



# **JUDICIAL REVIEW OF THE CONSTITUTIONAL AMENDMENT-AN ANALYTICAL STUDY**

**[WITH SPECIAL REFERENCE TO INDIAN CONSTITUTION]**

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## **ABSTRACT**

The fundamental law of the land of any nation is its Constitution. Consequently Constitutional Law is a subject of paramount importance. Every Constitution provide for its 'amendment'. It is made with a view to overcome the difficulties which may encounter in future in the working of the constitution. I felt the need of doing this research work as to sufficiently and clearly understand the basic procedure for bringing any change in the constitution through the concept of constitutional amendment in different countries such as U.S.A., U.K., Australia and Canada with special reference to the Constitution of India.

In dealing with this subject of my research, I have also come across the concept of the "Doctrine of Judicial Review" being used by different constitutional machineries of some of the world constitutions in determining the competency of such constitutional amendments. However there are some constitutions which do not provides for its judicial review. Then how such countries carried out the process to determine the constitutionality of any constitutional amendments undertaken by them? I have tried to explain the answer to the question in a plain manner in my research work in the best possible extent and as per my capability of fair understanding of such subject for which I have researched for.

I crave the indulgence of the readers of any error or imperfection which might have, despite the best possible endeavors', crept in this research work. Any suggestion, correction or improvement of my research work in this work shall be gratefully welcomed.

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**ABBREVIATIONS:**

A.I.R.: All India Reporters

ALJ/All LJ: Allahabad Law Journal

AER: All England Reports

AM. J. INT'L L.: American Journal of International Law

AM. POL. SCI. REV.: American Political Science Review

AMKD: Anayasa Mahkemes Kararlar Derg

CC: Conseil Constitutionnel (Constitutional Council) (France).

CAL. L. REV.: California Law Review

COLUM. L. REV.: Columbia Law Review

DLR: Dhaka Law Reports

Ed/ed.: Edition

I.R.: Irish Reports.

I.L.R.: Indian Law Reports

Jour.: Journal

J.: Justice

L.Ed.: London Edition

S.C.: The Supreme Court of India

S.C.C.: Supreme Court Cases (India).

S.C.R.: Supreme Court Reports (India)

U.S.: United States Reports.

Ibid: Same as above.

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# **CHAPTER-1**

## INTRODUCTION

*“All Constitutions are the heirs of the pasts as well as the testators of the future.”<sup>1</sup>*

### CONSTITUTIONAL LAW & CONSTITUTION:

The Constitution is a document for articulating and formalizing the basic ordering of a state-society. The traditional view of police state has no more in existence in the modern era and it had transformed itself into the clothing of social welfare-state where welfare of the people of the society is deemed to be paramount. The significant point however in the welfare state is that it requires certain basic organs or agents or instrumentalists to carry out its activities and functions.

It's quite impossible for all the people of a state to combine and operate together all the time to achieve their desired goals. Thus there is a need for certain fundamental organs to be necessarily created or established. This creates the need for a constitutional law through which the state acts and establishes some other organs. There should be a predictable institution or system of norms and rules from which the government organs may draw their powers and functions, their mutual relationship with other organs etc. The basic purpose of having a Constitution is to establish a suitable frame-work and structure of a government that governs the nation.<sup>2</sup>

Speaking generally, the constitution law is much wider than the term constitution itself as it comprises of relevant statutory laws, judicial decisions and conventions. It is a unique document comprising of special norms and rules designed to govern human conducts for years to come and stands at the highest point of normative period. It is difficult to amend and determines the appearance of the state and its aspirations of fundamental political view. It lays down the foundation for its social values<sup>3</sup>

Hence to know what do we mean by the Constitution, or simply what is Constitution? The answer for the question is precisely given by eminent scholars Wade and Philip as-‘A constitution means a document having a special legal sanctity which sets out the frame-work and principle functions of the organs of the government of a state and declares the principles governing the operation of those organs.’<sup>4</sup> Whereas there is no hard and fast definition of Constitutional law. It simply refers to the accepted use of rules that regulates the structure and functions of the principle organs of the government and their relationship with each other.<sup>5</sup>

The constitutional law of a country consists of both legal as well as non-legal norms. ‘Legal’ norms are enforced and applied by the courts and if any such norm is violated, courts can give relief and redress. On the other hand, ‘non-legal’ norms arise in course of time as a result of practices followed over and over

<sup>1</sup> Jennings- Some Characteristics of the Indian Constitution, p.56(1953)

<sup>2</sup> M.P Jain- Indian Constitutional Law p.1(7<sup>th</sup> ed)

<sup>3</sup> M.P Jain- Indian Constitutional Law p.2 (7<sup>th</sup> ed)

<sup>4</sup> Wade and Philip-Constitutional law p.1.(4<sup>th</sup> ed)

<sup>5</sup> Dr. J.N. Pandey- Constituional law of india p.1(25<sup>th</sup> ed)definition of constitutional law

again such as conventions, customs, usages, practices of the constitution. There may be nothing to sanction them but still they validly exist.<sup>6</sup>

*“An amendment formula was considered as a ‘healing principle’ that would allow the Constitution to stand the test of time.”<sup>7</sup>*

### **CONSTITUTIONAL AMENDMENT:**

The constitution is an organic living document. Its outlook and expression shall be dynamic in character and shall keep pace with the changing times and circumstances.<sup>8</sup> Every Constitution provides for its amendment. It is now universally recognized that in any political system, irrespective of its class or type, there should exist a rational method, planned in advance, for peacefully adjusting the basic frame work to changing socio-political conditions.

The classical authors used to classify constitutions as rigid and flexible, according to the mechanics of the amending process. This approach has now been discarded as being highly formalistic and unrealistic, since the mechanism of formal amendment or even the informal amendment itself is no longer considered the foremost instrumentality for establishing the harmony of the constitutional document with social change.

The modern approach places greater emphasis on the frequency or otherwise of actual change for distinguishing between the degrees of rigidity and flexibility of the constitutions. It is also appropriate to recognize that in this revolutionary era, constitutions, however carefully projected into the future, cannot aspire to make permanent their political solutions. The basic frame-work is therefore sought to be made sensibly elastic and dynamic, neither too rigid nor too flexible but with greater inclination to flexibility.<sup>9</sup>

The constitutional amendments, therefore act as the ‘safety-valve’, so devised as neither to operate the machine with too great facility nor to require, in order setting in motion, an accumulation of force sufficient to explode it.<sup>10</sup> If the basic frame-work is not adjusted to the changing social climate and political values, revolution would destroy it as unworkable. The present century has witnessed a series of

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<sup>6</sup> M.P Jain- Indian Constitutional Law p.3(7<sup>th</sup> ed)

<sup>7</sup> Wood (1998, 613).

<sup>8</sup> M.P Jain- Indian Constitutional Law p.5, 3<sup>rd</sup> para(7<sup>th</sup> ed)

<sup>9</sup> K.C. Wheare- Federal Government, p.209.

<sup>10</sup> Kesavananda Bharti v. State of Kerala, AIR 1973 SC1461- Dr. J.N.Pandey- Constituional law of India p.533(25<sup>th</sup> ed).



revolutions which had sought to destroy a constitution that became discordant with the existential realities.<sup>11</sup>

### **JUDICIAL REVIEW:**

The power of judicial review refers to the power of the court to interpret the constitution and to examine any law from the point of view of its constitutionality. Any law enacted should be in conformity with the provisions and spirit of the constitution, contrary to which if any particular law violates the spirit of the constitution then such law may be declared as unconstitutional and void and the court is empowered to strike down such unconstitutional law that goes against the object and spirit of the constitution. This power of the court to interpret the constitutionality of any law and strike down if it is unconstitutional is called the exercise of 'Judicial Review'.<sup>12</sup>

Reference in this prospect can be made to Chief Justice Marshal of United States who for the first time propounded the concept of Judicial Review in the famous case of Marbury v. Madison which was decided in 1803.<sup>13</sup> Since then the concept of Judicial Review have been rooted in almost all the constitutions of the world either expressly or impliedly and had brought a trend of vast dynamism in the modern constitutional development.

In a federal system, state constitutional amendments must be conforming to the federal constitution.<sup>14</sup> In many federal states, federal constitutional courts have reviewed the constitutionality of amendments made to state constitutions and have invalidated those which are contrary to the federal constitution. For example, in the United States Supreme Court, in *Hawke v. Smith*, held that the provision of the Ohio Constitution requiring a referendum on the ratification of amendments to the Federal Constitution was unconstitutional.<sup>15</sup>

In India the concept of Judicial Review was for the first time came into lime light just after one year of the Constitution of India 1950 was enacted in one of the case of Shankari Prasad's in the year 1951 whereby the validity of the constitution (first amendment) Act, 1951 curtailing the right of the property guaranteed by article 31 was challenged.<sup>16</sup> This case was in fact the first case on the amendability of the constitution. There after the concept got its prominence in number of cases like Sajjan Sing's case,

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<sup>11</sup> S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues:Introduction on Constitution-Making and Constitutional Amendment p.118.

<sup>12</sup> Vishnoolal Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.210(10 ed)

<sup>13</sup> Marbury v. Madison[(1803) 1 Cranch 137]-Dr. S.R. Myneni: Legal Systems in the World p.151.

<sup>14</sup> Kemal Gözler -Judicial Review of Constitutional Amendments-A Comparative Study [https://books.google.co.in].

<sup>15</sup> (253 U.S. 221, at 230-231 (1920)).

<sup>16</sup> Shankari Prasad Sing v. Union Of India AIR 1951 SC 458:M.P.Jain, Indian Constitutional law p.1670 (7ed).

Golaknath's case and the famous case of Kesavananda Bharti, whereby the Judicial Review Concept has been judicially exercised by the Apex court.

## 1.1 REVIEW OF LITRETAURE:

### CONSTITUTION :-

The Constitution, as the basic institutional framework in a political system, is indispensable. They provide the political system with a 'container' within which the dynamic processes of the government and politics can operate, within which political power is exercised and political allocations occur.<sup>17</sup> While a constitution can enforce a particular role on power-holders in society, it can also possess a 'symbolic capability' because it is also regarded as 'a showcase of norms and symbols of a given society'.<sup>18</sup> It is not merely a functional instrumentality but a focus for the evolution of law-making, law-changing, law-adjucating, and law-enforcing institution.<sup>19</sup>

*"The alternative to constitutional change is revolution; an unalterable constitution is the worst form of tyranny".<sup>20</sup>*

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<sup>17</sup>S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.116.

<sup>18</sup>Peter Merkl, Modern Comparative Politics(New York: Holt, Rinehart & Winston,Inc., 1970) p.426-S.N.RAY.Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment.

<sup>19</sup>Ibid p.116.

<sup>20</sup>George Kousoulas, On Government and Politics, p.63, 2<sup>nd</sup> ed. - S.N.RAY Modern Comparative Politics-Approaches,Methods and Issues: Introduction on Constitution-

## **CONSTITUTIONAL AMENDMENT:-**

Time is not static. Time changes and therefore the life of a nation is not static but dynamic, living and organic. Its political, social and economic conditions change continuously. Social norms and ideals change from time to time creating new problems and altering the complexion of the old ones. It is therefore, quite possible that the constitution drafted in one era, and in a particular context, may be found inadequate in another era and another context.<sup>21</sup>

Constitutional change is an equally important matter as a constitution, It may be legally valid, legitimate and highly acceptable at its inception but may not be actually lived upto. Its reality and activation may be imperfect. In other words, to enable a constitution to remain normative or transform itself from a nominal character to a normative one, some built in mechanism for adapting the constitution to the socio-political environment is usually devised in the shape of the term called 'constitutional amendment'.<sup>22</sup> In a world of changing patterns and dynamic relationships, the stability of the society may well depend upon its ability to recognize and accept the need for change. The success of a political system depends on a satisfactory balance between stability and change, which can be promoted by a viable system of constitutional dynamics.<sup>23</sup>

*It neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the constitution; and having done that its duty ends".<sup>24</sup>*

## **JUDICIAL REVIEW:-**

"By Judicial Review ,we mean the power of the judiciary to determine whether a law passed by the central legislature(such as Congress in U.S.A or Parliament in India) or any law enacted by a state legislature or any provision of the state constitution or any other public regulation having the force of law, is in consonance with the constitution. if it is not, the court refuses to give effect to the statute in question. In determining the constitutionality of the legislation, the court is not concerned about the wisdom, experience or policy of legislation.<sup>25</sup>

Judicial review does not apply only to federal and state statutes. Its scope is wider. The constitution of the states, the treaties made by the federal government and the orders issued by the federal and state executive's authorities come within its purview. However, questions of political nature do not fall within

Making and Constitutional Amendment p.116.

<sup>21</sup>M.P.Jain, Indian Constitutional law p.1661(7ed)

<sup>22</sup>S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.116.

<sup>23</sup>Ibid p.116.

<sup>24</sup>Chief Justice Marshall on Judicial review- Vishnool Bhagwan,Vidya Bhusan,Vandana Mohla-World Constitutions-a comparative study p.211(10 ed).

<sup>25</sup> Vishnool Bhagwan,Vidya Bhusan,Vandana Mohla-World Constitutions-a comparative study p.210(10 ed).

its ambit of jurisdiction. This has resulted in restoration of the public confidence as an institution of trust and justice upon the apex judiciary of the country.<sup>26</sup>

Through the exercise of the doctrine of Judicial review by the judiciary there is a control and check upon the executive as well as legislative actions whereby the abuse of power or in acting out of their jurisdiction by such organs or authorities bring injustice or deprive an individual of his rights or an error occur in the face of law of a statute or regulation which is against the public policy and welfare of the society, can be ratified or discarded on the basis of unconstitutionality. The main concern is whether every constitution of the world has such provision of judicial review to put a check on legislative and executive actions incorporated in their respective constitution? If not the matter of judicial review is of a grave concern on how such countries actually practice this doctrine?

## CHAPTER 2

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<sup>26</sup> Ibid p.211.

## HISTORICAL BACKGROUND\_\_\_\_\_.

### 2.1: THE EVOLUTION OF THE MODERN CONSTITUTION:

After the tribal people first began to live in cities and establish nations, many of these functioned according to unwritten customs. Some of them developed autocratic, even tyrannical monarchs who ruled the people according to their whims. Such rule led some thinkers to take the position that what mattered was not the design of governmental institutions and operations, as much as the characters of the rulers. These are called as the “Political Philosophers” and “Philosophical Writers” such as Aristotle, Plato, Socrates, etc. They examined different kingdoms and designed for a government having moral democratic values from a legal and historical standpoint.<sup>27</sup>

The Evolution of the modern constitution started right in 2300 BC. Excavations in modern day by in 1877 found evidence of the earliest known Code of Justice, issued by the Sumerian King Urukagina of Lagash in 2300 BC. Perhaps this was the earliest prototype for a law of government. By this document it is known that it allowed some rights to his citizens. It relieved tax for widows and orphans and protected the poor from the exploitation of rich.<sup>28</sup> Thereafter comes the revolution of codified constitutions, which are often the product of some dramatic political change, such as occurred in India.

The process by which a country adopts a constitution is closely tied to the historical and political context driving this fundamental change. The legitimacy and often the longevity of codified constitutions have often been tied to the process by which they are initially adopted. Like this, every country has its own history and reasons for making its own constitutions.<sup>29</sup> Example:-In 621 BC, the then King of Athens codifies the Athenian Constitution prescribing punishments for many offences. In 594 BC, the then Athenian King created the new Athenian Constitution in place of the old Constitution which eased the burden of the workers, and determined the membership of the ruling class was to be based on wealth, rather than by birth. In 594 BC, certain reforms on a democratic footing were made to the Athenian Constitution.<sup>30</sup>

#### ▪ The 350 BC Athenian Constitution:

Aristotle (384BC-322BC), the greatest philosopher, drafted this Constitution on the request of his student Alexander, the Emperor, who established his empire. Aristotle was the student of Plato, the greatest philosopher. Perhaps this was one of the first in recorded history to make a formal distinction between the ordinary law and the Constitutional law, established noble ideas of constitution and attempted to

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<sup>27</sup>G.V.Reddy- The Constitutional Law on India, Note on the evolution of the Modern Constitutions p.4.

<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Ibid.

classify different forms of the Constitutional government. For the first time, the general terms, i.e., ‘the arrangements of the offices in a state’, were used to give basic definitions for a constitution.

The 350 BC Athenian Constitution consists of a total 69 parts. The number of lines in each part varied from minimum five lines to more than hundred lines. In his works, Aristotle explored different constitutions of his day, including those of Athens. He classified this constitution as a good and a bad constitution and came to the conclusion that the best constitution was a mixed system, including monarchic, aristocratic and democratic elements. He also distinguished between citizens, who had the right to vote and to participate in the state, and non-citizens and slaves, who did not have the right to vote and to participate in governance.

There was a council, consisting of 500 members elected by the citizens. A citizen by birth, and whose parents are citizens by birth, attained the age of eighteen years was given the right to vote and the right to participate in the functions of the state. The Magistrates, the Commissioner of prison, the Commissioner of Games, the Commissioner of temples, roads, markets, etc., were appointed by election system, i.e., elected by the citizens. The King was given priority.<sup>31</sup>

#### ▪ **The Roman Constitution:**

The Romans first codified their constitution in 449 BC. They operated under a series of laws that were added from time to time, but was never reorganized into a single code until the AD 438. The Constitution of Eastern Empire highly influenced all the countries of the Europe. This was followed in the east by the Constitution of Ecloga, AD 740, and the constitution of Basilica, AD 878. All these Constitutions established the democratic principles and also the King’s Rule.<sup>32</sup>

#### ▪ **The German Constitution:**

Many of the Germanic peoples who felt the power vacuum left by the Western Roman Empire started codifying their laws. One of the first of them was the Code of Visigothic, AD 471. After it, separate codes were prepared for the Germans and the Romans in AD 500. In the AD 506, the King of the Visigoths, adopted and consolidated the ‘Codex Theodosianus’ together with assorted earlier Roman Laws ‘Lex Romana’.<sup>33</sup>

#### ▪ **The Constitution of England:**

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<sup>31</sup> G.V.Reddy- The Constitutional Law on India, Note on the evolution of the Modern Constitutions .

<sup>32</sup> Ibid

<sup>33</sup> G.V.Reddy- The Constitutional Law on India, Note on the evolution of the Modern Constitutions.

The Saxon Code with various Mosaic and Christian precepts and the Code of AD 602 had produced the Code of Laws for England. In Wales, the Constitution was codified during AD 942-950. Though there is no written Constitution for England, there have been codified laws and unbreakable customs in that country. The unwritten and customary Constitution of England can be estimated to date between 1090 and 1150 AD. The Proclamation of AD1100 bound the King for the first time in his treatment of the Clergy and the Nobility. This idea was extended and refined by the English Barony when they forced to sign in 1215AD.

The most important single article of the 'Magna Carta', provided that the King was not permitted to imprison, outlaw, exile or kill anyone at a whim- there must be of law first. This Article 39 of the Magna Carta read as: "No free man shall be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgment of his peers, or by the law of the land". This provision became the cornerstone of the English liberty. In the original case, it was between the King and the Nobility, but was gradually extended to all the people. It led to the system of democracy, with further reforms shifting the balance of power from the monarchy to the people.<sup>34</sup>

*"England had two short-lived written Constitution during the Cromwellian Rule, known as the Constitution of the United Kingdom, 1653 and the Constitution of the United Kingdom, 1657".<sup>35</sup>*

### ▪ The 1639 Connecticut Constitution:

'Connecticut' means the "Constitution State". While the origin on this title is uncertain, the nickname is assumed to refer to the 1639 Constitution. There are fundamental orders in the 1639 Constitution giving the framework for the first formal written by a representative body in Connecticut. Connecticut's government has operated under the direction of five separate documents in its history. The Connecticut colony at Hartford was governed by the fundamental Orders, and the Quinnipiac colony at New Haven had its own constitution.

