become rights without remedy. The following cases vividly demonstrate the nature, extent and importance of the role played by the Supreme Court of the Indian Union in protecting the supremacy of the constitution. The Supreme Court in *State of Madras* v. *Row*[24] stated that the constitution contains express provisions for judicial review of legislation as to its conformity with the constitution. The court further observed "while the court naturally attaches great weight to the legislative judgments, it cannot desert its own duty to determine finally the constitutionality of an impugned statute". In *A.K.Gopalan* v. *State of Madras*[25] the court held that " *In India it is the constitution that is supreme and that a statue law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not*".[26] Justifying judicial review, in *S.S. Bola* v. *B. D. Sharma*[27], Justice Ramaswami held *"The founding fathers very wisely, incorporated in the constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, a ailment and enjoyment of equality, liberty".* In *Subhash Sharma* v. *Union of India*[28], the court observed that judicial review is a basic and essential feature of the constitutional policy and held that the Chief justice of India should play the primary role in the appointment of judges of High court and Supreme Court and not the Executive.[29] Justice Bhagwati in *Sampath Kumar* v. *Union of India*[30] held that

[24] AIR 1951 Mad 147
[25] *Supra* note 21
[26] Id.
[27] AIR 1997 SC 3127, 3170
[28] AIR 1991 SC 631
[29] Id.

"*Judicial Review is essential feature of the constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the constitution will cease to be what it is*".[31] In Minerva Mills case, Chandrachud, C.J speaking on behalf of majority observed "It is the function of the judges, nay their duty, to pronounce the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will become uncontrolled". In the same case, Bhagwati, J observed "it is for the judiciary to uphold the constitutional values and to enforce the constitutional limitation. That is the essence of the rule of law, which inter alia requires that the exercises of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the constitution and the law. The power of judicial review is an integral part of our constitutional system and without it there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our constitution which, more than any other is basic and fundamental to the maintenance of democracy and

Democratic objections to judicial review imply that even when legislatures make the wrong decision about the rights we have, they have one enormous advantage over judiciaries, even when the latter make the right decision: that they are legitimate in ways that the latter are not. This legitimacy resides in the fact that they have been elected by citizens based on the egalitarian principle of one person one vote, and thus majority decision to resolve disputes; and because legislators are themselves bound to resolve their disagreements about rights by making decisions based on one person one vote and majority decision.

"*The rule of law, it is the power of judicial review and it is unquestionable, to my mind, part of the basic structure of the constitution*". Ahmadi, C.J in *Chandra Kumar* v. *Union of India*[32] has observed "*The judges of the Supreme Court have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limits*". After the period of emergency the judiciary was on the receiving end for having delivered a series of judgments which were perceived by

[30] AIR 1987 SC 386
[31] Id.
[32] AIR 1997 SC 1125

many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution. The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen. Judicial review extends to every governmental or executive action - from high policy matters like the President's power to issue a proclamation on failure of constitutional machinery in the States like in *S.R. Bommai* v. *Union of India*[33] case, to the highly discretionary exercise of the prerogative of pardon like in *Kehar Singh* v. *Union of India*[34] case or the right to go abroad as in *Satwant Singh* v. *Assistant Passport Officer, New Delhi*[35] case. Judicial review knows no bounds except the restraint of the judges themselves regarding justifiability of an issue in a particular case. In *Maneka Gandhi* v. *Union of India*[36], the judicial review has acquired the same or even wider dimensions as in the United States. Now 'procedure established by law 'in Article 21 does not mean any procedure lay down by the legislature but it means a fair, just and reasonable procedure. A general principal of reasonableness has also been evolved which gives power to the court to look into the reasonableness of all legislative and executive actions.