'The fundamental Agreement of New Haven colony' was signed on 4<sup>th</sup> June, 1639. In 1662, Connecticut was granted governmental authority by the King and a Royal Charter. While these two documents acted to totally the ground work for the State's Government, both lacked essential characteristics of the state. Separate branches of government did not exist during this period, and the General Assembly acted as the supreme authority. A true Constitution was not adopted in Connecticut. Finally, the current State

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<sup>34</sup> Ibid

<sup>35</sup> Ibid

Constitution was implemented in 1818. The 1965 absorbed by a majority of its 1818 predecessor, but incorporated a handful of important modifications.<sup>36</sup>

### ▪ **The Bendery Constitution by Hetman:**

It is the earliest written constitution still governing a sovereign nation today. It was written in Latin in AD 1600, and consists of six books. The first book, with 62 Articles, establishes councils, courts, various executive officers and the powers assigned to them. The remaining books cover criminal and civil law, judicial producers and remedies. This Constitution was based upon the ‘Statuti Communalis (Town Statute) of 1300’ and the ‘Codex Justinianus’, and it remains in force today.<sup>37</sup>

### ▪ **The Constitution of U.S.A.:**

The Constitution of America has got its origin traced out in a conference at the ‘Philadelphia Convention of 1787’ where a brief document embodying the constitution of the new government of the United States was signed unanimously by the states present. The Constitution was ratified by convention in nine states as agreed upon in the Philadelphia Convention and was enforced in 1789. James Madison, who drafted the constitutions, was called as “the father of the Constitution of America”, for his major contributions. One after one state ratified the constitution.

Finally, the Constitution of America came into force w.e.f. 04-03-1789. There were several influences in making the Constitution of America. The British mixed government, democratic values, customs, the Bill of Rights and essentially the Magna Carta, etc. played a vital role. The most important influence from the European continent was from Montesquieu, who emphasized the need to have balance forces pushing against each other to prevent tyranny. The Roman Constitution also influenced the draft men. John Locke, the British political philosopher, was a major influence. The clause “Due Process of Law” was taken from the Common law of England stretching back to the Magna Carta.<sup>38</sup>

### ▪ **The International Covenants and Conventions (World War I & II):**

The First World War occurred during 1914-1919. The League of Nations was established on 10-01-1920. It was called as a “Child War”. Most of the nations belong to Europe and America. It failed to meet the requirements as it could not stop the Second World War. After, the Second World War, the United Nations Organization was established on 24-10-1945 with 51 countries, and since then the number of the member-states has been increased up to 195.

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<sup>36</sup> G.V.Reddy- The Constitutional Law on India, Note on the evolution of the Modern Constitutions.

<sup>37</sup> Ibid p.6

<sup>38</sup> G.V.Reddy- The Constitutional Law on India, Note on the evolution of the Modern Constitutions p.7.



Majority of this member-state have opted for the democratic and republic constitutions, with certain changes. The Charter of the United Nations Organization itself is a World constitution. The Preamble of the Charter of the UNO explains the objects of the Charter. The phrase “We, the peoples of the United Nations determined...” denotes the determination of the Charter has dedicated itself for the human welfare of the entire globe. The same phrase was taken by the makers of the Indian Constitution. Since its inception, the United Nations Organization and its organs have been conducting Conventions, and several Covenants have been concluded, signed and ratified by the Member-states.

The Universal Declaration of Human Rights, 1948 (UDHR); the International Covenant on Civil and Political Rights, 1966 (ICCPR); the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); the International Covenant on the Elimination of all forms of Racial Discrimination, 1966 (ICERD); the Covenant against torture and other cruel, inhuman or degrading treatment or punishment, 1984, etc., have been influencing the Constitutions, which have been made after 1944. The Indian Constitution is also not an exception. India, being a Member-state, has been incorporating the good from the international Covenants and Conventions.<sup>39</sup>

## 2.2: THE EVOLUTION OF THE INDIAN CONSTITUTION:

“A Constitution is the hallmark of a democratic constitutional political system” The classification of the political systems into the autocratic and the constitutional democratic is based on the effective techniques operate for sharing the exercise of political power among the power-holders. These power-holders are to remain under the supreme power-holder, the electorate, as the ultimate arbitrator or the political system. It may not be expected that the power-holders would exercise self-restraint and protect the power addressees. This calls for built-in-devices for the containment of power. The purpose seemed to be served best by articulating the restraints which the society wanted to place on the power-holders in the form of a set of fixed rules that limits their exercise of political power.

A constitution is, thus that form of set of rules and the basic instrumentality of power control<sup>40</sup>. Power being the central concept in modern political analysis, the constitution may be looked upon as the totality of political-institutional arrangements for the legitimate and effective exercise of political power.

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<sup>39</sup> G.V.Reddy- The Constitutional Law on India, Note on the evolution of the Modern Constitutions p.8.

<sup>40</sup> Leslie Wolf-Philips, Comparative Constitutions(London:Macmillan,1972) S. N. RAY. Modern-Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.112.

Classical writers like Bryce, Strong and Wheare sought to look upon a constitution in terms of the institutional organizations of the political system whereas the modern writers concentrate on the basic purpose which is the limitation and restraint on, and the control of, political power.

Neumann has correctly stated that all states have constitutions but all states do not observe constitutionalism. There are autocratic, despotic states where the constitution is utilized as a convenient instrument or a measure to perpetuate the exploitation of the subjects by the power-holders. In such systems, the constitution serves its purposes by guiding the political action through proper channels desired by the autocrat or the despotic. In such cases, the constitution fulfils the procedural formalities without articulating genuine restrictions.<sup>41</sup>

The constitution may also perform the function of a national symbol, or may even articulate the ideals and aspirations of people. These are systematized programmatic constitutions which act as the vehicles for social revolution and social renaissance, or for political development and modernization. The Constitution of India falls in such category as in its preamble and the chapter dealing with the directive principles of state policy, seeks to realize certain social and economic ideals that might transform the present Indian society and economy into an ideal one in the coming future. Before the Britisher's Rule, India was divided into various kingdoms and were ruled by the Emperors of such kingdom. The King/Emperor was superior. In other words there was a system of Monarchical rule. The Hindus, who were then in the majority, believed that the King would be the Avatar of Vishnu, and he could not do any wrong.

The very fact that the Constitution of the Indian Republic is the product not of a political revolution but of the research and deliberations of a body of eminent representatives of the people, who sought to improve upon the existing systems of administration, makes a retrospect of the constitutional development indispensable for a proper understanding of the constitution.<sup>42</sup>

No one will deny the truth of the above statement that to study a law or Constitution of any country one has to go to its historical process and insight. However, in order to develop an understanding of the development and inception of the Constitution of India, one may not necessarily go beyond the 'British Period' as for the modern political institutions originated and developed in that period only. The Political Institutions established by the Hindus in the olden days and by the Muslims in the medieval period have become a thing of the past, and they do not survive in any form in the present day context.

### **Early-Period:**

Nationalism is a feeling of consciousness about race, language, history, culture, tradition, economics, politics and hopes and aspirations of the people. The conditions created by the British rule and many

<sup>41</sup> Neumann, op. cit.,3, p.29- S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.113.

<sup>42</sup> D.D. Basu- Introduction to the Constitution of India, p.3(3<sup>rd</sup> ed.)

other factors helped in the growth of national consciousness amongst Indian people. We know that Indian society was suffering from various social and religious ills like, blind faith, caste division, child marriage, sati system, purdah system etc. Many reformers like Raja Ram Mohan Rai, Swami Dayananda Saraswati, Swami Vivekananda, Sir Syed Ahmed Khan, Mrs. Annie Besant etc. deserve a special mention who tried to reform the Indian society. They inspired the people with ideas of self respect and self confidence.<sup>43</sup> These noted organizations played a vital role to reform the Indian society by removing various religious and social evils. These organizations made great contributions towards Indian nationalism.

The spread of western education, role of the press, economic exploitation, racial discrimination against Indians, etc. also made the people politically conscious. The Indian leaders felt a need for an All India organization.<sup>44</sup> Accordingly, in 1885, the first Indian national organization called the Indian National Congress was established. The main role in establishing this organization was played by a British officer named A.O. Hume. In 1905, S.N. Benerjee, Dada Bhai Naoroji and Gopal Krishna Gokhle guided the Congress who all believed in the moderate policy. Moderate policy meant the policy of resolutions and reforms. The Moderate policy was not accepted by some revolutionary leaders like, Bal Gangadhar Tilak, Lala Lajpat Rai, Bipin Chandra Pal etc. They were known as Extremists or militant nationalists. In the Congress session held in Benaras in 1905, the Extremists rejected the policy of the Moderates. The split between them occurred at Surat in 1907. The British Government adopted a stern policy to suppress the Extremists and most of them were sent to jail. But both the Moderates and Extremists were united at the Lucknow Session in 1916 to strengthen the Congress<sup>45</sup>.

Mrs. Annie Besant, a European woman joined the Congress in 1914 and started the Home Rule Movement. But, later, she was arrested and there was a strong agitation for her release. The British Government passed the Rowlatt Act in 1919 to suppress the Nationalist Movement. This Act was against the self respect of the people. It gave the Government powers to crush liberties, to arrest and detain suspected persons without warrant and to imprison them without any trial.<sup>46</sup> Soon there was a wave of anger throughout the country against this Act.

Among the many foreign countries, the Portuguese were the first to visit India. Gradually the Dutch, the French and the British merchants became the rivals of the Portuguese in India. The British period in the history of India began with the incorporation of the East India Company in the year 1600 in England. The advent of the English on the Indian shore and the growth of Indian Constitution can be studied in various phases, that can be broadly be divided as under:

- 1600-1765: The Coming of the British.

<sup>43</sup> [www.kkhsou.in/main/polscience/historical-background](http://www.kkhsou.in/main/polscience/historical-background)

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Ibid

- 1765-1858: Beginning of the British Rule.
- 1858-1919: End of Company's Rule.
- 1919-1947: Introduction of Self Government
- 1947-1950: The Framing of the New Constitution.<sup>47</sup>

#### ▪ **The Coming of the British[1600-1765]:-**

The Britishers came to India in 1600 as traders in the form of East India Company. Attracted by the stories of fabulous wealth of India and fortified by the adventurous maritime activity of the Elizabeth era, Englishmen were eager to establish commercial contacts with the east. To facilitate such a venture some of the enterprising merchants of London formed themselves into a company.

The company secured for it a Charter from Queen Elizabeth in December, 1600, which settled its Constitutions, powers and privileges. The Charter vested the management of the company in the hands of a governor and 24 members who were authorized to organize and send trading expeditions to the East India. The Charter granted the company a monopoly of trade with the East. It had authority to keep an armed naval force for its security. The Charter was granted in the first instance for fifteen years and was terminate on two years notice. It could be renewed further if the interest of the crown or the people were not prejudicially affected.<sup>48</sup>

Fortified with the Charter, the Company started establishing its trading centers or factories at several places in India. The first settlement of the company was at Srirangapatna in 1612 which was established as a result of a 'Royal Firman' from the Emperor Jehangir granting it land and other concessions. This was followed by Musulipattam- Madras in 1639 and later in Hariharpur in Mahanadi Delta in 1690. Thus in the course of time the factories at Bombay, Madras and Calcutta became the chief settlements or presidencies of the company. The administration of these presidencies was carried on by the President and a Council composed of the servants of the company.<sup>49</sup>

The Charter of 1601 granted to the Governor and the company power to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances for the good governance of the company. The legislative power of the company was very limited in its scope and character. They were not be in contrary to the laws, statutes or customs of England. The power conferred under the Charter was essentially a power of minor legislation prohibiting any fundamental change in the principles of English law. It was not the power to legislate for some territory because the company was purely a trading concern and not a political sovereign acquiring foreign territory. Thus the legislative power was simply designed to enable the company to regulate its business and to maintain discipline among its servants. Though limited in scope, but the legislative powers of the company was of great historical importance as it is 'the germ out of which the Anglo-Indian Codes were ultimately developed'. By the

<sup>47</sup> [www.slideshare.net/history-of-indian-constitution](http://www.slideshare.net/history-of-indian-constitution).

<sup>48</sup> M.V. Pylee - Constitutional History of India p.1.

<sup>49</sup> Dr. J.N. Pandey- Constituional law of india p.2,3(25<sup>th</sup> ed).

Charters of 1609 and 1661 similar powers were affirmed. The Charter of 1693 makes no mention of legislative powers.<sup>50</sup>

#### ▪ **The Charter of 1726:**

The Charter of 1726 had a great legislative significance. During this period the legislative power was vested in the Court of Directors in England. They were not conversant with the conditions prevailing in India. Therefore, it was considered desirable to vest law-making power to those who were well acquainted with the Indian conditions. Accordingly the Charter authorized the Governor and Council of the three Presidencies to make, constitute and ordain bye-laws, rules and ordinances for the good governance of the Company and to impose punishments for their contravention.

These bye-laws, rules, ordinances and punishments were to be reasonable and not contrary to the laws and statutes of England and they were not to be effective unless approved and confirmed in writing by the Company's Court of Directors. The charter also established the Mayor's Courts at Calcutta, Bombay and Madras and expressly introduced English laws into these Presidencies.<sup>51</sup>

The Britishers had not become a ruling power in India until the second-half of the 18<sup>th</sup> century. Initially, they were busy with trade and commerce only. After defeating the rivals the British became rulers in India. They followed a policy of conquest, annexation and consolidation in India.<sup>52</sup> But, after the death of Aurangzeb in 1707 the British Company took some active interest in the Political matters in India. Their imperialistic attitude to rule India became clear after the Battle of Plassey in 1757. In this battle British defeated Siraj-Ud-Daulah, Nawab of Bengal. The Battle of Buxar (1764) and the annexation of Punjab (1849) completed the task of British imperialism in India<sup>53</sup>. Moreover, the grant of 'Diwani'(i.e the collection of revenue) was given to the Company by Shah Alam, automatically paved their way for civil administration in India. As Illbert has said-"the year 1765 makes a turning point in the Anglo-Indian history and may be treated as commencing the period of territorial sovereignty by the east India Company". The Company henceforth threw off the mask of traders and appeared in the true garb of rulers.<sup>54</sup>

#### ▪ **Beginning of the British Rule[1765-1858]:-**

##### ▪ **The Regulating Act (1773):**

The Act of 1773 is of great Constitutional importance because it asserted for the first time the right of Parliament to regulate the affairs of the east India Company. This Act is the first Act of the British

<sup>50</sup> Illbert – The Government of India, p.1(2<sup>nd</sup> ed. 1907) referred from Dr. J.N. Pandey- Constituional law of india p.2,3(25<sup>th</sup> ed).

<sup>51</sup> Dr. J.N. Pandey- Constituional law of india p.3(25<sup>th</sup> ed).

<sup>52</sup> www.kkhsou.in/main/polscience/historical-background

<sup>53</sup> Ibid

<sup>54</sup> Dr. J.N. Pandey- Constituional law of india p.3(25<sup>th</sup> ed).

parliament which established a definite system of government in India. The main features of this Act were:-

- I. It changed the Constitution of the Company in England;
- II. Recognized the government in Calcutta. The Governor of Bengal was made the Governor General. The first man to be appointed to this post was Warren Hastings. For the assistance of the Governor General an executive Council of four members created;
- III. The Act empowered the Governor-general and his Council to make rules, ordinances and regulations for the good governance of the Company's settlement at Fort William and factories subordinate thereto.
- IV. It brought the presidencies of Bombay and madras to some extent under the control of the Governor-General of Bengal;
- V. A Supreme Court was set up at Fort William in Calcutta, with a Chief Justice and three assistant judges.
- VI. The number of the Directors of the Company was fixed at 24. The Regulating Act initiated the process of centralization in India.<sup>55</sup>

The object of the Act was good but the system that it established was imperfect. It suffered from many defects, such as:-

- It did not clearly define the relationship of the Governor-General and his Council and the Supreme Court with each other
- It did not make it clear as to what law the Supreme Court was to administer
- It placed the Governor-General at the mercy of his Council.<sup>56</sup>

#### ▪ The Act of Settlement, 1781:

To remove the defects of the Regulating Act of 1773, Parliament passed the Act of Settlement of 1781. It made the following changes in the Regulating act:

- I. It exempted the actions of the public servants of the Company done in official capacity from the jurisdiction of the Supreme Court,

<sup>55</sup> www.historydiscussion.net/essay/themaking-of-indian-constitution/2113

<sup>56</sup> Ibid

- II. It tried to settle the question of jurisdiction of the Court over servants of the Company and the native inhabitants’,
- III. It made it clear to what law to be applied by the Supreme Court,
- IV. The Act recognized and confirmed the appellate jurisdiction of the Governor-General-in-council in cases decided by the Muffasil Courts,
- V. It empowered the Governor-General-in-council to frame regulations for the Provincial Courts and Councils also.<sup>57</sup>

▪ **The Pitts India Act (1784):**

This Act introduces many important changes in the Constitutional history of India. The number of members of the Governor General’s Council was reduced to three and the Commander-in-Chief was to be one of them. A special court was established for better trial of the Company’s officials in England for offences committed by them in India. By this Act, the real power in India passed from the Directors of the Company to the British Parliament.<sup>58</sup>

The Regulating Act of 1773 made a provision that the Charter of the Company would be reviewed every 20 years. Therefore, from time to time, Acts of 1793, 1813, 1833 and 1853 reviewed the Charter Act of the Company and brought about some changes here and there. The first Law Commission was established after the Charter Act of 1833.<sup>59</sup>

The Rule of the East India Company was terminated when the British Parliament passed the Indian Councils Act of 1858. The power to govern India was transferred from the Company to the Crown and India was to be governed by and in the name of ‘Her Majesty’. Again, the Indian Councils Act of 1861 was passed by the British Parliament.

This Act is very important in the Constitutional history of India because it has created decentralization system of administration in India. The members the Governor-General’s Executive Council was increased from the four to five. The work of administration was also distributed among its different members. The Legislative members of the Bombay and Madras Government were restored. The British Parliament passed Indian Councils Act of 1892 and the principle of indirect election was introduced. The elected members could ask questions and seek other information from the Governor.<sup>60</sup>

▪ **The Charter Act of 1813:**

- I. The Company’s monopoly over Indian trade terminated; Trade with India open to all British subjects.

<sup>57</sup> [www.historydiscussion.net/essay/themaking-of-indian-constitution/2113](http://www.historydiscussion.net/essay/themaking-of-indian-constitution/2113)

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> [www.historydiscussion.net/essay/themaking-of-indian-constitution/2113](http://www.historydiscussion.net/essay/themaking-of-indian-constitution/2113)



II. The Crown asserted a greater control over the power of the Councils.<sup>61</sup>

▪ **The Charter Act of 1833:**

- I. Governor-General of Bengal became as the Governor-General of India. First Governor-General of India was Lord William Bentinck.
- II. This was the final step towards centralization in the British India. Beginning of a Central legislature for India as the Act also took away legislative powers of Bombay and Madras provinces.
- III. The Act ended the activities of the East India Company as a commercial body and it became a pure administrative body.<sup>62</sup>

▪ **The Charter Act of 1853:**

- I. The legislative and executive functions of the Governor-General's Council were separated.
- II. 6 members in Central legislative council. Four out of six members were appointed by the provisional governments of Madras, Bombay, Bengal and Agra.
- III. It introduced a system of open competition as the basis for the recruitment of civil servants of the Company (Indian Civil Service opened for all).<sup>63</sup>

▪ **End of Company's Rule[1858-1919]:-**

▪ **The Government of India Act, 1858:**

The Act of 1858 made the administration of the country not only unitary but rigidly centralized. The provincial Governments were mere agents of the government of India and had to function under the superintendence, direction and control of the Governor – General. There was no Separation of functions.

The Act of 1858 transferred Government of India from the Company to the British Crown. India henceforth to be governed by and in the name of “Her Majesty”. All the powers were in hands of Her Majesty's Secretary of State. The powers of the Crown were transferred or to exercised by the secretary of state for India assisted by a council of 15 members. While military, executive & legislative was vested in the hands of Governor – General in Council. The control of the Secretary of State over the Indian administration was absolute. The secretary has - superintendence, direction and controls of all acts related to the government of India. The entire machinery of administration was bureaucratic, totally unconnected about public opinion in India.<sup>64</sup>

▪ **The Indian Council's Act, 1861:**

<sup>61</sup> <https://en.wikipedia.org/wiki/constitution-of-india>.

<sup>62</sup> Ibid

<sup>63</sup> <https://en.wikipedia.org/wiki/constitution-of-india>.

<sup>64</sup> Dr. J.N. Pandey- Constitutional law of India p.12(25<sup>th</sup> ed).



The Indian Councils Act, 1861 was of basic importance. The Act enlarged the council of the Governor-General for the purpose of making laws and regulations by the additions of not less than 6 and not more than 12 ‘ Additional Members’ : half of these were to be non- officials members.<sup>65</sup> This Act suffered from many defects. It gave unlimited power to the governor – general rather than people. Some essential features are:-

- I. It introduced for the first time Indian representation in the institutions like Viceroy’s executive and legislative council (non-official). Three Indians entered Legislative council.
- II. Legislative councils were established in Center and provinces.
- III. It provided that the Viceroys Executive Council should have some Indians as the non-official members while transacting the legislative businesses.
- IV. It accorded statutory recognition to the portfolio system.
- V. Initiated the process of decentralization by restoring the legislative powers to the Bombay and the Madras Provinces.<sup>66</sup>

▪ **The Indian Council’s Act, 1892:**

This Act achieved three things –

- I. It increased the number of members in the Central and Provincial Council
- II. Introduced the election systems partially, and
- III. Enlarged the functions of the Council.

It is true that the Act laid down the foundation of the representative Government but it also suffered from many defects. First defect was that the system of election was defective. Second defect was that the power of Legislative Councils was very limited. Third defect was that the number of non-official members was very small.<sup>67</sup>

▪ **The Morley – Minto Reform & The Indian Council Act, 1909:**

The first attempt at introducing a representative and popular element was made by Morley – Minto Reforms known by names of the Secretary of State (Lord Morley) & Viceroy Lord Minto which implemented by the Indians Council Act, 1909. By this Act the size of Legislative Councils, Central as well as Provincial was considerably increased. The powers were also enlarged. The council had also the right of discussing & moving a resolution on the financial statement but they were not given the power of voting. Some of the essential aspects of the Reforms are:-

- I. It changed the name of the Central Legislative Council to the Imperial Legislative Council. The member of Central Legislative Council was increased to 60 from 16.

<sup>65</sup> [www.kkhsou.in/main/polscience/historical-background](http://www.kkhsou.in/main/polscience/historical-background)

<sup>66</sup> [www.kkhsou.in/main/polscience/historical-background](http://www.kkhsou.in/main/polscience/historical-background)

<sup>67</sup> Ibid

- II. Introduced a system of communal representation for Muslims by accepting the concept of 'separate electorate'.
- III. Indians for the first time in Viceroy's executive council. (Satyendra Prasad Sinha, as the law member)<sup>68</sup>

### ▪ **Introduction of Self Government[1919-1947]:-**

#### ▪ **Montagu – Chelmsford Report - The Government of India Act, 1919:**

The landmark report in the constitutional development which led to enactment of the Government of India Act, 1919. The British Parliament passed the Government of India Act of 1919 which is also known as Montague-Chelmsford Reforms. The Act made many important changes in the Central and provincial Government. The Act introduced a bicameral legislature at the centre. The two Houses were- Legislative Assembly (Lower House) and Council of States (Upper House). The term of Legislative Assembly and Council of States were five and three years respectively. But the Governor-General could alter this term. The powers and functions of both the Houses were also increased. The number of Indian members in the Executive Council of the Governor General was raised from one to three. The system of direct election was introduced.<sup>69</sup>

The Act made many changes in the provincial Government too. A system of Diarchy was introduced in the Provinces. The subjects which were dealt with by the Provincial Government were divided into two sets: Transferred and Reserved Subjects. The Governor administered the Reserved Subjects with the help of the Ministers chosen by him from the elected members of the legislature. The Governor General could shift a subject from Transferred to Reserved Part.

The Act created two lists of Subjects (departments) and divided them into Central and Provincial Governments. The Central List included the subjects such as Defence, Currency, Commerce, Communication, Telegraph, Foreign Relations, Customs, Civil and criminal law etc. were given to the Central Government. On the other hand, the Provincial List which were of provincial interest such as Local-Self Government, Education, Public Works, Agriculture, Public Health, Revenue, Irrigation, water Supplies etc. were given to the provincial Government.

<sup>68</sup> [www.historydiscussion.net/essay/themaking-of-indian-constitution/2113](http://www.historydiscussion.net/essay/themaking-of-indian-constitution/2113)

<sup>69</sup> [www.historydiscussion.net/essay/themaking-of-indian-constitution/2113](http://www.historydiscussion.net/essay/themaking-of-indian-constitution/2113)

The Act created a post of a High Commissioner for India. The term of his office was six years. The Act of 1919 was an important landmark in the constitutional development of India which opened a new era of responsible Government.<sup>70</sup>

Shortcoming of Act, 1919 – Reforms of 1919, failed to fulfill the aspirations of the people of India. Its reasons were that first it did not fulfill the demands for responsible Government. Secondly, the failure of the Diarchy system.

▪ **The Simon Commission:**

The British Government appointed a Statutory Commission known as ‘Simon Commission’. The government of India Act had provided for the appointment of a statutory Commission after the expiry of ten years of the passing of the Act to inquire into and report on the working of the Act in 1927. This commission was constituted for ten years. The commission was headed by Sir John Simon. After ten years completion Simon submitted his report in 1930.

The Report was considered by a Round Table Conference consisting of the representatives of the British Government & of British India as well as the Rulers of the States. A white paper was prepared as a result of this conference embodying the outlines of the reforms. The white paper was submitted to the select committee of the Parliament. In accordance with the recommendations of the select committee the Government of India Bill was introduced in the Parliament and passed with certain amendments as the Government of India Act, 1935.<sup>71</sup>

▪ **The Government of India Act, 1935:**

This Act regarded as the full milestone on the highway leading to full responsible government. The British Parliament passed the Government of India Act of 1935 which was so valuable and important that most provisions of this Act were taken by the framers of the Indian Constitution. The Act was a very lengthy written document. The Act proposed to form an All India Federation. All the provinces were to be members of a federation.<sup>72</sup>

The Government of India Act of 1935 provided a bicameral legislature at the Centre consisting of Federal assembly (Lower House) and Council of States (Upper House). The total number of members of the Federal Assembly were 375 (250 were elected by the people of British Provinces and 125 from Indian States). The Council of States consisted of 260 members (150 elected from the British Provinces, 104 nominated by the rulers of the States and 6 were nominated by the Governor-General).

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<sup>70</sup> Ibid

<sup>71</sup> [www.historydiscussion.net/essay/themaking-of-indian-constitution/2113](http://www.historydiscussion.net/essay/themaking-of-indian-constitution/2113)

<sup>72</sup> [www.historydiscussion.net/essay/themaking-of-indian-constitution/2113](http://www.historydiscussion.net/essay/themaking-of-indian-constitution/2113)

The Act introduced Diarchy system at the Centre. The Central Subjects were divided into the Reserved and the Transferred subjects. The Act provided Division of powers by creating Federal list; Provincial List, Concurrent List and also a provision for Residuary Subjects. 59 subjects were included in Federal List consisting of Defense, Currency and Coinage, post and Telegraphs, Foreign Affairs etc. Provincial List included 54 subjects such as Police, Administration of Justice, Education, Agriculture, Industry, Land revenue etc. There were 36 subjects in Concurrent list. These were Newspaper and Printing Press, Marriage and Divorce, registration, Criminal Procedure Code etc. The subjects who were not included in any of the above lists were residuary subjects. They were looked after by the Governor General.<sup>73</sup>

The Act established a Federal Court at Delhi. Federal Court was to decide inter-state disputes and also heard appeals against the decisions of the High Courts. The system of Diarchy was replaced by the Provincial autonomy in the Provinces.

The Act introduced a bicameral legislature (viz, Legislative Assembly and Legislative Council) in six out of total eleven provinces. These six provinces were- Bengal, Bihar, Bombay, Uttar Pradesh, Madras and Assam. Rest five Provinces Punjab, Central Provinces, Orissa, and North-West Frontier Provinces (N.W.F.P.) and Sind were to have Legislative Assembly only. The Legislative Council was the Upper Chamber and the Legislative Assembly was the Lower Chamber.

The Legislative Council was to be a permanent body and one third of its members were to retire every three years. The members of the Legislative Assembly were elected for five years. Governor was the executive head of the Provinces. The India Council of the Secretary of State for India was replaced by an Advisory Council. A Federal Public Service Commission was established.<sup>74</sup>

#### ▪ **The Cripps Mission IN 1942:**

The Second World War started in 1939 and Great Britain was fully involved in this war. In 1942, the Cripps Mission was sent to India from Great Britain under the leadership of Sir Stafford Cripps to negotiate with the Indian Leaders and secure their cooperation in the prosecution of war. The Cripps Mission provided some proposals to Indian people. Some of them are-

- I. After the Second World War, dominion status would be granted to India.
- II. For framing a Constitution for India, an elected body would be set up in India, after war.
- III. The Indian states would also participate in the Constitution making body.
- IV. The British Government was to accept the Constitution so framed. But a Province or a Princely State may or may not accept it. The Provinces were given a right to finalize their Constitution

<sup>73</sup> www.historydiscussion.net/essay/themaking-of-indian-constitution/2113

<sup>74</sup> Ibid

in consultation with the British Government. The Princely States would have the freedom to join Indian Union.

- V. During the World war and until the new constitution was framed, India would remain under the control of Her Majesty's Government.

But the Cripps proposals were rejected by almost all the Parties and sections in India on different grounds. The Indian National Congress, Muslim League, Hindu Mahasabha and Sikhs rejected the Cripps Proposal.<sup>75</sup>

#### ▪ **The Cabinet Mission Plan, 1946:**

The appointment of Cabinet Mission Plan was another important step approved by the British Government in the process of Constitutional development. The Cabinet Mission came to India on 4<sup>th</sup> March, 1946. It consisted of three British Cabinet Ministers- Lord Pethic Lawrence, Sir Stafford Cripps and Mr. Alexander. The chief proposals of Cabinet Mission plan were:-

- I. To form a Union of India consisting of British Provinces and Indian States with the exception of certain reserved subjects, all subjects were to be retained by the states and the paramountcy of Crown was to be lapse.
- II. For the purpose of framing a new Constitution, a Constituent Assembly needs to be establishing having elected members.
- III. An interim Government with fourteen representatives of the major Political Parties.

Initially, the proposals were accepted by the Congress but the Muslim League under the leadership of Md. Ali Zinnah rejected the proposals and left the Interim Government. The Muslim League observed 'Direct Action Day' on August 16, 1946. On that Hindu Muslim clashes and riots took place in various parts of the Country. Disagreement and conflict between the Congress and Muslim League continued. At this juncture, Lord Mountbatten proposed a plan to Divide India into two parts- India and Pakistan. The Congress and Muslim League accepted the plan. On the basis of Mountbatten plan, the British Parliament passed the Indian Independence Act on July 18, 1947. and ultimately; in August 15, 1947 India became an independent State. According to the proposals of cabinet Mission Plan, a Constituent Assembly was framed as a representative body. It was accepted that the constituent Assembly would act as the Dominion Legislature until the Constitution was framed and India was administered according to the provisions of the Government of India Act, 1935 with some necessary modifications.<sup>76</sup>

#### ▪ **Freedom Movement:**

The Non-Co-operation Movement was started by Mahatma Gandhi against the Rowlatt Act. Gandhiji got the political leadership of Congress after the death of Lokmanya Tilak on 1st August 1920. Mahatma

<sup>75</sup> [www.historydiscussion.net/essay/themaking-of-indian-constitution/2113](http://www.historydiscussion.net/essay/themaking-of-indian-constitution/2113)

<sup>76</sup> [www.historydiscussion.net/essay/themaking-of-indian-constitution/2113](http://www.historydiscussion.net/essay/themaking-of-indian-constitution/2113)

Gandhi was in South Africa for many years and returned to India in 1915. On the other hand, the British tried to crush his movement with a heavy hand.<sup>77</sup> On April 13, 1919 people gathered in the Jallianwala Bagh of Punjab to hold a peaceful meeting. General Dyer ordered his soldiers to fire without any warning. About thousand people were killed and several thousand wounded. The Jallianwala Bagh Tragedy was condemned by all sections of people. The Khilafat Movement started by Maulana brothers brought Hindu-Muslim unity.<sup>78</sup>

In 1928 the Congress at Calcutta Session appointed Nehru Committee with Motilal Nehru as its Chairman to draft the future Constitution of India. The Congress adopted the Nehru Report and declared that if the report was not accepted by the British Government the Congress would fight to achieve independence by civil disobedience. When the British rejected its demand the Congress declared complete Independence as the chief goal under the President ship of Jawaharlal Nehru.<sup>79</sup> Mahatma Gandhi started Civil Disobedience Movement in 1930 by violating the Salt Law. He marched from Sabarmati Ashram to Dandi, a small village where a large number of people took part in it. Gandhi preached a message of non-violence and non-co-operation. British adopted a repressive policy of suppressing this movement and also followed a policy of conciliation and called the First Round Table Conference in 1930. But Congress boycotted the Conference.

On March 5, 1931 the famous Gandhi-Irwin Pact was signed and the Congress called off the Civil Disobedience Movement and took part in the Second Round Table Conference held in London in 1931. The Conference almost failed and the movement again started when many leaders along with Gandhi were arrested. The British announced "Communal Award" and gave separate electorates to the Harijans which was protested by the Congress. But the matter was compromised by the Poona Pact (1932) as a result of which joint electorates were maintained for the Scheduled Castes and Hindus. When the British Parliament passed the Government of India Act, 1935, Mahatma Gandhi called off the Civil Disobedience Movement.<sup>80</sup>

Under the Act of 1935, elections to the provincial legislatures were held in 1937. Congress won eight out of eleven provinces except Punjab, Sindh and Bengal. But the Congress Ministers resigned when the Second World War broke out in 1939. Cripps Mission was proposed by the British in 1942 with a promise to grant Dominion Status to India and a Constitution making body would be set up after the Second World War. As we have stated above, the proposals of Cripps Mission were rejected. The Congress started the Quit India Movement (1942) under the leadership of Mahatma Gandhi and asked the British to quit India.<sup>81</sup>

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<sup>77</sup> [www.slideshare.net/history-of-indian-constitution](http://www.slideshare.net/history-of-indian-constitution).

<sup>78</sup> Ibid

<sup>79</sup> [www.slideshare.net/history-of-indian-constitution](http://www.slideshare.net/history-of-indian-constitution).

<sup>80</sup> Ibid

<sup>81</sup> Ibid

The people of Assam also participated in this movement. Leaders like Gopinath Bordoloi and Siddhinath Sarmah were arrested. In Kamrup, Madan Chandra Barman and Routa Ram Boro were killed by the police. Kanaklata Baruah and Mukunda Kakati were shot dead at Gohpur Police Station. Kushal Konwar was hanged and many freedom fighters sacrificed their lives to free India. The names of Bhogeswari Phukanani, Nidan Koch etc. deserve a special mention. Contributions of political leaders like Jawaharlal Nehru, Gopinath Bordoloi, Sardar Vallabhbhai Patel, Maulana Abul Kalam Azad, Dr. Rajendra Prasad, Dr. S. Radhakrishnan, Lal Bahadur Shastri are always remembered.<sup>82</sup>

### ▪ **The Indian Independence Act 1947:**

The legislation was formulated by the government of Prime Minister Clement Attlee and the Governor General of India Lord Mountbatten, after representatives of the Indian National Congress, the Muslim League represented by Muhammad Ali Jinnah, Liaquat Ali Khan, and Sardar Abdul Rab Nishtar and the Sikh community represented by Sardar Baldev Singh came to an agreement with the Viceroy of India, Lord Mountbatten of Burma, on what has come to be known as the 3rd June Plan or Mountbatten Plan.<sup>83</sup> The Prime Minister of the United Kingdom announced on 20 February 1947 that:

- I. After 15<sup>th</sup> August 1947 British Government would grant full self-government to British India and not to control the Dominion or the Provinces,
- II. The Act provided for the creation of two independent Dominions, India and Pakistan from 15<sup>th</sup> August 1947.
- III. Each Dominion was to have a Governor-General who was to be appointed by the King.
- IV. The Constituent Assemblies of both Dominions were empowered to frame laws for their respective territories till the new constitution came into force.
- V. For the time being, till the new Constitutions were framed, each of the Dominions and the provinces were to be governed by the Government of India Act, 1935.
- VI. The post of Secretary of the States for India was to be abolished and was taken over by the Secretary of the Commonwealth of Nations.
- VII. The future of Princely States would be decided after the date of final transfer is decided.
- VIII. The Act proclaimed lapse of British paramountcy over Indian States.

The Indian Independence Act, 1947, came into force on August 15<sup>th</sup>, 1947, when the British rule in India came to an end.<sup>84</sup>

## **2.3: MAKING OF THE INDIAN CONSTITUTION:**

<sup>82</sup> [www.slideshare.net/history-of-indian-constitution](http://www.slideshare.net/history-of-indian-constitution).

<sup>83</sup> Ghose, Sankar (1993). Jawaharlal Nehru : a biography (1. publ. ed.). New Delhi: Allied Publ. p. 151-[https://en.wikipedia.org/wiki/Constitution\\_of\\_India](https://en.wikipedia.org/wiki/Constitution_of_India).

<sup>84</sup> Dr. J.N. Pandey- Constitutional law of india p.13(25<sup>th</sup> ed).



### **The Constituent Assembly--Machinery for Constitution-Making:-**

A written constitution is a document for articulating and formalizing the basic ordering of a state-society. In line with the concept of popular sovereignty, the task of constitution-making has often been left to the constituent assembly which, in a sense, is Europe's contribution to the ethics and technique of definite phase of social revolution. Historically, such a body is seen to be constituted as constitution-making machinery before the transfer of power from an alien government to a home government by agreement or after forcible seizure of power.<sup>85</sup> The great advantage of constitution-making and constitutional changes through such a representative assembly lies in the fact that it ensures the reflection and representation of the interests of a large segment of the political community, imparts certainly to the written constitution which comes after prolonged debates and mature deliberations, provides participation of many social groups, and imparts greater legitimacy to the basic institutional framework.<sup>86</sup>

The framers of the Constitution were neither in favour of the traditional theory of federalism, which entrusts the task of constitutional amendment to a body other than the Legislature, nor did they favor a rigid special procedure for such amendments. They also never wanted to have a British-style system where Parliament is supreme. The framers, instead, adopted a combination of the "theory of fundamental law", which underlies the written Constitution of the United\_States with the "theory of parliamentary sovereignty" as existing in the United Kingdom. The Constitution of India vests constituent power upon the Parliament subject to the special procedure laid down therein.<sup>87</sup>

The demand for formulation of a Constituent Assembly was first raised by M.N.Roy in 1934. The Swarajist Party claimed a representative Constituent Assembly, representing all sections of the Indian people to frame an acceptable Constitution. The Constituent Assembly for drafting the Constitution of India was constituted under the Cabinet Mission Plan, 1946. The members of the Constituent Assembly were indirectly elected. But it was a highly representative body.