Recent Judgment of Supreme Court dated 11.01.2007 rendered in the case in *I R Coelho (Dead) by LRs* v. *State of Tamil Nadu & Others*[37] is a master stroke of the judiciary. Prima facie, it is laudable for the reason, that it is a unanimous judgment of nine judges Constitution Bench of the Supreme Court, unlike fractured earlier judgments on the point. In *Keshavananda Bharati* v. *State of Kerala*[38] which is said to have first propounded the Doctrine of basic structure of the Constitution, the Hon'ble 13 Judge Constitution Bench of Supreme Court delivered 11 truncated judgments. Since 24th April 1973, the date of the judgment of the *Keshavananda Bharati* case, the debate is, what is the ratio decidendi, viz., the point of law laid down in the said judgment.[39] Fortunately, the present judgment of Supreme Court by providing unanimous verdict saved the Nation from such turmoil of searching for the ratio decidendi with magnified glasses.[40] Fractured Judgments pains the Nation a lot to understand what is the Law and much time and energy of legal fraternity is

[33] AIR 1994 SC 1918
[34] AIR 1989 SC 653
[35] AIR 1967 SC 1836
[36] AIR 1978 SC 597
[37] AIR 2007 SC 861
[38] AIR 1973 SC 1461
[39] Id.
[40] Id.

spent on debating, interpreting and searching laws from such truncated judgments.[41] The whole of the present judgment is devoted to understand and lots of pains have been taken to impress that Doctrine of Basic Structure was propounded in *Keshvananda Bharati* case. Much effort is made to highlight and explain Justice Khanna's views in Keshavananda Bharti's case and as clarified by Justice Khanna in *Indira Gandhi* case, since Justice Khanna's vote in favor of Basic Structure Doctrine will give the much needed majority in its favor in Keshavananda Bharti's case. However the propriety and validity of the clarifications provided by Justice Khanna in Indira Gandhi case, whether the same clarification can be read into Keshavananda Bharati case, is a question to be answered. Now a day, it is a welcome feature that most of the landmark judgments are unanimous.

The role played by the Supreme Court to implement the obligation of the state for social safety, the obligation of the state for social safety is the mandate of the sovereign people. Such responsibility and obligation are not merely moral, but are enjoined by the constitution. The people cannot lead a peaceful life if there be no social safety. The Supreme Court has played a very important role by interpreting the legislations and has not hesitated to strike down if it is going unconstitutional. For instances section 63 of the Madhya bharat Panchayat Act of 1949 provided that no legal practitioner had right to defend any party in the dispute, case or proceeding pending before the Nyaya Panchayat.[42] The constitutionality of this provision of law was challenged under Article 22(1) and it was declared unconstitutional by the majority decision of the Supreme Court. Again in UP Police Regulations under 236(b) which authorized "domiciliary visits" was declared unconstitutional by the Supreme Court as violative of Article 21 of the constitution.[43] By "Domiciliary Visits", the police Authorities were authorized to enter the premises of the suspect, knock the door and have it opened and search it for the purpose of ascertaining his presence in the house. Regulation 236(b) was struck down by the majority decision. The Supreme Court held that the entire police Regulation 236 was unconstitutional as it violated article 19(1)(d) And article 21 of the constitution.[44]

ROLE OF JUDICIAL REVIEW IN DEVELOPING SOCIAL JUSTICE

[41] Id.
[42] Madhya Bharat Panchayat Act, 1949
[43] Available at: https://uppolice.gov.in/writereaddata/uploaded-content/Web_Page/14_8_2014_10_43_8_police_regulation_2.pdf (Accessed on 12/11/2017)
[44] *Kharak Singh* v. *State of U. P.*, 1964 SCR (1) 332

Social justice has received a great importance for last 62 years than before. No doubt the Supreme Court through its innumerable decisions has defined clarified and widens the fundamental principles underlying the concept of social justice in India. For instances, section 25 FFF of the Industrial Disputes Act 1947, was challenged as unconstitutional.[45] The section lays down that where an undertaking is closed down for any reason, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure, shall subject to the provisions of sub-section (2) be entitled to notice and compensation in accordance with the provisions of section 25 of the act, as if the workman has been retrenched. The Apex court held the validity of the said section and observed that "Closure of an industrial undertaking involves termination of employment of many employees, and throws them into the ranks of the unemployed, and it is in the interest of the general public that misery resulting from unemployment should be redressed. In *Jalan Trading Co.* v. *Mill Mazdoor Sabha*[46], the validity of Payment of Bonus act, 1965 was challenged by the plaintiff companion the ground that the Act is fraud on the Constitution or is a colourable exercise of the legislative power. The Supreme Court upheld the validity of the Act and ruled that the validity of the law authorizing deprivation of the property can be challenged on following three grounds:

1. *Incompetence of the Legislature to frame the law.*

2. *Infringement of Fundamental Rights guaranteed in part III of the Constitution and*

3. *Violation of any other express provision of the Constitution.*

AN INVISIBLE AMENDMENT TO THE CONSTITUTION

Since 1951, questions have been raised about the scope of the constitutional amending process contained in Article 368. The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any fundamental right through constitutional amendment? Since 1951, a number of amendments have been effectuated in the Fundamental rights. The constitutionality of these has been challenged for number of times before the Supreme Court.