The first meeting of the Constituent Assembly was held on 9th December, 1946. The Chairman of the Constituent Assembly was Dr. Rajendra Prasad. To draft the Indian Constitution, a Drafting Committee was constituted by the Constituent Assembly with seven members under the chairmanship of Dr. B. R. Ambedkar. The Constituent Assembly constituted different Committees to deal with different aspects of the Constitution.<sup>88</sup>

Jawaharlal Nehru on 13 December, 1946 moved the 'Objective Resolution' which contained the main objectives that were to guide the deliberations of the Assembly. In 1948, the first draft of the Constitution was submitted by Drafting Committee to the Constituent Assembly. Discussions were held on that draft

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<sup>85</sup> S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.116.

<sup>86</sup> Ibid

<sup>87</sup> S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.116.

<sup>88</sup> [www.kkhsou.in/main/polscience/historical-background](http://www.kkhsou.in/main/polscience/historical-background)



of the Constitution. Many suggestions were also made by the people on that draft. A draft was prepared incorporating the required amendments, which were suggested by the people. The final draft of the Constitution was presented before the Constituent Assembly on November 3, 1949. The President of the Constituent Assembly put his signature and finally on 26th November, 1949, the Constitution of India was adopted and on 26th January, 1950, it came into force in all over India except Jammu and Kashmir.<sup>89</sup>

## **SOURCES OF THE INDIAN CONSTITUTION:**

The Indian Constitution is drawn from many sources. Keeping in mind the needs and conditions of India the framers of the Indian Constitution borrowed different features freely from the different constitutions of the world. Therefore, some critics have described the Indian Constitution as a “borrowed Constitution” or “bag of borrowings” and a “hotch potch Constitution”. The sources of the Indian Constitution are:

- **The British Constitution: -**

The British Constitution influenced a lot on framers of the Constitution of India. The Parliamentary form of Government, the Cabinet System of Government, the superior position of the lower House as compared to the Upper House and the rule of law etc. were adopted by the framers of the Indian Constitution from the British constitution. In India, like the King of Britain, the head of the State, i.e. the President is only a nominal head and actually the real executive power is exercised by the Prime Minister with the help of the Council of Ministers who are accountable to the Parliament.

- **The Constitution of the United States of America: -**

The Fundamental Rights which are incorporated in the Part III of the Indian Constitution are based on the “Bill of Rights” of the United States of America. The concept of independent, impartial and unitary form of Judiciary and the functions of the Vice President of India are borrowed from the Constitution of the United States of America.

- **The Constitution of Canada:-**

The term ‘Union of India’ which is in Article 1 of the Indian Constitution is taken from the Canadian Constitution. The framers of the Indian Constitution have borrowed our federal system from Canada though some of its features have been taken from the Australian and South African constitutions. Like the Canadian Constitution, in India, the residuary powers have been vested in the hands of the Central Government.

- **The Irish Constitution:-**

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<sup>89</sup> ibid

Our Constitution provides for the Directive Principles of State Policy under Part IV of the Constitution. These are derived from the Irish Constitution. The provision of nomination of certain members to the Rajya Sabha (Upper House) from different fields like, art, culture, science, social services etc. are taken from the Irish Constitution.

▪ **The Constitution of South Africa: -**

The framers of the Indian Constitution were also greatly influenced by the Constitution of South Africa. The procedure of amendment and the provisions relating to the election of Rajya Sabha members reflect the influence of the Constitution of South Africa.

▪ **The Constitution of Germany:-**

The power of the President to suspend the Fundamental Rights during emergency was adopted from the Weimer Constitution of Germany.

▪ **The Government of India Act, 1935:-**

The Government of India Act, 1935 is the biggest source of our Constitution. The relations between the Union and the States and the three lists (Union, State and Concurrent) dividing governmental powers between them were taken from that Act. According to Prof. Jennings, “The Constitution derives directly from the Government of India Act, 1935, from which in fact many of its provisions are copied almost textually.”<sup>90</sup>

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<sup>90</sup> [www.kkhsou.in/main/polscience/historical-background](http://www.kkhsou.in/main/polscience/historical-background)

# CHAPTER-3

## CONSTITUTIONAL AMENDMENT:

Every constitution provides for its amendment. It is now universally recognized that in any political system, irrespective of its class or type, there should exist a rational method, planned in advance, for peacefully adjusting the basic framework to changing socio-political conditions. The classical authors used to classify constitutions as rigid and flexible, according to the mechanics of the amending process. The mechanism of formal amendment, or even the informal amendment itself, is no longer considered the foremost instrumentality for establishing the harmony of the constitutional document with social change.

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The modern approach places greater emphasis on the frequency or otherwise of actual change for distinguishing between the degrees of rigidity and flexibility of the constitutions. It is also appropriately recognize that in this revolutionary era, constitutions, however carefully projected into the future, cannot aspire to make permanent their political solutions.

The basic framework is, therefore, sought to be made sensibly elastic and dynamic, neither too rigid nor too flexible, but with greater inclination to flexibility.<sup>92</sup> The constitutional amendments, therefore, act as the 'safety valve' for the political system. If the basic framework is not adjusted to the changing social climate and political values, revolution would destroy it as unworkable. The present century has witnessed a series of revolutions which sought to destroy a constitution that became discordant with the "existential realities".<sup>93</sup>

### 3.1 Necessity of Amending the Constitution:-

Provision for amendment of the constitution is made with a view to overcome the difficulties which may encounter in future in the working of the constitution. No generation has monopoly of wisdom nor has it a right to place fetters on future generations to mould the machinery of government according to their requirements. If no provisions were made for the amendment of the constitution, the people would have recourse to extra-constitutional method like revolution to change the constitution.<sup>94</sup> It has been the nature of amending process itself in federation which has led political scientists to classify federal constitution as rigid.

A federal constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American constitution is very difficult. So is the case with

<sup>91</sup> www.kkhsou.in/main/polscience/historical-background

<sup>92</sup> Ibid

<sup>93</sup> S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.117.

<sup>94</sup> Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461 - Dr. J.N. Pandey-Constitutional law of india-The Amendment of the Constitution p.532( 25<sup>th</sup> ed).

Australia, Canada and Switzerland. It is a common criticism of federal constitution that is too conservative, too difficult to alter and that is consequently behind the times.<sup>95</sup>

The framers of the Indian constitution were keen to avoid excessive rigidity. They were anxious to have a document which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. But the framers of Indian constitution were also aware of the fact that if the constitution was so flexible it would be a playing of the whims and caprices of the ruling party. They were, therefore, anxious to avoid flexibility of the extreme type. Hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesired changes. The constitution-makers have, therefore, kept the balance between the danger of having non-amendable constitution and a constitution which is too easily amendable.<sup>96</sup>

*“The law changes from time to time. The social circumstances, needs, thinking power of the people, their trends, development of legal situations etc., is also viable for a radical change. If the Constitution is rigid and cannot be change according to the changed circumstances, the people of that country suffer”.*<sup>97</sup>

### 3.2 METHODS OF AMENDMENT- [Formal & Informal]:-

The ideas upon which a constitution is based in one generation may be spurned as old fashioned in the next generation. It thus becomes necessary to have some machinery, some process, by which the constitution may be adapted from time to time in accordance with contemporary national needs. The modes of adapting the constitution from time to time to new circumstances may either be ‘Formal’ or ‘Informal’.

There are two peaceful processes by which the basic framework may be altered or modified, namely, “*Formal Method of Amendment*”-such as provisions or procedures incorporated in the constitution itself for its alteration or modification; and ‘Conventions & Usages’, and Interpretation by Judicial decisions that are considered as an “*Informal Method of Amendment*”. Formal method is the constituent process while the Informal methods comprises of judicial interpretation, conventions and constitutional usages.

In fact, the written constitutions adjust itself to social change not only by formal constitutional amendment but also by constitutional usage, conventions, and interpretation on the part of the government agencies, the parliament, and the courts. For example, in the United States , formal amendments have been resorted to only 26 times, and if the first ten amendments entitled Bill of rights,

<sup>95</sup>K.C. Wheare: Federal Government, p-209(1963 ed.)- Dr. J.N. Pandey- Constituional law of India-The Amendment of the Constitution p.532( 25<sup>th</sup> ed).

<sup>96</sup> Ibid 95

<sup>97</sup> S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.117.

incorporated in 1791 are omitted, only 16 formal amendments have been approved in about more than 200 years of the US constitution.<sup>98</sup>

### ▪ **Formal Amendment:-**

Formal amendment is perhaps the most significant way of adapting the constitution to changing circumstances. The judicial interpretation may help to some extent in this respect but it cannot change the wordings of the basic law and certain desired changes may not be attainable without verbal changes in the constitutional text. Further the judicial process is slow and a change may be desired early. At times, some principles laid down by the courts may appear to be against public morals and political needs and may need to be changed.<sup>99</sup>

Practically every constitution has some formal method of constitutional amendment. This consists of changing the language of a constitutional provision so as to adapt it to the changed context of social needs.<sup>100</sup> A distinction is made between constitutions on the basis of the mechanics of formal amendment. Some constitutions may be amended by the ordinary legislative process, while some others can be amended through some special process. Very few of the modern constitutions can be altered by ordinary legislative process, but there is a wide variety relating to the amending processes prescribed in constitutions. Hence, it seems well high impossibility to find common features among them.<sup>101</sup>

Based on the above distinction accordingly, the constitutions are sometimes classified into 'flexible' and 'rigid'. A flexible constitution is the one in which amendment can be effected rather easily, as easily as enacting an ordinary law. The best example of such type of constitution is the British Constitution which can be amended by an ordinary Act of Parliament, and there is thus no distinction between ordinary legislative process and constituent process.<sup>102</sup>

On the other hand, the federal constitutions such as that of U.S.A., Canada, Switzerland etc., are very rigid. It is very difficult to amend the provisions of the constitution. Besides, the passing of a bill in the Parliament, the Referendum shall be made among the people of the country. Therefore a rigid constitution is regarded as the fundamental law of the land as it lays down the basic principles of governance of a country that are considered to be of the permanent value. The basic principles are made to change only after through consideration and deliberation and that the hasty and ill considered changes under political pressures are avoided. Accordingly in such a constitution, the process of constitutional amendment is more elaborate and difficult than the enactment of ordinary legislation.<sup>103</sup>

<sup>98</sup> S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.118.

<sup>99</sup> www.ecoweb.enud.edu/amendment-of-the-constitution.

<sup>100</sup> M.P.Jain, Indian Constitutional law p.1664(7ed)

<sup>101</sup> S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.118.

<sup>102</sup> Ibid 100

<sup>103</sup> Ibid 100

The amending provision in a constitution is of great importance and vitality as it enables the country to develop peacefully and the alternative to such may be result into stagnation and revolution.

## ▪ **Informal Amendment:-**

Informal methods comprises of Judicial Interpretation, Conventions and Constitutional usages\_\_\_\_\_.

### **I. Judicial Interpretation:**

In this case, the constitutional text does not change, but its interpretation undergoes a change. The words in the constitution having one meaning in one context may be given somewhat different meaning in another context. “while the language of the constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import this meaning. Judicial interpretation is a process of slow and gradual metamorphosis of constitutional principles and is somewhat invisible, for the change has to be deciphered by an analysis of a body of judicial precedents. In this process, the courts play a dominant role, for it is their function to interpret the constitution.”<sup>104</sup>

The process is slow because it develops from case to case over a length of time and it may take a long time for such a view to be crystallized. It is also in some way to be considered haphazard as because the courts do not take the initiative to interpret the constitution unless the question is raised before them. The course of interpretation depends upon the nature of cases and constitutional controversies which are presented to the court for adjudication.<sup>105</sup>

Though the process of judicial interpretation goes on in every constitution to a greater or lesser extent, yet it assumes a crucial importance in countries in which the ‘formal method’ of constitutional amendment is very tardy and difficult and the language used in such constitution is general. The best example can be cited is of the United States wherein the Supreme Court has from time to time give a new meaning to the phrases and words in the constitution so as to make the 18<sup>th</sup> century, ‘laissez faire’ era document subserve the needs of a vast, expanding and highly industrialized civilization of the twentieth century without many formal amendments being effectuated in the text of its constitution.<sup>106</sup>

### **II. Conventions & Usages:**

The operation of constitutional provisions may be modified by the growth of conventions, practices and observances. This is another process of slow metamorphosis, of imperceptible change, where the constitutional text retains its original form and phraseology, where there is no visible modification on the face, but where, underneath the surface, a change has come about so far as the working and operation of the provisions is concerned. The conventions and usages, though operating within the framework of the

<sup>104</sup> M.P.Jain, Indian Constitutional law p.1662(7ed)

<sup>105</sup> M.P.Jain, Indian Constitutional law p.1662(7ed)

<sup>106</sup> Ibid

provisions of the constitution, nevertheless, do modify their content and effect. Conventions evolve out of the practices followed over a period of time.<sup>107</sup>

To understand the changes in the constitution produced by convention and usage, it is necessary to bring out the distinction between the two. 'Convention' implies binding rules, a rule of behavior, which is obligatory to those who are responsible for working of the constitution while 'usage' is nothing more than usual practice.

The sources of convention are twofold. Sometimes a course of conduct persist for a long time and gradually attains first persuasive and then obligatory force. Such conventions may be called 'customs'. Convention may arise out of consensus to work in a particular way and adopt a particular rule of conduct. This rule is immediately binding, and it is a convention. Its basis is a kin to those of the conventions which are followed in the field of International relations. Even though they are morally and politically binding but they do not become part of the law or alter the law till they are enacted by the appropriate machinery of the state.<sup>108</sup>

Conventions operate in several ways such as it may nullify a constitutional provision in practice without formally abolishing it or it may work by transferring powers granted to one authority in the constitution to another authority or it may effect a constitution by supplementing a provision therein.<sup>109</sup> Britain by far the most is the best example where conventions play a very important role in the constitutional process.

### 3.4: AMENDMENT PROCESS IN SOME OF THE WORLD CONSTITUTIONS:

The term 'amendment' derives from the Latin term '*amend ere*'. The term 'amend' means to make right, to make correct or to rectify. In Black's Law Dictionary the term amendment has been defined as 'a formal revision or addition proposed or made to a statute, constitution, pleading, order or other instrument; a change made by addition, deletion or correction specially an alteration of wording.'<sup>110</sup> Legally speaking amendment denotes adjustment, amelioration, betterment, change, elaboration, emanation, enhancement, improvement, notification and refinement etc.<sup>111</sup>

#### ❖ UNITED STATES:-

One of the essential features of any Federalism is the rigidity of the constitution. The United States government fulfils this requirement to a remarkable degree. *Article V of the American Constitution* lays

<sup>107</sup> M.P.Jain, Indian Constitutional law p.1662(7ed)

<sup>108</sup> S.N.RAY. Modern Comparative Politics-Approaches, Methods and Issues: Introduction on Constitution-Making and Constitutional Amendment p.127.

<sup>109</sup> Wheare, modern Constitutions, 178-201(1964); G. Marshall, Constitutional Conventions 1984 - M.P.Jain, Indian Constitutional law p.1663(7ed)

<sup>110</sup> Garner, 'Black Law dictionary', 8th Edition, p-89

<sup>111</sup> Burton, William C, Legal Thesaurus-Complete and Unabridged, Macmillan, New York, 198, p-23.



down a very cumbersome and difficult procedure for its amendment as it states- “ The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in each case, shall be valid to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses of the Ninth Section of the First Article; and that no state without its consent, shall be deprived of its equal suffrage in the Senate”.<sup>112</sup>

Therefore the process by which amendment can be effected in the America Constitution involves two different stages: Initiation and Ratification. An amendment may be proposed or initiated either-

- I. by vote of two-thirds of each House of Congress, and must be ratified by three-fourths of the states; or
- II. by the states themselves may take the initiative in proposing amendments if two-thirds of the state legislatures apply to the congress for this purpose, the Congress calls a constitutional convention which shall, on the basis of original recommendation, proposed the amendments.

An amendment proposed as above may be ratified either-

- a. by vote of the legislatures of three-fourths of the states; or
- b. by the constitutional conventions in three-fourths of the states.<sup>113</sup>

The mode of ratification is wholly within the discretion of the Congress. After ratification, the constitutional amendments become effective. A restriction imposed by the constitution on the amending process is that no state can be deprived of its equal suffrage in the Senate without its consent. Hitherto, all amendments have been initiated by the first method and the second method has only once been employed wherein the Congress proposed for the twenty-first amendment which repealed the eighteenth amendment (which had enforced prohibition) was ratified by the conventions of the state.<sup>114</sup> Because of the complicated nature of the amendment procedure, sometimes it takes years before an amendment becomes operative after it has been proposed.

Though the process of amendment to the Constitution has been extremely slow, yet it had led to its growth to a considerable extent and social sphere. There have been only twenty-six amendments to the Constitution since its inception. The Constitution of 1779 embodied only general outlines of the framework of the Federal Government. But the present day Constitution of the United States cannot be

<sup>112</sup> Dr.S.R. Myneni-Legal Systems in the World-Legal System in the United States of America p.141.

<sup>113</sup> Vishnoo Bhagwan,Vidya Bhusan,Vandana Mohla-World Constitutions-a comparative study p.129(10 ed).

<sup>114</sup> Vishnoo Bhagwan,Vidya Bhusan,Vandana Mohla-World Constitutions-a comparative study p.129(10 ed)

cannot be identified with the original constitutional document prepared by the Philadelphia Convention. Today it includes many rules and regulations, judicial interpretations and conventions etc., which effect the distribution and exercise of the sovereign powers of the state. It has changed beyond recognition according to the demand of time and needs of the American Republic.<sup>115</sup>

### ❖ UNITED KINGDOM:-

The British Constitution is the child of wisdom and chance. It has evolved itself gradually, expressing itself in different charters, statutes, precedents, usages and traditions. It has grown like an organism from age to age. It is the oldest among the existing constitutions.<sup>116</sup> The British Constitution is flexible in nature. There is no difference between the procedure for the passage of a constitutional law and that of an ordinary law in England.

The British Parliament is empowered to pass and amend the ordinary law as as the constitutional law through the ordinary procedure. There is no special procedure for passing a constitutional law in England. This flexibility of the constitution permits it to be adapted more readily to the new conditions and changing circumstances than is possible in any other federal country<sup>117</sup>. It may however be noted that the flexibility of a constitution does not depend primarily on the breadth of its provisions. Though legally the Constitution of England is more flexible in the world but actually it is considerably less fluid that might be inferred from what the scholars say.<sup>118</sup>

### ❖ SWITZERLAND:-

*“It is easier for the Swiss people to amend their fundamental law than their ordinary statutes against the will of a hostile Parliament”.*<sup>119</sup>

Switzerland is the only ancestral house of direct legislation and the only country in the world still practicing direct democracy. Referendum and Initiative are the enviable rights which in the real sense the Swiss citizens alone enjoy and can take pride in their democracy- the only direct democracy in the world.<sup>120</sup> The Swiss Constitution is rigid in character, though not so rigid as the American Constitution. The procedure of its amendment is rather complicated. There are two methods of amending the Swiss Constitution:-

#### I. Through Referendum:-

<sup>115</sup> Dr. S.R. Myneni-Legal Systems in the World-Legal System in the United States of America p.142.

<sup>116</sup> Vishnoo Bhagwan,Vidya Bhusan,Vandana Mohla-World Constitutions-a comparative study p.14(10 ed).

<sup>117</sup> Ibid p.15(10 ed).

<sup>118</sup> Ibid

<sup>119</sup>Rappard D.E.,The Government of Switzerland,p.60- Vishnoo Bhagwan,Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.240 (10 ed).

<sup>120</sup> Dr. S.R. Myneni-Legal Systems in the World-Legal System in the United States of America p.212.

If both the Houses of the federal Parliament agree by passing a resolution to revise the constitution, either wholly or partially, they may draft such a proposal and submit it to the people and the Cantons for their vote. If the majority of the citizens voting at Referendum and a majority of the Cantons approve of it, the amendment is made in the constitution accordingly. In case, only one House agrees to the proposed revision and the other does not, then the proposed revision is referred to the people's vote to ascertain whether the proposed revision is necessary or not. If the people approve the proposed revision by a majority of vote, Federal assembly stands dissolved. The newly elected assembly takes up the proposed revision. If both the Houses of the assembly ratify it, which is a foregone conclusion, the revision is submitted to the people and the Cantons for vote. If majority of both approves it then the revision is effected.<sup>121</sup>

## II. Through Constitutional Initiative:-

A complete or partial revision of the Constitution can also be effected through popular initiative, on the petition of at least, one lakh Swiss citizens. In case of a complete revision of the Constitution through initiative, the question whether there should be a revision of the constitution or not, is referred to the people for their vote. If majority of the people give verdict in favour of such a revision, fresh elections of the Federal Assembly take place. The newly elected assembly drafts the new Constitution and after approving it which is a foregone conclusion, submits it to the Referendum of the people and the Cantons. If majority of both of them gives verdict in favour, the revised constitution is enforced.<sup>122</sup> As regards to the partial revision of the constitution, both 'Formulative' and 'Unformulative' Initiative methods can be adopted.<sup>123</sup> The above stated complicated procedures reflects clearly that the Swiss Constitution is rigid in character for the reason since 1874, only two proposals for complete revision were made and both were rejected. There have been quite number of partial revisions of the Constitutions, vast majority of which has enhanced the competence of the Central Government.

## ❖ CANADA:-

The Constitution of Canada consists of many laws as well as political conventions and judicial practices. But its main document is a British law, the British North America Act (BNA) of 1867. This Act has been amended twenty-three times in one hundred and fifteen years, the last amendment being the Constitution Act of 1982.

"In Canada there is no document that purports to set out the complete laws pertaining to the country's Government. The constitution consists, in parts, of written material and in part in convention and

<sup>121</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.239(10 ed).

<sup>122</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p240 (10 ed).

<sup>123</sup> Ibid , 'for formulative and unformulative Initiative methods' kindly read p.240,5<sup>th</sup> and 6<sup>th</sup> paragraph.

customs".<sup>124</sup> The American Civil War of 1861 which synchronized with the years when federal idea was taking its shape in Canada also left indelible imprint on the Canadian Constitution. The Constitution is thus an amalgamation of the British and the American Constitutions. It adopts federal idea from the USA and Parliamentary democracy from Great Britain.

The Canadian Constitution is mostly written as British North America Act is its very base. Besides, the amendments effected in it from time to time; the statutes passed by the British Parliament expressly referred to Canada, viz. colonial laws, Validity Act, the statute of Westminster 1931 etc., forms the written part of the Constitution. In short, the written part of the Canadian Constitution, unlike that of America is not a single document. It is a collection of 20 documents- 13 Acts of the British Parliament, 7 of the Canadian and 4 British Orders-in-Council. The unwritten part of the constitution is discernible through conventions which have played a vital part in the evolution of the Canadian Constitution.<sup>125</sup>

The British North America Act was silent regarding amendment of the Constitution. It contained only a provision that the provinces were authorized to amend their Constitutions though they too could not effect changes in the affairs of the Lieutenant Governors. Thus, originally the Constitution could be amended by the British parliament on an address by the Canadian parliament to His majesty, the King of UK. Since 1949 the position underwent some changes.

The Parliament of Canada was empowered to legislate with respect to constitutional matters and amend the Constitution of Canada, except legislative authority of the provinces, the rights and privileges of the provincial legislatures and Government and Schools, the use of the English and French languages and the term of House of Commons.<sup>126</sup>

The Constitution Act of 1982 has now laid down the amending procedure in details. It has established four legal formulae explaining the processes for amending the Constitution out of which in the first three formulae, provinces have been associated with the amending process, i.e.:

- I. The First formula explains that the amendments must be passed by the Senate and the House of Commons, and by the legislature of every province. This gives every single province a veto.
- II. The Second formula speaks about the amendments must be passed by the Senate and the House of Commons, and by the legislatures of two-thirds of the provinces with at least half of the total population of all the provinces. The seven provinces needed to pass any amendment would have to include either Quebec or Ontario.

<sup>124</sup> Reference paper No.113, Information Division, Department of External Affairs, Ottawa, Canada-Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a Comparative study p.411 (10 ed).

<sup>125</sup> Ibid p.411 (10 ed).

<sup>126</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.412(10 ed).

- III. Under the Third formula, amendments dealing with the matters that apply to one province or to several but not all provinces must be passed by the Senate and the House of Commons and by the legislature or legislators of the particular province or provinces concerned.
- IV. While the last Fourth formula states that amendments can be made by an ordinary Act of the Canadian Parliament.<sup>127</sup>

The Canadian Constitution possesses both rigid and flexible character so far its nature of amendment is concerned. The Constitution may be termed as flexible in the sense that to some extent some of the amendments may be made by an ordinary Act of parliament of Canada as can be seen in the above fourth formula of amendment procedure under the Constitution Act of 1982. Otherwise it is a rigid Constitution.

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### ❖ AUSTRALIA:-

The present Constitution of Australia is to be found in the Commonwealth of Australia Act, 1900; which came into force on 1<sup>st</sup> January 1901. It is the statute of the British parliament containing 9 clauses. The first eight clauses are commonly called the “Covering Clauses”; as they contain introductory, explanatory and consequential provisions. The Ninth clause contains “The Constitution”.

The Constitution is divided into 8 chapters and contains 128 sections. The Constitution declares Australia a federation. All the requisites of a federation- written and rigid Constitution, division of powers and judicial review are found in the Constitution. The Australian federation is a kin more too American federation than to Canadian. The Australian Constitution is a rigid one.<sup>128</sup>

Section 128 of the Australian constitution provides that only law proposing an amendment passed by an absolute majority in both the Houses of parliament must be submitted to the electors of the House of Representatives in each state and territory to vote upon it by means of Referendum within not less than two nor more than one month after its passage through both the Houses.

If any such law passed by one house and rejected by the other, and is passed again by the same House after a lapse of three months or in the next session, the Governor General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both the Houses, to the electors in each state for referendum. If in a majority of the states the majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor General for the Queen’s assent.<sup>129</sup>

<sup>127</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.412(10 ed).

<sup>128</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.453(10 ed).

<sup>129</sup> Ibid p.455

However, if the amendment proposes an alteration of the limits of any state or a diminishing of its proportion of members in each House or a change of any sort in its separate rights under the Constitution, it shall not become law unless the majority of electors voting in that state approve it.<sup>130</sup>

## ❖ FRANCE:-

France has been described as a laboratory of political experiments. In the field of Constitution-making, the French hold a world record. Since 1789, France had no less than twelve regimes and thirteen Constitutions. the political changes cover extremes in time ranging from the twenty-one days of the ‘Acte Additionnel 1815’ to the sixty-five years of The Third Republic, and extremes in content ranging from complete changes of regime to simple modifications carried out by the normal processes of constitutional revision. If in Britain and the USA the political arrangements have persisted, slowly evolving, over a long period of time, in France, on the other hand, “the pendulum has wing from Government d’ assemble to a highly personality regime in a comparatively short span”.<sup>131</sup>

The Constitution of the Fifth French Republic was drafted by a small Ministerial Committee headed by Michel Debre under the authority of General de Gaulle. After having been approved by the Cabinet and the French Council of State and a group of high civil servants advisors to the Government on legal and constitutional questions, the new Constitution was submitted for the Referendum of the people on September 28, 1958, who approved it by a vast majority of nearly 80%. It came into force on October 4, 1958.<sup>132</sup> The Constitution contains a Preamble and ninety-two articles. It has been described as “tailor-made for General de Gaulle”, “quasi-monarchial”, quasi –presidential, a parliamentary empire, unworkable, “the worst drafted in French constitutional history”, and ephemeral. It has both republican and presidential characteristics. It is a Constitution in which diverse constitutional principles are sought to be combined, and whose general characteristics are difficult to describe. The factual truth is that it is a ‘Hybrid’<sup>133</sup>

The Fifth French Republic Constitution of 1958 is rigid in nature. It lays down a special provision for its revision. According to Article 89 of the Constitution of 1958, a proposal for revision which can come either from the President or from private members must, to be effective, be voted first in identical terms by both houses of parliament and then ratified by a Referendum or, if the President decides otherwise, by a three-fifths majority of both Houses, meeting as Congress. The Republican form of government is not

<sup>130</sup> Ibid

<sup>131</sup> Finner, S.E., Comparative Government, p.281- Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions- a comparative study p.290(10 ed).

<sup>132</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions- a comparative study p.290(10 ed).

<sup>133</sup> Ibid



subject to revision. The Senate has an effective veto and it is obligatory to seek its consent before a constitutional revision can be brought about.<sup>134</sup>

In case the President decides not to submit a proposed revision to a referendum, such revision must first be passed individually by both the Houses of Parliament in identical terms and thereafter by three-fifths majority of both the Houses, meeting as Congress, before it can be brought on the statute book. Although the procedure for revision under the Fifth Republic is relatively simple as far as the constitutional requirements are concerned, yet it is not that easy to implement it keeping in view the prevalence of the multiple party systems in France.<sup>135</sup>

## ❖ RUSSIA:-

The Russian Federation celebrates its Independence Day on June 12, 1990, though it attained independence from Soviet Union on August 24, 1991. The Constitution of Russian Federation came into force on December 12, 1993 with Moscow as its capital. The Constitution of Russia's Federation is a written one like that of Soviet union, USA, India, France, Canada, Switzerland etc. and it comprises of 137 Articles.

The Constitution was approved by President Yeltsin and adopted by referendum on 12<sup>th</sup> December 1993. Minor textual changes to Article 65 were added by order of the President on 9<sup>th</sup> January, 1996. Evidently it is a brief document. The Constitution of Russian Federation is democratic constitution and is rigid in character. Articles 134 to 137 deal with constitutional amendments and revisions of the Constitution. The proposals for amendments are to be made by the President of Russian Federation, the Federal Council, the State Duma, and the Government of Russian Federations well as one-fifth of the Deputies of the Federal Council or the state Duma.<sup>136</sup>

The revisions of chapters 1,2 and 9 of the Constitution are to be supported by three-fifth of the total number of Deputies of the Federal Council and the State Duma. Thereafter, a special Constitutional assembly will be convened in accordance with the Federal Constitution law. Two-third members of the Constitutional assembly or popular voting can approve it. Amendments to chapters 3-8 of the Constitution can be adopted in accordance with the procedures envisaged for the adoption of Federal Constitutional law.<sup>137</sup>

In the event of a change in the name of a republic, territory, region, federal cities, autonomous area, and the new name of the subject of the Russian federation shall be included in Article 65 of the constitution

<sup>134</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.296(10 ed).

<sup>135</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.296(10 ed).

<sup>136</sup> Article 134 of the Russian Federation Constitution- Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.558 (10 ed).

<sup>137</sup> Article 16 of the Russian Federation Constitution- Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla-World Constitutions-a comparative study p.558 (10 ed).



of Russian Federation.<sup>138</sup> Amendments in Article 65 of the Constitution which determines the position of the Russian Federation shall be made on the basis of the Federal Constitutional law.<sup>139</sup> The provisions clearly reflect that the amendment procedure in the Constitution of Russian Federation is fairly cumbersome and quite complicated.

### ❖ CHINA:-

The drafting of the formal Constitution in China took place in November 1952 when the work was taken in hand by the Central Peoples Government Council- the highest executive authority in China, constituted a commission of 33 members comprising top Communist leaders as well as a few new party men to draft the Constitution. The first draft was completed in March, 1954 and was widely discussed in numerous public forums. A revised draft was published in June, 1954, and was thrown open to discussion and it was a sheer display of democratic sentiments.

Very few changes were actually effected in the second draft in the light of these discussions. Thus the third draft of the constitution was ready by the Central People's Government Council which approved it after making minor alterations in it on September 9, 1954. The draft was however adopted by the national People's Congress on September 20, 1954. The constitutional framework underwent a radical change in 1978 when the new Constitution was implemented.<sup>140</sup>

The Constitution of 1954 remained in force till 1974 and was substituted by a new constitution in January, 1975. It proved to be a transient affair and a new fairly liberalized Constitution was portrayed with no major changes and within the framework of the old Constitution in the year 1978. The Constitution of 1978 met with an eclipse by June, 1981. The axe fell on the Constitution of 1978 under a new leadership of Hu Yao-Bang. It was replaced by another Constitution promulgated in December, 1982. Presently, China is governed according to the new Constitution as amended during later years in 1993 and 1999 effected a few minor and substantial amendments in the constitution of 1978.<sup>141</sup>

The new Constitution of 1982 comprises of a Preamble and 138 Articles. It is not as brief as the Constitution of 1975 that consisted of 30 Articles and more elaborate than the Constitution of 1954, which comprises of 116 Articles and a long preamble. The present Constitution like the earlier Constitution is flexible in nature. According to Article 64, amendment may be moved either by the Standing Committee or by more than one-fifth of the total members of the National People's Congress. Amendment so moved can be effected only if more than two-thirds of all the members of the Congress accord approval. Keeping in view the dominance of the Communist party, such a majority to support the

<sup>138</sup> Ibid Article 137

<sup>139</sup> Ibid Article 7

<sup>140</sup> Framing of the Constitution-The People's Republic of China- Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla- World Constitutions-a comparative study p.479(10 ed).

<sup>141</sup> The Constitution of 1982 -The People's Republic of China- Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla- World Constitutions-a comparative study p.497(10 ed).

amendment is a foregone conclusion. The other statutes and resolutions can be adopted by a majority vote of more than a half all deputies to the National People's Congress <sup>142</sup>

### ❖ JAPAN:-

The old constitution of Japan to be known by the name of "The Meiji Constitution" remained in force from November 1890 to May 1947. On May 13, 1947, the Shova Constitution came into force. This Constitution was prepared after the Second World War was over by the headquarters of General MacArthur with mainly two objectives that is Japan should not become in future a menace to the world peace and security and secondly, that a peaceful and responsible Government should be established in Japan. Thus it was a constitution forced on the people of Japan by MacArthur.<sup>143</sup>

The Shova Constitution has been termed as the "Constitution of Japan" whereas the Meiji Constitution was named as the "Constitution of the Empire of Japan". The Shova Constitution consists of 11 chapters and 103 Articles. This Constitution is longer by atleast one-third than the old one and basically it is not of Japanese origin but essentially of the Western origin. The new Constitution has derived much from the American, British and International principles.<sup>144</sup> The Constitution of Japan is rigid in nature and the procedure proposed to amend it is tough. Chapter IX Article 96, describes the procedure of amendment. It provides that the amendment to the Constitution can be initiated by the Diet<sup>145</sup>, through a concurring vote of two-thirds or more of all the members of each House. Thereafter, they shall be submitted to the people for ratification. Amendments so ratified by the people shall be an integral part of the Constitution.<sup>146</sup>

The new Constitution of Japan a political statement of the values which were selected to guide post-war reconstruction, abolition of militarism, revival of democratic institutions and respect for basic Human rights. There has not been a single constitutional amendment in all these years in the Constitution of Japan unlike that of the Indian Constitution which has been amended more than one hundred times in a lesser period of 68 years.<sup>147</sup>

### ❖ SRI LANKA:-

The British negotiated the island's dominion status with the leader of the State Council, D.S. Senanayake, during World War II. Senanayake was also minister of agriculture and vice chairman of the Board of

<sup>142</sup> ibid

<sup>143</sup> The Constitution of Japan - Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study p.362 (10 ed).

<sup>144</sup> Ibid p.362 (10 ed).

<sup>145</sup> Diet is the Parliament of Japan consists of two chambers-the House of Peers and the House of Representatives described under Article 33-56 of the constitution- Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study p.380(10 ed).

<sup>146</sup> The Constitution of Japan - Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study p.362 (10 ed).

<sup>147</sup> Ibid p.365.s

Ministers. The negotiations ended with the Ceylon Independence Act of 1947, which formalized the transfer of power. Senanayake was the founder and leader of the United National Party (UNP), a partnership of many disparate groups formed during the Donoughmore period, including the Ceylon National Congress, the Sinhala Maha Sabha, and the Muslim League. The UNP easily won the 1947 elections, challenged only by a collection of small, primarily leftist parties. On February 4, 1948, when the new constitution went into effect (making Sri Lanka a dominion), the UNP embarked on a ten-year period of rule.<sup>148</sup>

From 1948-72, Sri Lanka (then Ceylon) was a British dominion with the British monarch as its head of state and a Westminster parliamentary government. Sri Lanka adopted the Westminster model primarily because of its close ties with Britain. British constitutional scholar Sir Ivor Jennings was instrumental in the drafting of the post-independence constitution. In 1972, Sri Lanka adopted its first republican constitution, but maintained a parliamentary government. By 1978, with the Sri Lankan economy floundering and weak coalition governments preventing stable leadership, Sri Lanka adopted a presidential system modeled on the French (Gaullist) and American governments.

*Constitution of 1978:* After coming to power, Jayewardene directed the rewriting of the constitution. The document that was produced, the new Constitution of 1978, drastically altered the nature of governance in Sri Lanka. It replaced the previous Westminster style, parliamentary government with a new presidential system modeled after France, with a powerful chief executive. The president was to be elected by direct suffrage for a six-year term and was empowered to appoint, with parliamentary approval, the prime minister and to preside over cabinet meetings. Jayewardene became the first president under the new Constitution and assumed direct control of the government machinery and party.<sup>149</sup>

The Constitution of Sri Lanka is a rigid Constitution as the bill for amendments shall follow a long procedure. A bill for the amendment of any provision of the constitution or for repeal or replacement of the constitution or for the repeal or replacement of which is inconsistent with the provisions of some Articles, shall become a law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of members (including those not present), is approved by the people at a referendum and upon a certificate by the President or the Speaker, as the case may be, endorsed thereon.<sup>150</sup>

## ❖ BANGLADESH:-

The Constitution of Bangladesh is not the outcome of a negotiated settlement with a former colonial power, or drawn up with the concurrence or approval of any external sovereign power. It is the fruit of a historic war of independence making it a class apart from other constitutions of comparable

<sup>148</sup> [www.slideshare.ceylonconstitution/1948-72/constitution-of-Srilanka-1978](http://www.slideshare.ceylonconstitution/1948-72/constitution-of-Srilanka-1978)

<sup>149</sup> [www.slideshare.ceylonconstitution/1948-72/constitution-of-Srilanka-1978](http://www.slideshare.ceylonconstitution/1948-72/constitution-of-Srilanka-1978)

<sup>150</sup> Dr. S.R. Myneni-Legal Systems in the World-Legal System in Sri Lanka p.363.

description.<sup>151</sup> In the Constitution the people feature as the dominant actors and it is a manifestation of what is called 'the people's power'.<sup>152</sup>

The Constitution of Bangladesh, 1972 was the result of the war of liberation between the Pakistan Armed Forces on the one side and the Indian Armed Forces and the Bangladesh Freedom Fighters on the other. On 16 December; 1971 the Pakistan Armed Forces surrendered and Bangladesh became fully liberated.<sup>153</sup>

The Awami League leader Sk. Mujibur Rahman who "made a declaration of independence at Dacca on March 26 1971, and urged the people of Bangladesh to defend the honour and integrity of Bangladesh" for which he was kept in custody by then President of Pakistan Yakub Khan was released by the Government of Pakistan in January, 1972 and he returned to Dhaka on 10 January 1972. The next day he, in his capacity as the President of Bangladesh, issued the Provisional Constitution of Bangladesh Order, 1972 providing for a parliamentary form of government in the interim period and constituting the Constituent Assembly with the members of National Assembly and East Pakistan Provincial Assembly who were elected by the people of East Pakistan in December 1970 for giving, the country a democratic constitution.