[45] The Industrial Disputes Act, 1947
[46] AIR 1967 SC 691

In *Shankari Prasad* v. *Union of India*[47], the 1st amendment which inserted Article 31-A and 31-b of the constitution challenged.[48] The amendment was challenged on the ground that it takes away the rights conferred in Part III of the constitution.[49] However the Supreme Court held that the power to amend the constitution including the fundamental right contained in article 368of the constitution. Again in *Sajjan Singh* v. *state of Rajasthan*[50], the validity of the constitution 17th amendment was challenged. The Supreme Court approved the majority judgment given in Shankari Prasad's case and held that the words 'amendments to the constitution' means amendment of all the provisions of the constitution. But these two landmarks decisions were overruled by the Supreme Court in *Golaknath* v. *State of Punjab*[51] where certain state acts in Ninth schedule were again challenged.[52] The Supreme Court by a majority decision prospectively overruled its earlier decisions of Shankari Prasad and Sajjan Singh cases and held that Parliament have no power from this date of the decision to amend Part III of the Constitution so as to take away the fundamental rights.[53] In *Keshvananda Bharati* v. *state of Kerala*[54], the Supreme Court overruled the Golaknath case, which denied parliament the power to amend fundamental rights of citizens. The Court observed that 24th amendment does not enlarge the amending power of the Parliament. The parliament is having unlimited power to amend the constitution but it should not destroy the basic structure of the Constitution. In *Indira Gandhi* v. *Rajnarayan*[55] the Supreme Court struck down the clause inserted by the amendment which said once elected Prime Minister and Speaker of Loksabha are not answerable to any court against violation of Right to equality in the Constitution.[56] In *Waman Rao* v. *Union of India*[57] the Supreme Court held that all amendment to the Constitution which was made before *Keshavananda Bharti's* case including those by which the Ninth Schedule to the Constitution was amended from time to time were valid and constitutional.[58] But amendments to the Constitution made on or after that date by which the Ninth Schedule was amendment were left open to challenge on the ground that they were

[47] AIR 1951 SC 455
[48] Id.
[49] Case Analysis : *Shankari Prasad* v. *Union of India* (AIR 1951 SC 455), Available at: https://lawlex.org/lex-bulletin/case-analysis-shankari-prasad-vs-union-of-india-air-1951-sc-455/9758 (Accessed on 08/11/2017)
[50] AIR 1965 SC 845
[51] AIR 1971 SC1643
[52] Id.
[53] *Supra* note 4
[54] AIR 1973 SC 1461
[55] AIR 1975 SC 2299
[56] Id.
[57] AIR 1981 SC 271
[58] Id.

beyond the Constituent power of parliament because they damaged the basic structure of the Constitution.[59]

Since *AK Gopalan* case up to this date and has brought out the development of judicial construction of the Constitution and the Doctrine of Basic Structure. 24th April 1973, the date of Judgment of *Keshavananda Bharati* is made the cutoff date to test the legislative action on the touch stone of Basic Structure Theory.[60] All Laws passed; even if they are kept in IX Schedule of the Constitution has to pass through the Basic Structure Doctrine.[61] By making 24th April 1973 as the cutoff date, the Supreme Court has admitted that they have propounded the said Doctrine of Basic Structure from the said date. Its impact and its repercussions are very serious to the Nation and it tells a lot on the amending powers of the Constitution by the Judiciary itself. We find no written letters Basic Structure in the whole of the Constitution and it is undoubtedly a judicial invention.[62]