The Constituent Assembly adopted a Constitution which came into operation on 16 December 1972, exactly one year after the liberation of Bangladesh.<sup>154</sup> Parliament was given the power to amend the constitution. Article 142 of the Constitution of Bangladesh provides for a special procedure for amendment and prescribed that no Bill for amendment should be presented to the President unless it was passed by the votes of not less than two-thirds of the total number of members of Parliament. According to Article 142(1) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of parliament. According to Article 142 of the Constitution any bill for the requirement of amendment is needed to have the support of 2/3 majority of the total number of Parliament. However, in 1978, under the Presidential head of Ziaur Rahman an amendment to the Preamble, and Articles 8, 48, 56, 142(1A) was made wherein along with the support of 2/3 majority of the parliament, the people's anticipation was also involved by way of referendum.<sup>155</sup>

## ❖ PAKISTAN:-

The constitution of Pakistan 1973 was enforced on 14<sup>th</sup> Aug 1973. It consists of 280 articles and 7 schedules with Objective Resolution forming the preamble of the constitution beside 20 amendments which have been made since then. It is regarded as the landmark accomplishment of Bhutto's era as it

<sup>151</sup>Dr.Mohiuddin Farooque vs. Bangladesh, 49 DLR (AD) 1, Para 41 [www.assignmentpoint.com/wp-content/upload/2014/02/thesis-on-amendment-of-bangladesh-constitution-doc](http://www.assignmentpoint.com/wp-content/upload/2014/02/thesis-on-amendment-of-bangladesh-constitution-doc).

<sup>152</sup>[www.assignmentpoint.com/wp-content/upload/2014/02/thesis-on-amendment-of-bangladesh-constitution-doc](http://www.assignmentpoint.com/wp-content/upload/2014/02/thesis-on-amendment-of-bangladesh-constitution-doc).

<sup>153</sup> Ibid

<sup>154</sup> Ibid

<sup>155</sup>[www.assignmentpoint.com/wp-content/upload/2014/02/thesis-on-amendment-of-bangladesh-constitution-doc](http://www.assignmentpoint.com/wp-content/upload/2014/02/thesis-on-amendment-of-bangladesh-constitution-doc).

was a unanimous act of the parliament with complete consensus of all the political parties. However, many twists and turns have been witnessed ever since its enforcement but still it is the supreme law of land and the sacrosanct instrument which reigns supreme in governance of the state.<sup>156</sup>

The constitution 1956 and 1962 failed to provide the aspired political stability to the country. Both proved short lived and were replaced with the martial laws in the country. But the subsequent years after imposition of martial law were highly tumultuous costing Pakistan its eastern wing. The leftover country was first governed by a unique proposition of civilian Chief Martial administrator till the interim constitution was adopted by the national assembly. The assembly constituted a committee headed by Hafiz-ud-Din Pirzada to formulate the permanent constitution for Pakistan.

The committee did its work in shortest possible time and the national assembly adopted the constitution on 10<sup>th</sup> April unanimously.<sup>157</sup> The constitution declared Pakistan an Islamic republic laying down condition for head of state and head of the government to be Muslims. However, 8th amendment has made the Objective Resolution a substantial part of the constitution by incorporating it as article 2A according to which all laws made in Pakistan should be in accordance with the injunctions of Quran and Sunnah.

Its Islamic character is further reinforced by accepting the sovereignty of Almighty Allah, Islam to be the state religion and by promising the Muslims to enable them to order their lives in accordance with the fundamental principles of Islam. It also provides a long list of fundamental rights as well directive principles of state policy. Besides, the constitution envisages a federation of Pakistan and affords a parliamentary form of government leaving president with only ceremonious functions. The federal legislature is bicameral i.e. senate the upper house and national assembly the lower house. Moreover, the constitution provides an independent judiciary, provincial autonomy to the federating units, a council of common interests, a council of Islamic ideology etc.<sup>158</sup>

The subsequent voyage of the constitution however was not smooth. It has been suspended or held in abeyance twice. Amendments made by military dictators have changed spirit of original constitution. So far, 20 amendments have been made most of which have been brought about not for the fulfillment of compulsions and needs of changing times but to accomplish the selfish ends. This experimentation has achieved nothing but instability in the country that has blocked the process of establishing and strengthening the democratic system in Pakistan.<sup>159</sup> Amendments in constitution are a necessity to bring it into line with needs of the changing times. These amendments and adaptations keep the sacred instrument afresh and up-to-date.

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<sup>156</sup> www.historypak.com-constitution-0f-1973

<sup>157</sup> Ibid

<sup>158</sup> www.historypak.com-constitution-0f-1973

<sup>159</sup> Ibid

Similarly, the constitution of 1973 that came into force on 14<sup>th</sup> August 1973 was amended seven times during Bhutto regime. However, most of these amendments were not made out of necessity but were motivated by some ulterior motives.<sup>160</sup> The Constitution of Pakistan is said to be rigid and flexible at the same time when it comes to making amendments. A constitution is rigid in the sense that it cannot be amended in the manner in which ordinary laws are passed or amended. In Pakistan, a 2/3<sup>rd</sup> majority is required to pass a constitutional amendment Bill as compared to a simple majority needed for passing ordinary or institutional Bills. However it is still considered flexible as compared to the US constitution that has a more rigid amendment procedure.<sup>161</sup>

Articles 238 and 239 (in Part XI) provide for the amendment procedure in the 1973 Constitution of Pakistan. According to Article 238, the Constitution may be amended by an Act of Parliament, which means that it would follow a similar procedure as that of passing a Bill. According to Article 239, an amending Bill can be initiated in either of the two Houses of Parliament. For example, it may originate in the National Assembly and after being passed by 2/3<sup>rd</sup> majority of the House, it shall be transmitted to the other House, the Senate. If the other House also passes the amending Bill with 2/3<sup>rd</sup> majority of the total membership, without any further amendments, the Bill shall be presented to the President for assent.

If the Bill originates in one House and is passed accordingly, and then sent to the other House for approval, and if it is also passed in the other House by 2/3<sup>rd</sup> majority, but with further amendments, it shall be sent back to the House where it originated, for reconsideration. After reconsideration of the proposed changes by the originating House, if the Bill is passed including those amendments and changes, by 2/3<sup>rd</sup> majority, then it shall be presented to the President for assent. If there is an amending Bill relating to the altering of provincial boundaries, then it shall not be presented to the President unless the same Bill has been passed in the concerned Provincial Assembly by the votes of not less than 2/3<sup>rd</sup> of its total membership. Article 239 also entails that no amendment of the Constitution shall be called in question in any court on any ground. It should also be noted that according to this Article, there is no limitation on the power of the Parliament to amend any provisions of the Constitution.<sup>162</sup>

Bhutto was more like an autocrat and wanted concentration of all powers in his own hands. His desire of establishing a presidential system could not be fulfilled because of strong opposition. But the way he got the constitution amended shows his lack of respect for the democratic credentials. The first two amendments were made in 1974. The very first was primarily aimed at recognizing Bangladesh and establishing diplomatic ties with her. The second declared Ahmadis non-Muslims and it also defined the term Muslim.

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<sup>160</sup> Ibid

<sup>161</sup> www.historypak.com-constitution-of-1973

<sup>162</sup> www.historypak.com-constitution-of-1973

## CHAPTER 4



## AMENDMENT IN THE CONSTITUTION\_\_.

### INDIAN PERSPECTIVE:-

Constitution, said to be the '*General Will*' of the people, is a document of great importance. It determines the composition and functions of the different organs of the Government and also states the relationship between the government and the citizen. It is not only the basic law of the land but the living organic thing by which the other laws are to be created as per the requirement of the nation.

The life of a nation is dynamic, living, and organic and its political, social and economic conditions are always subject to change. Therefore, a constitution drafted in one era and in a particular circumstance may be found not suitable or inadequate in another era in a different context. It becomes necessary therefore to have devices, machinery or some process by which the constitution may be adopted from time to time as per the contemporary need of the nation. Such changes may be brought by way of *Judicial Interpretation* through decided cases that come before the court time to time. The framers of the Indian Constitution instead of leaving this important task entirely to the Judiciary inserted Article 368 as a formal method to provide for amendment to the constitution.<sup>163</sup>

In spite of occasional challenges, the Constitution of India has been able to keep itself working with a surprising degree of adaptability to changing circumstances. This has been due mainly to its inherent dynamism and flexibility of its amending process. The merit of the draftsmen of the constitution lies in the fact that they devised a mechanism which combines the virtues of stability and change, order and progress. During the discussion in the Constituent Assembly on the aspect amendment, some members were in favour of adopting an easier mode of amending procedure for the initial five to ten years. Explaining why it was necessary to introduce an element of flexibility in the Constitution,

*Jawaharlal Nehru observed in the Constituent Assembly on 8<sup>th</sup> November 1948,\_\_\_\_.*

"While we want this Constitution to be as solid and as permanent a structure as we can make it, nevertheless there is no permanence in Constitutions. There should be certain flexibility. If you make anything rigid and permanent, you stop a nation's growth, the growth of a living, vital, organic people. Therefore, it has to be flexible ... while we, who are assembled in this House, undoubtedly represent the people of India, nevertheless I think it can be said, and truthfully, that when a new House, by whatever name it goes, is elected in terms of this Constitution, and every adult in India has the right to vote - man and woman - the House that emerges then will certainly be fully representative of every section of the Indian people. It is right that House elected so under this Constitution - of course it will have the right to do anything - should have an easy opportunity to make such changes as it wants to. But in any event, we

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<sup>163</sup>Guest Lecture by S.K. Acharya -University of Kalyani Campus, Department of Law, university of Calcutta and comments of Prof. Amit Sen, Ph.D. (London), Ex-Dean, Faculty of Law, University of Calcutta- <http://ssrn.com/abstract=1745439>.

should not make a Constitution, such as some other great countries have, which are so rigid that they do not and cannot be adapted easily to changing conditions. Today especially, when the world is in turmoil and we are passing through a very swift period of transition, what we may do today may not be wholly applicable tomorrow. Therefore, while we make a Constitution which is sound and as basic as we can, it should also be flexible ..."<sup>164</sup>

*Dr. P.S. Deshmukh* believed that the amendment of the Constitution should be made easier as he felt there were contradictory provisions in some places which would be more and more apparent when the provisions were interpreted, and that the whole administration would suffer, if the amendment to the Constitution was not made easy. *Brajeshwar Prasad* also favoured a flexible Constitution so as to make it survive the test of time. He was of the opinion that rigidity tends to check progressive legislation or gradual innovation. On the other hand, *H.V. Kamath* favoured ensuring procedural safeguards to avoid the possibility of hasty amendment to the Constitution.<sup>165</sup>

Amendment of the Constitution of India is the process of making changes to the nation's fundamental law or supreme law. The Constitution of India provides for a distinctive amending process when compared to the Constitutions of other nations. It can be described as the Constitution having a Unique Blend of Flexibility and Rigidity. The Constitution provides for a variety in the amending process. The procedure of amendment in the constitution is laid down in Part XX-Article 368 of the Constitution of India. This procedure ensures the sanctity of the Constitution of India and keeps a check on arbitrary power of the Parliament of India.<sup>166</sup>

#### 4.1: Types of Amendment:-

The Constitution of India provides for three categories of amendments. The first category of amendments can be effected by the “*Simple Majority*” of the Parliament such as that it required for the passing of any ordinary law. The amendments under this category are specifically excluded from the purview of Article 368 which is the specific provision in the Constitution dealing with the power and the procedure for the amendment of the Constitution. The second category includes amendments that can be effected by Parliament by a prescribed process of obtaining “*Special Majority*”; and the third category of amendments includes those that require, in addition to such *Special Majority*, “*Ratification*” by at least one half of the State Legislatures. The last two categories are governed by Article 368.<sup>167</sup>

The first category of amendments are those contemplated in Articles 4 (2), 11, 73(2), 59(3), 75(6), 97, 125(2), 148(3), 158(3) and 221(2)- Schedule II, 105(3), 124(1), 133(3), 135, 137, 171(2), 170(3), 343(3),

<sup>164</sup> G.V.Reddy- The Constitutional Law on India, Note on the evolution of the Modern Constitutions.

<sup>165</sup> Ibid

<sup>166</sup> Dr. S.R. Myneni-Legal Systems in the World-Legal System in India.

<sup>167</sup> M.P.Jain, Indian Constitutional law- Amendment of the constitution in India p.1666(7ed)

348(1), 169 (3) -1962, 239A (2) -1962, 239AA (7b) -1991, 243M (4b) -1992, 243ZC (3) -1992, 244A (4) -1969, 356 (1)c, Para 7(2) of Schedule V and Para 21(2) of Schedule VI.<sup>168</sup>

Ambedkar speaking in the Constituent Assembly on 17 September 1949, pointed out that there were "innumerable articles in the Constitution" which left matters subject to laws made by Parliament. Under Article 11, Parliament may make any provision relating to citizenship notwithstanding anything in Article 5 to 10. Thus, by passing ordinary laws, Parliament may, in effect, provide, modify or annul the operation of certain provisions of the Constitution without actually amending them within the meaning of Article 368. Since such laws do not in fact make any change whatsoever in the letter of the Constitution, they cannot be regarded as amendments of the Constitution nor categorized as such.<sup>169</sup>

Article 4 provides that laws made by Parliament under Article 2 (relating to admission or establishment of new States) and Article 3 (relating to formation of new States and alteration of areas, boundaries or names of existing States) effecting amendments in the First Schedule or the Fourth Schedule and supplemental, incidental and consequential matters, shall not be deemed to be amendments of the Constitution for the purposes of Article 368. For example, the States Reorganization Act, 1956, which brought about reorganization of the States in India, was passed by Parliament as an ordinary piece of legislation. The Supreme Court held that power to reduce the total number of members of Legislative Assembly below the minimum prescribed under Article 170 (1) is implicit in the authority to make laws under Article 4.<sup>170</sup>

Article 169 empowers Parliament to provide by law for the abolition or creation of the Legislative Councils in States and specifies that though such law shall contain such provisions for the amendment of the Constitution as may be necessary, it shall not be deemed to be an amendment of the Constitution for the purposes of Article 368. The Legislative Councils Act, 1957, which provided for the creation of a Legislative Council in Andhra Pradesh and for increasing the strength of the Legislative Councils in certain other States, is an example of a law passed by Parliament in exercise of its powers under Article 169.<sup>171</sup>

The Fifth Schedule contains provisions as to the administration and control of the Schedule Areas and Scheduled Tribes. Para 7 of the Schedule vests Parliament with plenary powers to enact laws amending the Schedule and lays down that no such law shall be deemed to be an amendment of the Constitution for the purposes of Article 368. Under Para 21 of the Sixth Schedule, Parliament has full power to enact laws amending the Sixth Schedule which contains provisions for the administration of Tribal Areas in the

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<sup>168</sup> Ibid p.1667

<sup>169</sup> Ibid

<sup>170</sup> Mangal Singh v. Union of India, A.I.R. 1967 S.C. 944- M.P.Jain, Indian Constitutional law p.1667 (7ed).

<sup>171</sup> M.P.Jain, Indian Constitutional law p.1667 (7ed)

States of Assam, Meghalaya, Tripura and Mizoram. No such law will be deemed to be an amendment of the Constitution for the purposes of Article 368.<sup>172</sup>

Other examples include Part XXI of the Constitution—"Temporary, Transitional and Special Provisions" whereby "Notwithstanding anything in this Constitution" power is given to Parliament to make laws with respect to certain matters included in the State List (Article 369); Article 370 (1) (d) which empowers the President to modify, by order, provisions of the Constitution in their application to the State of Jammu and Kashmir; provisos to Articles 83 (2) and 172 (1) empower Parliament to extend the lives of the House of the People and the Legislative Assembly of every State beyond a period of five years during the operation of a Proclamation of Emergency; and Articles 83(1) and 172 (2) provide that the Council of States/Legislative Council of a State shall not be subject to dissolution but as nearly as possible one-third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

The second category and the third category of amendments that can be effected by Parliament by a prescribed "*Special Majority*"; also includes those that require, in addition to such *Special Majority*, "*Ratification*" by at least one half of the State Legislatures seeks to make any change in any of the provisions mentioned in the proviso to Article 368. These provisions relate to certain matters concerning the federal structure or of common interest to both the Union and the States viz., the election of the President (Articles 54 and 55); the extent of the executive power of the Union and the States (Articles 73 and 162); the High Courts for Union territories (Article 241); The Union Judiciary and the High Courts in the States (Chapter IV of Part V and Chapter V of Part VI from Articles 124-147 and 214-231 respectively); the distribution of legislative powers between the Union and the States (Chapter I of Part XI and Seventh Schedule); the representation of States in Parliament; and the provision for amendment of the Constitution laid down in Article 368. Ratification is done by a resolution passed by the State Legislatures. There is no specific time limit for the ratification of an amending Bill by the State Legislatures. However, the resolutions ratifying the proposed amendment must be passed before the amending Bill is presented to the President for his assent.<sup>173</sup>

## 4.2 Provision under the Constitution-Article 368:-

Article 368 of the Constitution of India grants constituent power to make formal amendments and empowers Parliament to amend the Constitution by way of addition, variation or repeal of any provision according to the procedure laid down therein, which is different from the procedure for ordinary legislation. Article 368 has been amended by the 24th and 42nd Amendments in 1971 and 1976 respectively. The following is the full text of Article 368 of the Constitution, which governs constitutional amendments.

<sup>172</sup> Ibid

<sup>173</sup> M.P.Jain, Indian Constitutional law- Amendment in the constitution p.1667(7ed)

**368. Power of Parliament to amend the Constitution and Procedure therefore:**

- 1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.
- 2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill; Provided that if such amendment seeks to make any change in –
  - a) Article 54, 55, 73, 162 or 241, or
  - b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI;
  - c) any of the Lists in the Seventh Schedule, or
  - d) the representation of States in Parliament, or
  - e) the provisions of this article;

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

- 3) Nothing in article 13 shall apply to any amendment made under this article.
- 4) *No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.*
- 5) *For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.*<sup>174</sup>

New clauses 368 (1) and 368 (3) were added by the 24th Amendment in 1971, which also added a new clause (4) in Article 13 which reads, "Nothing in this article shall apply to any amendment of this Constitution made under Article 368." The provisions in *italics* were inserted by the 42nd Amendment, but were later declared unconstitutional by the Supreme Court.<sup>175</sup>

After the 24th amendment, Article 4(2), etc. of the constitution are superseded/made void by Article 368 (1) which is the only procedure for amending the constitution however marginal may be the nature of the amendment. Supreme Court ruled that the constituent power under Article 368 must be exercised by the

<sup>174</sup> M.P.Jain, Indian Constitutional law- part xx -Amendment in the constitution p.1846 (7ed).

<sup>175</sup> Minerva Mills v. Union of India, 1980. M.P.Jain, Indian Constitutional law- Amendment in the constitution p.1846(7ed).

Parliament in the prescribed manner and cannot be exercised under the legislative powers of the Parliament.

#### **4.3: Rules of Procedure in Parliament:-**

An amendment of the Constitution can be initiated only by the introduction of a Bill in either House of Parliament. The Bill must then be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. There is no provision for a joint sitting in case of disagreement between the two Houses. The Bill, passed by the required majority, is then presented to the President who shall give his assent to the Bill.

If the amendment seeks to make any change in any of the provisions mentioned in the proviso to article 368, it must be ratified by the Legislatures of not less than one-half of the States. Although, there is no prescribed time limit for ratification, it must be completed before the amending Bill is presented to the President for his assent. Every constitutional amendment is formulated as a statute. The first amendment is called the "Constitution (First Amendment) Act", the second, the "Constitution (Second Amendment) Act", and so forth. Each usually has the long title "An Act further to amend the Constitution of India".<sup>176</sup>

Article 368 does not specify the legislative procedure to be followed at various stages of enacting an amendment. There are gaps in the procedure as to how and after what notice a Bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. This point was decided by the Supreme Court while delivering the judgment, Patanjali Sastri J. observed, "Having provided for the constitution of a Parliament and prescribed a certain procedure for the conduct of its ordinary legislative business to be supplemented by rules made by each House (Article 118), the makers of the Constitution must be taken to have intended the Parliament to follow that procedure, so far as it may be applicable consistently with the express provisions of Article 368, when they entrusted to it the power of amending the Constitution."<sup>177</sup>

Hence, barring the requirements of special majority, ratification by the State Legislatures in certain cases, and the mandatory assent by the President, a Bill for amending the Constitution is dealt with the Parliament following the same legislative process as applicable to an ordinary piece of legislation. The Rules of the House in the Rajya Sabha do not contain special provisions with regard to Bills for the amendment of the Constitution and the Rules relating to ordinary Bills apply, subject to the requirements of Article 368.<sup>178</sup>

The Rules of Procedure and Conduct of Business make certain specific provisions regarding amendment bills in the Lok Sabha. They relate to the voting procedure in the House at various stages of such Bills, in the light of the requirements of Article 368; and the procedure before introduction in the case of such

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<sup>176</sup> <https://encyclopedia.org/amendment-of-the-constitution-of-india>.

<sup>177</sup> Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.

<sup>178</sup> M.P.Jain, Indian Constitutional law- Amendment in the constitution p.1668(7ed)



Bills, if sponsored by Private Members. Although the "special majority", required by article 368 is prima facie applicable only to the voting at the final stage, the Lok Sabha Rules prescribe adherence to this constitutional requirement at all the effective stages of the Bill, i.e., for adoption of the motion that the Bill be taken into consideration; that the Bill as reported by the Select/Joint Committee be taken into consideration, in case a Bill has been referred to a Committee; for adoption of each clause or schedule or clause or schedule as amended, of a Bill; or that the Bill or the Bill as amended, as the case may be, be passed.<sup>179</sup>

*B.R. Ambedkar, speaking in the Constituent Assembly on 4 November 1948.*\_\_\_\_\_

"It is said that the provisions contained in the Draft make amendment difficult. It is proposed that the Constitution should be amendable by a simple majority at least for some years. The argument is subtle and ingenious. It is said that this Constituent Assembly is not elected on adult suffrage while the future Parliament will be elected on adult suffrage and yet the former has been given the right to pass the Constitution by a simple majority while the latter has been denied the same right. It is paraded as one of the absurdities of the Draft Constitution. I must repudiate the charge because it is without foundation. To know how simple are the provisions of the Draft Constitution in respect of amending the Constitution one has only to study the provisions for amendment contained in the American and Australian Constitutions. Compared to them those contained in the Draft Constitution will be found to be the simplest.

The Draft Constitution has eliminated the elaborate and difficult procedures such as a decision by a convention or a referendum ... It is only for amendments of specific matters—and they are only few—that the ratification of the State Legislatures is required. All other Articles of the Constitution are left to be amended by Parliament. The only limitation is that it shall be done by a majority of not less than two-thirds of the members of each House present and voting and a majority of the total membership of each House. It is difficult to conceive a simpler method of amending the Constitution. What is said to be the absurdity of the amending provisions is founded upon a misconception of the position of the Constituent Assembly and of the future Parliament elected under the Constitution. The Constituent Assembly in making a Constitution has no partisan motive. Beyond securing a good and workable Constitution it has no axe to grind. In considering the Articles of the Constitution it has no eye on getting through a particular measure.

The future Parliament if it met as Constituent Assembly, its members will be acting as partisans seeking to carry amendments to the Constitution to facilitate the passing of party measures which they have failed to get through Parliament by reason of some Article of the Constitution which has acted as an obstacle in

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<sup>179</sup> Ibid p.1668(7ed)



their way. Parliament will have an axe to grind while the Constituent Assembly has none. That is the difference between the Constituent Assembly and the future Parliament. That explains why the Constituent Assembly though elected on limited franchise can be trusted to pass the Constitution by simple majority and why the Parliament though elected on adult suffrage cannot be trusted with the same power to amend it."<sup>180</sup>

#### **4.4 Role of State Legislatures:-**

The role of the states in constitutional amendment is limited. State legislatures cannot initiate any Bill or proposal for amendment of the Constitution. They are associated in the process of the amendment only through the ratification procedure laid down in Article 368, in case the amendment seeks to make any change in the any of the provisions mentioned in the proviso to Article 368.

The only other provision for constitutional changes by state legislatures is to initiate the process for creating or abolishing Legislative Councils in their respective legislatures, and to give their views on a proposed Parliamentary bill seeking to affect the area, boundaries or name of any State or States which has been referred to them under the proviso to Article 3. However, this referral does not restrict Parliament's power to make any further amendments of the Bill. <sup>181</sup>

Article 169 (1) reads, "Notwithstanding anything in article 168, Parliament may by law provide for the abolition of the Legislative Council of a State having such a Council or for the creation of such a Council in a State having no such Council, if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting." The proviso of article 3 provides that no bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the bill has been referred by the President to the Legislature of the State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.<sup>182</sup>

#### **Role of Union territories:-**

Union territories have no say in constitutional amendments, including the ratification process which is only open to States. Delhi and Pondicherry are two union territories that are entitled, by special constitutional amendments, to have an elected Legislative Assembly and a Cabinet of ministers, thereby enjoying partial statehood powers. However, neither of these territories can participate in the ratification process because they are not States, as defined by the Constitution. <sup>183</sup>

<sup>180</sup> G.V.Reddy- The Constitutional Law on India, Note on the Modern Constitutions.

<sup>181</sup> <http://www.indiankanoon.com>

<sup>182</sup> <http://www.indiankanoon.com>)

<sup>183</sup> Ibid

#### 4.5 Limitations--Basic Structure Doctrine:-

The first implied limitation derived from the theory of delegation is the most basic: the constitutional amendment power cannot be used in order to destroy the constitution. The delegated amendment power is the internal method that the constitution provides for its self-preservation.<sup>184</sup> The second limitation derives from the first one, but it is one logical step forward: the constitutional amendment power cannot be used in order to destroy the basic principles of the constitution.<sup>185</sup> The third limitation is that the amending power, like any governmental institution, must act in bona fide.<sup>186</sup>

The doctrine of implicit limitations on the amendment power is thus a method to protect the constitution against the possibility that ‘the legislature of the day, hijacked by individual, group and institutional interests and temporary impulses or permanent passions may use its authority to inflict torture on the Constitution’.<sup>187</sup> This fear from abuse of the amendment power is not a mere theoretical presupposition. As the lessons from India, among other places, teach us, it is built upon historical evidence.

The Constitution can be amended only by the Parliament; and only in the manner provided. Although Parliament must preserve the basic framework of the Constitution, there is no other limitation placed upon the amending power, meaning that there is no provision of the Constitution that cannot be amended. “The Bombay High Court held that any attempt to amend the Constitution by a Legislature other than Parliament, and in a manner different from that provided for, will be void and inoperative”.<sup>188</sup>

The Supreme Court first struck down a constitutional amendment in 1967, ruling in the case - An amendment was struck down on the basis that it violated Article 13: "The State shall not make any law which takes away or abridges the rights conferred by [the charter of Fundamental Rights]".<sup>189</sup> The term "law" in this article was interpreted as including a constitutional amendment. Parliament responded by enacting the twenty-fourth Amendment of the Constitution of India which declared that "nothing in Article 13 shall apply to any amendment of this Constitution".

The current limitation on amendments comes from *Kesavananda Bharati*'s case wherein the Supreme Court ruled that amendments of the constitution must respect the "basic structure" of the constitution, and certain fundamental features of the constitution cannot be altered by amendment.<sup>190</sup> Parliament attempted to remove this limitation by enacting the Forty-second Amendment, which declared, among other provisions, that "there shall be no limitation whatever on the constituent power of Parliament to amend

<sup>184</sup> This was acknowledged in *Kesavanda Bharati v. State of Kerala*, AIR 1973 SC 1461,1426: ‘Article 368 cannot be construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called as lawful “Harakiri.” Khanna(1977, 11) ; Keshavamurthy (1982, 86).

<sup>185</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461. See Krishnaswamy (2010,74).

<sup>186</sup> Schmitt (2008, 152).

<sup>187</sup> Guha and Tundawala (2008, 537).

<sup>188</sup> In *Abdul Rahiman Jamaluddin v. Vithal Arjun*, AIR 1958 Bombay, 94, 1957.

<sup>189</sup> *L.C. Golak Nath and Ors. vs. State of Punjab* AIR 1967 SC 1643

<sup>190</sup> *Kesavananda Bharati v. The State of Kerala*, AIR 1973 SC 1461.

...this Constitution". However, this change was itself later declared invalid by the Supreme Court in *Minerva Mills v. Union of India*<sup>191</sup>.

The issue of whether an entire constitutional amendment is void for want of ratification or only an amended provision required to be ratified under proviso to clause (2) of article 368 was debated before the Supreme Court in *Kihota Hollohon's case*, in which the constitutional validity of the Tenth Schedule of the Constitution inserted by the 52nd Amendment in 1985 was challenged. The decisions of the Speakers/Chairmen on disqualification, which had been challenged in different High Courts through different petitions, were heard by a five-member Constitution Bench of the Supreme Court. The case, now popularly known as *Anti-Defection* case, was decided in 1992. The Constitution Bench in its majority judgement upheld the validity of the Tenth Schedule, but declared Paragraph 7 of the Schedule invalid because it was not ratified by the required number of the Legislatures of the States as it brought about in terms and effect, a change in Articles 136, 226 and 227 of the Constitution. While doing so, the majority treated Paragraph 7 as a severable part from the rest of the Schedule. However, in the dissenting opinion, the minority of the Judges held that the entire Amendment is invalid for want of ratification<sup>192</sup>.

#### 4.6: Judicial Interpretation on Amendment of Basic Structure:

Generally the Constitution provides machinery whereby any of its provision may be altered following the procedure prescribed therein. The framers of the Indian Constitution were anxious to have a document which could grow with the growing nation and enable the parliament to give effect to the popular will which sometimes tend the people to adopt extra constitutional method like revolution to change the Constitution. The procedure of amendment under Article 368 of the constitution shows the awareness of the framers about the danger of two extremes *i.e.* extreme flexibility and extreme rigidity. However, in spite of its own importance, Article 368 is not free from ambiguity and imperfection. Since 1951 questions have been raised about the true scope and nature of amending process provided under Article 368 of the constitution. A survey of the Indian constitutional amendments till this date reveals that there are very few provisions that remain untouched today. Starting with the preamble of the constitution and ending with Article 394A majority of the provisions have been touched upon by taking the recourse of amendments for more than hundred times.

The doctrine of *Basic Structure* as evolved in the *Keshavananda Bharati v. State of Kerala*<sup>193</sup>, is considered by many as a powerful weapon to strike at the plenary power of parliament to amend the constitution even though the concept itself is an elastic and imprecise one. Prior to the decision in *Golak*

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<sup>191</sup> AIR 1980 SC 1789 3 SCC 625.

<sup>192</sup> *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412.

<sup>193</sup> AIR 1973 SC 1461.

Nath case, it was settled that the Constitutional Amendment Acts are not the ordinary laws passed by the parliament exercising its ordinary legislative power. In *Shankari Prasad v. State of U.P.*,<sup>194</sup> the unanimous view of the Supreme Court was that there is a clear distinction between ordinary law and constitutional law made by the parliament by exercising its constituent power. Therefore in absence of any clear and express limitation to the Contrary the plenary power of parliament cannot be restricted.

Subsequently, the Constitution (Seventeenth Amendment) Act which added several legislations to the Ninth Schedule of the Constitution making them immune from attack on the ground of violation of fundamental rights was challenged in *Sajjan Singh v. State of Rajasthan*<sup>195</sup>. *Gajendragadkar*, C.J. observed that if the framers of the constitution intended to exclude the fundamental rights from the scope of the amending power they would have made a clear provision to that effect. The terms of Article 368 of the constitution are perfectly general and empower the parliament to amend the constitution without any exception whatsoever.

Two of the five judges (*Hidayatulla & Mudholkar*, JJ.), however in a separate but concurring opinion expressed serious doubts whether fundamental rights created any restriction upon the power of the parliament. Perhaps encouraged by the above opinion of the two judges, the question whether any of the fundamental rights could be abridged or taken away by parliament in exercise of its power under Article 368 of the Constitution was raised again in *Golak Nath v. State of Punjab* in 1967<sup>196</sup>. In *Golak Nath* case the Constitution (Seventeenth Amendment) Act was challenged which involve three writ petitions. The majority overruled its earlier decision in *Shankari Prasad* and *Sajjan Singh*'s case<sup>197</sup>.

Chief Justice *Subba Rao* invoked the doctrine of *Prospective Overruling* in order to save the amendments already made including the amendments disputed in the case. The majority took the view that the fundamental rights occupy a transcendental position in the Constitution therefore if amendments took away or abridged rights conferred by Part III of the Constitution are void. The leading majority view however, did not express any final opinion as to whether fundamental rights could be abridge by parliament exercising its residuary power and calling a Constituent Assembly for making a new constitution or radically changing it.

The minority of judges in *Golak Nath* case consisting of Justice *Wanchoo*, *Hidayatullah*, *Bhargava*, *Mitter*, *Bachawat* and *Ramaswami* did not agree with the view that Article 368 of the constitution merely

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<sup>194</sup> AIR 1951 SC 458

<sup>195</sup> AIR 1965 SC 845.

<sup>196</sup> L.C. Golak Nath and Ors. vs. State of Punjab AIR 1967 SC 1643

<sup>197</sup> AIR 1951 SC 458; AIR 1965 SC 845.

prescribe the procedure not the power to amend. It is important to note that all the eleven judges who constituted the Bench agreed upon the view that even fundamental rights could be taken away but they adopted different methods for achieving that purpose. *Subba Rao*, C.J. and four of his colleagues suggested calling for a Constituent Assembly; *Hidayatullah J.* suggested an amendment of Article 368 for calling a Constituent Assembly after passing a law under Entry 97; the remaining five judges held that the parliament itself had the power to amend the constitution so as to abridge or take away the fundamental rights guaranteed by the Constitution.<sup>198</sup>

A different view had also been expressed in this respect by Ex- chief Justice of India *K. Subba Rao* in the following words: “The Supreme Court of India in *Golak Nath v. State of Punjab* did not say that the parliament has no power to abridge the fundamental rights. What it said that it has no power to abridge the fundamental rights except the manner and to the extent prescribed in Part III of the Constitution.”<sup>199</sup>

According to Prof. P.K. Tripathi the distinction between Constitution and ordinary law had always been sensed and recognized, but the challenge now posed to articulate this distinction with precision and juristic terms. Against this challenge posed by the decision relying upon the works of the positivist Jurist *Austin*, *Kelson* and *Salmond*, he submitted that the distinction between law and Constitution lay in the criterion of validity; *i.e.* whereas ordinary law depended on a higher law for establishing its own validity, a provision of the constitution did not so depend on another law and, instead generated its own validity.<sup>200</sup>

In *Golak Nath Case*<sup>201</sup> *Subba Rao*, C.J., speaking on behalf of himself and four other Judges, equated fundamental rights with natural rights and characterized them as ‘the primordial rights’ necessary for the development of human personality. He referred to the marginal heading of Article 368 and held that the power to amend the constitution was to be found in the Article 248 read with Entry 97 of List-I of Seventh Schedule, since power to amend was not expressly mentioned either by any Article or by any legislative entry in the Constitution. Whatever may be the basis of the decision, it raised an acute controversy in the country.<sup>202</sup>

<sup>198</sup> *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461: (1973) 4 SCC 225

<sup>199</sup> *K. Subba Rao* (Ex- chief Justice of India), “The Two Judgments: *Golak Nath* and *Keshavananda Bharati*” (1973) 2 SCC (Jour) 1.

<sup>200</sup> Prof. P. K. Tripathi, *Keshavananda Bharati v. State of Kerala who wins?* (1974) 1 SCC (Jour) 3.

<sup>201</sup> *L.C. Golak Nath and Ors. vs. State of Punjab*, AIR 1967 SC 1643.

<sup>202</sup> Justice H.R. Khanna, “Power To Amend The Constitution”, (1983) 2 SCC (Jour) 2.

In order to overcome the difficulty created by the decision *Nath Pai*, M.P. introduced a Bill in the Lok Sabha on 7th April, 1967 for amending Article 368. The object of the Bill was to restore the parliament in its earlier position, so as to make it explicit that the parliament could amend any provision of the Constitution including the fundamental rights following the procedure contained in Article 368. But the Bill remained in cold storage, because the decision in *Shantilal Mangaldas's* case<sup>203</sup> by giving effect to the fourth Amendment Act, which made the adequacy of compensation non-justifiable, removed the sense of urgency from the Bill.<sup>204</sup>

Soon after in the 1971 election, the Congress Party was returned with a huge majority in the Lok Sabha and the parliament passed the Constitution (24th Amendment) Act to neutralize the effect of *Golak Nath*<sup>205</sup> and set the stage for *Keshavananda Bharati's* case<sup>206</sup> in the Indian constitutional history. By way of the Constitution (24th Amendment) Act, Parliament introduced certain modifications in Article 13 and Article 368 to assert the parliament's amending power and get over the *Golak Nath* case. Subsequently by the Constitution (29th Amendment) Act, the Kerala Land Reforms (Amendment) Act, 1969 and 1971 were included in the Ninth Schedule of the Constitution in order to making them immune from attack on the ground of violation of fundamental rights. These amendments made by the parliament subsequent to the *Golak Nath's* case were challenged in *Keshavananda Bharati v. State of Kerala*,<sup>207</sup> the decision of which creates many paradoxes in the country.

In *Keshavananda's* case the court was confronted by a difficult dilemma even though specific amendments had been made in Article 13 and 368, because the validity of the Constitution (24th Amendment) Act itself was challenged in the present case. If the 24<sup>th</sup> Amendment stood valid fundamental rights could be the plaything of any parliamentary majority while, if it failed, an alternative impossible situation would arise. In this situation, the Supreme Court overruled the decision of *Golak Nath's* case and by an original stroke of statesmanship, evolved the 'Basic Structure' theory.

*Hedge and Mukherjee, JJ.*, contended that an examination of the various provision of the Constitution shows that it has made a distinction between 'the Constitution' and 'the laws.' They asserted that the framers of the Constitution did not use the expression 'law' in Article 13 to include Constitutional law. As regards to the scope of the power of amendment of the Constitution under Article 368, the majority in *Keshavananda's* case did not concede an unlimited amending power, rather it has affirmed the proposition of limited amending power asserted by the majority in *Golak Nath* case.

<sup>203</sup> *State of Gujrat v. Shantilal Mangaldas* (1969) 3 S.C.R 341.

<sup>204</sup> H.M. Seervai, 'Constitutional Law of India', 3111, Vol. III, 4th Edition, 2006 .

<sup>205</sup> *L.C. Golak Nath and Ors. vs. State of Punjab*, AIR 1967 SC 1643

<sup>206</sup> *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461: (1973) 4 SCC 225.