Article 32 of the Constitution confers the power on the Supreme Court, for the enforcement of any of the rights conferred by this part viz. Part III of the Constitution and not beyond the same. No doubt, the said power is apart from the powers conferred under Part V, chapter IV of the Constitution. If there is a violation of fundamental rights in state action, including legislative action, the same can be struck down under Article 32 of the Constitution. The touchstone could only be the Constitution and more specifically Part III of the same. Fundamental rights are enshrined in the Constitution at the time of its adoption itself. By making 24th April 1973 as cutoff date, judiciary admits introduction of a new Chapter called Basic Structure to the Constitution, to be a touchstone, to test the state action and it is in the nature of an invisible amendment without inserting any letter to the Constitution. Certainly, judiciary does not have powers to amend the Constitution, but by propounding the Basic structure doctrine as touchstone to test the legislative actions and by evolving the same from Keshavananda Bharati case to the present case and making the same as an enforceable doctrine, the judiciary had exceeded its delineated powers.[63] While holding on one hand that the Parliament, while exercising constitutional amending power under Article 368, cannot amend the Basic structure of the Constitution, the judiciary has exactly done the same by

[59] *Supra* note 54

[60] *Supra* note 54

[61] The case that saved Indian democracy Arvind P. Datar, Available at: www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article4647800.ece (Accessed on 10/11/2017)

[62] Id.

[63] An analysis of discrepancy between Judiciary and legislature over sharing of power under Indian constitution, www.lexpress.in/wp-content/uploads/2014/12/Kesavanand_bharati_case.pdf (Accessed on 11/11/2017)

usurping to amend the Constitution by inserting the Basic Structure Doctrine in the Constitutional Arena, without having even semblance of power to amend the Constitution.[64]

Basic Structure Doctrine is certainly an invisible amendment to the Constitution or otherwise the date 24th April 1973 is irrelevant. The Judiciary can have the Constitution as touchstone and not the doctrines, theories, propounded later by the judiciary. The doctrines and theories can only serve as tools to understand or to interpret the constitution. But they themselves cannot be touchstones and replace the constitution. The judiciary possibly, unconsciously made a theory, laid it as a touchstone and put a cutoff date, everything without introducing a word in the constitution. Again, the big question is who can review the power of judiciary to make such invisible amendments to the constitution. There is no provision or mechanism spelt out in the Constitution to review the judicial action by any independent organ, similar to judicial review of legislative action read into Article 32 of the Constitution. At times, legislature and the executive could only be helpless spectators of judicial action. If the Supreme Court in the present case does not restrict the date as 24th April 1973 things could have been possibly different. The Supreme Court should have continued to have part III of the Constitution as touchstone and not beyond. Supreme Court in the present case has proclaimed at Para 78 that this Court being bound by all the provisions of the Constitution and also by the Basic Structure doctrine has necessarily to scrutinize the Ninth Schedule Laws. By such assertion, the Supreme Court openly admitted that they are bound by not only provisions of the Constitution but also Basic Structure Doctrine and it evidences that Basic Structure Doctrine is apart from the Constitution and not part of the Constitution.[65]

CONCLUSION

Judicial review and parliamentary democracy have an interesting equation. They may appear to be two swords at loggerheads with each other but in reality they supplement and complement each other. All modern democracies whether it be India or USA are an edifice to that. It may appear a bit overreaching but the truth is that democracies function on popular support and sometimes in order to garner political support, the politics may turn ugly. The real danger in such scenarios is that majoritarianism will like to force its way and thus rule of law and equality before law will take a backseat. Judicial review ensures that parliamentary democracy is constrained within its bounds and never condescends any group of people.

[64] Id.
[65] *Supra* note 11

History bears witness that US Supreme Court in *Brown* v. *Board of Education of Topeka*[66] has held that Separate but equal is acceptable in respect to racially segregated schools. Similarly in ADM Jabalpur case, Indian Judiciary too failed to rise up to the occasion. Therefore it is imperative that for smooth functioning of countries both are needed. In countries like USA where appointment of judges are political it will not be wrong to suggest that it is the parliamentary democracy which acts as a check on the judiciary. If there would not be a strong opposition in the US congress, then there is danger that US president in connivance with his selected leaning of Supreme Court judges would affect such laws which can easily mold the US polity.

Hence it comes not as a surprise that democracy all over the world whether it is common law countries or civil law countries have reposed their faith in judicial review. Experts all over the globe would agree that if democracy is like a car then doctrine of judicial review is the brake which acts as a stopping force should the car approach a danger or even when the car goes out of control. The legacy of Indian Supreme Court in form of Justice Bhagwati, Justice Iyer and Justice Chinappa Reddy is a living edifice to this fact.

[66] 347 US 483