<sup>207</sup> AIR 1973 SC 1461: (1973) 4 SCC 225



The majority held the view that there are certain Basic Structures or Features of the Constitution which cannot be altered in exercise of the power under Article 368. Therefore a constitutional amendment which seeks to alter or destroy or emasculate the Basic Structures of the Constitution is *ultra vires*. They took the word 'amend' in a restrictive sense which only means changes other than altering the very basic structure of the Constitution, which would be tantamount to make a new Constitution. Though the court by a stroke of judicial creativity handcuffed the parliament's amending power under Article 368 but the Judges made no attempt to define the Basic Structure, in clear terms. The result is that the Supreme Court by a majority of seven Judges boldly declared the limitation of Basic Structure and the expression has now become a very important weapon in the hands of Judiciary to limit the amending power of the parliament which is expanding day to day.<sup>208</sup>

In *Indira Neheru Gandhi v. Raj Narain*,<sup>209</sup> the Supreme Court has had an occasion to apply the theory of Basic Structure when the parliament enacted the Constitution (39th Amendment) Act. It was contended that Clause (4) of the 39th Amendment Act wiped out not merely the High Court's judgment, but even the election petition and the law relating thereto. This challenge was unanimously upheld by the Supreme Court. All the Judges seemed to rely in varying degrees, either expressly or impliedly, upon the Basic Structure theory, however the Judges differed in their perception of the Basic Structure and its application to the case on hand.

In *Minerva Mills Ltd. V. Union of India*<sup>210</sup> the difficulty in applying the doctrine of Basic Structure was noticed once again when the petitioner *inter alia*, challenged the validity of newly added Clauses (4) and (5) of Article 368. *Chandrachud, C.J.*, striking down the amendment observed: "Since the Constitution had conferred a limited amending power on the parliament, the parliament cannot under the exercise of that limited power enlarge the very power into an absolute power. Indeed, a limited amending power is one of the Basic Feature of our Constitution, and therefore, the limitations on that power cannot be destroyed. The doctrine of a limited power cannot by the exercise of that power convert the limited power into an unlimited one."<sup>211</sup>

The doctrine of Basic Structure was further affirmed in *Waman Rao v. Union of India*<sup>212</sup> where the Supreme Court applied the doctrine of prospective overruling to the law declared in *Keshavananda* case

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<sup>208</sup> *Keshavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 767,777 (Para 1426, 1436)

<sup>209</sup> 1975 Supp SCC 1 : AIR 1975 SC 2299

<sup>210</sup> AIR 1980 SC 1789

<sup>211</sup> AIR 1980 SC 1789

<sup>212</sup> AIR 1981 SC 271, & *Ambika Prasad Mishra v. State of Andhra Pradesh*, AIR 1980 SC 1762



by holding that all amendments to the Constitution which were made before April 24, 1973 i.e., the day on which the judgment in *Keshavananda* case was rendered valid and constitutional.

In *S.P.Sampath Kumar v. Union of India*<sup>213</sup> and *P. Sambamurthy v. State of A.P.*<sup>214</sup> the judges laid down that the rule of law and judicial review were integral part to the Constitution and therefore constitute the Basic Structure. Effective access to justice is part of the 'Basic Structure' according to the decision in *Central Coal Fields Ltd. v. Jaiswal Coal Co.*<sup>215</sup>

In *Bhim Singhji v. Union of India*<sup>216</sup>, *Krishna Iyer and Sen, JJ*, asserted that the concept of social and economic justice – to build a welfare state forms a part of the Basic Structure. Article 32, 136, 141 and 142 of the Constitution conferring power on the Supreme Court were held as a Basic Structure in *Delhi Judicial Service Assn. v. State of Gujarat*<sup>217</sup>.

The independence of judiciary within the limits of the Constitution,<sup>218</sup> judicial review under Article 32, 226 and 227 of the Constitution,<sup>219</sup> Preamble,<sup>220</sup> Independence of Judiciary,<sup>221</sup> Secularism,<sup>222</sup> federalism,<sup>223</sup> separation of power,<sup>224</sup> free, fair and periodic election<sup>225</sup> are all declared to be the Basic Structure of the Constitution. The power of the High Court to exercise Judicial Superintendence over the decision of all courts within their respective jurisdiction is also part of Basic Structure.<sup>226</sup>

In the *Mandal's*<sup>227</sup> case it was held that the failure to exclude the creamy layer or the inclusion of forward castes in the list of backward class would violate the provisions of Article 14 and 16 which form the

<sup>213</sup> AIR 1987, SC 368

<sup>214</sup> AIR 1987, SC 663

<sup>215</sup> 1980 Supp. SCC 471.

<sup>216</sup> (1981) 1 SCC 166 : AIR 1981 SC 234, Para 81 & 82.

<sup>217</sup> (1991) 4 SCC 406 at 452.

<sup>218</sup> *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441; AIR 1994 SC 268; *S.P. Gupta v. Union of India*, AIR 1982 SC 149, *State of Bihar v. Bal Mukund Shah* (2000) 4 SCC 640.

<sup>219</sup> *Chandrakumar L. v. Union of India*, AIR 1997 SC 1125.

<sup>220</sup> *State of U.P. v. Dina Nath Shukla*, AIR 1997 SC 1095.

<sup>221</sup> *Kumar Padma Prasad v. Union of India*, AIR 1992 SC 1213.

<sup>222</sup> *Valsamma Paul v. Cochin University*, AIR 1996 SC 1011; *Aruna Roy v. Union of India*, AIR 2002 SC 3176.

<sup>223</sup> *Bommai S.R. v. Union of India*, AIR 1994 SC 1918.

<sup>224</sup> *State of Bihar v. Bal Mukund Shah*, AIR 2000 SC 1296.

<sup>225</sup> In the matter of Special Ref. No. 1 of 2002 (Gujarat Assembly Election Matter), AIR 2003 SC 87; *Kihoto Hollohan v. Zachilhu*, AIR 1993 SC 412.

<sup>226</sup> *Chandrakumar L. v. Union of India*, AIR 1997 SC 1125

<sup>227</sup> *Indira Sawhney II v. Union of India*, AIR 2000 SC 498

Basic Structure of the Constitution. In *All India Judge's Association v. Union of India*<sup>228</sup> an independent and efficient judicial system was held to be the part of the list of Basic Structure.

Rule of law as a basic structure was reiterated in *Indira Sawhney's*<sup>229</sup> case. Unamendability of the Basic Structure in itself constitutes the Basic Structure of the Constitution. According to *Prof. Baxi* the fact that the judiciary has a say in the matter of amendment of the Constitution is the most notable aspect of the doctrine of Basic Structure.<sup>230</sup>

In *M. Nagraj v. Union of India* the court observed that the amendment should not destroy constitutional identity and it is the theory of Basic Structure only to judge the validity of constitutional amendment. Doctrine of equality is the essence of democracy accordingly it was held as a Basic Structure of the Constitution.<sup>231</sup>

In a very recent judgment *I.R. Coelho v. State of Tamil Nadu*<sup>232</sup> the Supreme Court applied the doctrine and held that: "All amendments to the constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provision would be open to attack on the ground that they destroy or damage the Basic Structure if the fundamental right or rights taken away or abrogated pertains or pertain to the Basic Structure."

The above pronouncements of the Indian judiciary have given a firm establishment to the doctrine of Basic Structure in our constitutional law. But the court has not foreclosed the list of the basic features and there has been no consensus in this regard among the Judges. Accordingly the dispute remains about its contents and it remains an imprecise and elastic concept till this date. Though the Judiciary has successfully invented a new doctrine to curb the amending power of the parliament, even then doubts have been expressed as to the role of Judiciary in declaring the validity of the constitutional amendments in India.

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<sup>228</sup> All India Judge's Association v. Union of India AIR 2002 SC 1752 25

<sup>229</sup> AIR 1992 SC 477

<sup>230</sup> U. Baxi: *Courage, Craft and Contention*, 64ff (1985) cited in V.N.Shukla, "Constitution of India" at 897 (Reprint July, 06)

<sup>231</sup> AIR 2007 SC 71 (Para 25 & 33)

<sup>232</sup> AIR 2007 SC 861, 892, Para 15(iii)

There is no scope in denying the fact that this doctrine has served the country very well during turbulent times when parliament was in a mood to resort to Article 368 recklessly. But the questions always posed before us; can we divide the provisions of the Constitution some as basic and the others as peripheral? Instead of interpreting the constitutional provisions can the judiciary assume the constituent power which was not vested in it? Whether the mere assumption that the parliament will abuse its power is a valid ground to limit its power when it is not mentioned in the Article 368 itself?

When the parliament amends the Constitution by exercising its power under Article 368 it becomes the part of the original constitution which is the fountainhead for the power of the Judiciary as well. The power to make judicial review intended to be exercised with respect to laws made under the Constitution, not in respect to the Constitutional law. Doctrine of Basic Structure negates this proposition which has no precise meaning at all. A concept which is considered to be the basic today ceases to be so tomorrow.

Thus when the power to amend the Constitution is expressly conferred upon the parliament, then restricting the same by developing some artificial limitation is beyond the democratic norms. Even the debate took place in the constituent assembly shows that the framers never contemplated the present constitution to be immutable and unamenable. These observations clearly show a clear intention for framing a flexible Constitution which could adapt the changing circumstances of the nation. Therefore it is not desirable to restrict the parliament's power to amend the Constitution in the name of Basic Structure. If any provision of the Constitution declared as Basic Structure is found to be an impediment to fulfill the other objectives of the Constitution then the provision be necessarily amended. The expression 'Amendment of the Constitution' must be given its *prima facie* meaning i.e. the power to amend any provision of the Constitution including the provisions contained in Part-III.

A comparative study of the Constitution of Canada, Australia, USA, Switzerland, Ireland and Japan shows that the Constitution which wanted to place prohibition or restrictions, there were always express provision to that effect. Since there is no such provision in the Indian Constitution, parliament is competent enough to amend any provision following the procedure prescribed under Article 368. It is the will of the people that is reflected in the unlimited constituent power enshrined in Article 368. For the elected representatives of the people in a democratic country to amend the Constitution under Article 368 is only carrying out the mandate of the people and as such this cannot be curbed by any implied limitations.

In India the Constitution being controlled does not leave the power of amendment to any entry in the legislative lists, but enshrines it in Article 368 itself. The Canadian constitution is an example of uncontrolled constitution with a legislative list containing an entry as to amendment. To read into Entry

97 a residuary amending power is to convert a constituent power as a mere legislative power of amendment.<sup>233</sup> He argued when the expression 'laws in force' in Article 13 (2) could not be said to be Constitutional Law. So an amendment of the constitution cannot be tested by the touchstone of fundamental rights.

He adverted the speeches of Pandit Jawharlal Nehru and Dr. B.R. Ambedkar in the constituent assembly (referred to by Bachawat, J. in *Golak Nath* minority judgment) which pointed out that every provision of the constitution is subject to the amending process. Judges only reveal the law and not make it. Once the judiciary vetoes the unlimited amending power they cease to be Judges of free democracy. The Constitution was only a means to an end which is 'the safety and greatness and well being of the country and the people for whom the Constitution was enacted'. This end was achieved by way of constitutional amendments, in a federal up. Unless specifically so provided by express provisions, there can be no limitation on the amending power.<sup>234</sup>

It is submitted that the principle of Basic Structure must be clarified with finality. Even after the expiry of 34 years the Supreme Court has not spelled out what are these Basic Structure and the articles in which they are constituted. Certain generalization has been made, but if it is left to guess work, then as stated publicly by the former Law Minister *Shri Ram Jethmalani*, more than 80% of the provisions of the Constitution is "Basic Structure". It will, therefore mean that hardly any provision of the Constitution can be modified or amended by the parliament. The sovereign body representing the people of India *viz.* the constituent assembly has specifically provided the process and power of amending the Constitution in Article 368 of the Constitution and there is no limitation restricting it to certain articles whether called 'basic or otherwise'. There cannot be any limitation placed by any wing of the Constitution even by the Supreme Judiciary on the 'Constituent Power' specifically laid down in the Constitution. The decision of 228 *Ibid* the Supreme Court's majority member is a clear violation of the provision of Article 368 and the constituent powers of the parliament and therefore, is *ultra vires* of the Constitution. This needs to be clarified and set right by the parliament.<sup>235</sup>

Even the first recommendation of the Swaran Singh Committee was that Article 368 should be further clarified by the addition of a sub-clause in effect saying that no amendment shall be called into question in any court of law on any ground. The committee reasons that any amendment to the constitution,

<sup>233</sup> V.G. Ramachandran, 'Summery of Arguments in the Fundamental Rights case', (1973) 4S CC (jour)35

<sup>234</sup> L.C. Golak Nath and Ors. vs. State of Punjab, AIR 1967 SC 1643

<sup>235</sup> Vasant Sathe, 'Fundamentals of the Constitution and Parliamentary Reforms' in Dr. Subhas C. Kashyap(ed) Constitution of India – Review and Reassessment, 68-69, 2006.

following the prescribed procedure is a part of the Constitution, the supreme law which of course cannot be challenged in any court. This view has an impressive judicial and juristic support. It simply restores the law as it prevailed from 1950 to 1967; and some would even say until and after Keshavananda's case whose ratio is highly indeterminate. At any rate, all justice in that case gave parliament wide-ranging power to amend the Constitution, and at least six Justices conceded parliamentary supremacy in unequivocal term. Even if the court accepted that, there was a majority decision limiting parliament's power, there a question will still arise whether judicial review of Constitutional amendments is a 'Basic Structure'?

In order to remove the difficulty or ambiguity Professor Upendra Baxi suggested that the Swaran Singh Committee's proposed addition may recast as follows: "Notwithstanding anything contained in this Constitution, the term 'Constituent Power' used herein shall mean and include the power to change the Basic Structure, and essential features, of this Constitution and no such amendment shall be called in to question in any court." He wrote that, this provision creates a bar to judicial review for any other and subsequent amendment which may do so. Now one may say that Article 368 confers a limited power which cannot be converted into absolute; but can this argument serve any purpose, when Article 368 empowers the parliament to amend the Article 368 itself. Moreover there is an inherent fallacy in the argument that the amending power of the parliament under Article 368 is limited, which must not be interpreted so as to destroy the Basic Structure of the Constitution. Both the powers i.e. power to amend the Constitution and the power to make judicial review of such amendment are to be found within the constitution. Therefore if the amending power is limited then the power to make judicial review be also limited too.

If the Constitution is not always to be what parliament says it is, how can it always be what the judges say it is? When Mr. Justice Hidayatullah said in Sajjan Singh case that fundamental rights should not be the plaything of a special legislative majority, I had to ask reluctantly but equally forcefully in 1967, soon after Golak Nath's case whether the rights can be plaything of a special judicial majority? The foreboding is born out.

Justice Mathew wonders in Indira Gandhi case, whether Keshavananda's case did decide that Article 14 does not pertain to the Basic Structure; Justice Khanna in retrospectively explaining his Keshavananda opinion only mentions that the rights guaranteed by Article 15 and the rights embodying secular character of the state, cannot be abridged or repealed. All other articles in Part –III are subject to the amending power. It is unprofitable to multiply instances of this kind. This uncertainty over the nature and ambit of amending power may be perhaps, inevitable, given the way the constitution has been drafted. The continuance of dialogue between Judiciary and Parliament over the scope and nature of amending power

may well be a part of the constitutionally desired social order. He then overstressed the point and said that “this uncertainty is itself a Basic Structure of the Constitution.”<sup>236</sup>

The doctrine of Basic Structure is considered to be a powerful weapon which can be used by the judiciary to curtail or limit the power of the parliament, and this ultimately raises the controversy. It must be remembered that there is no inherent confrontation between the legislature and the judiciary since both of them get their origin from the Constitution of itself. In country like India where the ‘Rule of Law’ prevails there is a great need of wise accommodation between Parliament and Supreme Court and not the confrontation with one another. Vagueness, elasticity, uncertainty inclusive nature and ambiguity are the prime criticisms against the doctrine of Basic Structure, which need to be clarified with certainty.

V.R. Krishna Iyer submitted, “I can appreciate the judicial inclination to put an end to the uncertainty of the Basic Structure jurisprudence, so that parliament may know where the constitution inhibits its legislative exercise. But that had to be done not at random in litigation where the question is altogether alien.” Even the Jawaharlal Nehru’s speeches in the constituent assembly clearly posits that, ‘No Judiciary including the Supreme Court was intended under the constitution to stand in judgment over the sovereign will of parliament representing the entire will of the community.’<sup>237</sup>

In a democratic society a veto on change imposed by a political or judicial body will be removed by effective political action. This is the lesson of history to be drawn from the nature of amending power.<sup>238</sup> Abuse of power can be no ground for denying the exercise of an unlimited amending power which the constituent assembly gave the parliament. *Chandrachud, J.*, observed in *Keshavananda Bharati* case, “Trust in the elected representatives is the cornerstone of democracy. When the trust fails, everything else fails.” The Swaran Singh Committee’s report on constitutional changes shows that political leadership is capable and determined to maintain that trust. The committee is also conscious with *Chandrachud, J.*, that ‘Our confidence in the man of our choice cannot completely silence our fears for the safety of our rights’ as is manifested in its overall solicitude for judicial review, fundamental rights and for the Supreme Court.<sup>239</sup>

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<sup>236</sup> Professor Upendra Baxi, ‘Constitutional Changes: An analysis of the Swaran Singh Committee report’ (1976) 2 SCC 17-28

<sup>237</sup> V.R. Krishna Iyer, ‘There was no hidden agenda, Mr. Nariman, [www.thehindu.com](http://www.thehindu.com)-2005

<sup>238</sup> V.G. Ramachandran, ‘The Silver Jubilee of the Constitution: a Plus and Minus Assessment’ (1975) 1 SCC(Jour)1

<sup>239</sup> Professor Upendra Baxi, ‘Constitutional Changes: An analysis of the Swaran Singh Committee report’ (1976) 2 SCC 28



On the completion of fifty years of the Constitution in the year 2000, the President of India Shri K.R. Narayanan appointed the National Commission to Review the Working of the Constitution (also referred to as the Constitution Commission, Constitution Review Commission or NCRWC). The commission submitted its report on 31st March 2002. In its reform agenda NCRWC suggested for the establishment of Constitution Committee to look after the various matters in relation to the amendment of the Constitution and also suggested some proposal in relation to the amendment of the Constitution.

It has been suggested that instead of the Constitution Amendments being presented to parliament like ordinary pieces of legislation in the form of Bills for introduction, sometimes at very short notice, it would be desirable if parliament is associated right from the initial stages of formulation of proposals of constitutional reforms, *i.e.* the actual drafting of a Constitutional Amendment Bill may be taken up only after the principles involved have been thrashed out in parliamentary forum and subjected to appropriate ‘*a priori*’ scrutiny by the constituent power. The proposed involvement of the parliament and a *priori* scrutiny can be achieved through the device of a Constitution Committee of parliament.

As an alternative, after a Constitution Amendment Bill has been formulated but before it has been introduced, it may be a subject to a *Priori* scrutiny of the ‘Constitution Committee’. If this is done, even the Government would be saved many an embarrassment. Also, where an enactment is placed beyond the power of judicial review by being included under the Ninth Schedule, it may be desirable for Parliament itself to provide an alternative forum and remedy by way of review etc. to any aggrieved citizen. The proposed Constitution Committee may perform this function as well.<sup>240</sup>

The above discussion reveals one truth that an exhaustive discussion about the true scope and nature of the doctrine of Basic Structure is not an easy task. Starting from the Keshavananda Bharati to *I.R. Coelho v. State of Tamil Nadu*<sup>241</sup> the doctrine is being used to limit the parliament’s amending power, in spite of the fact that the doctrine, itself is subjected to several criticisms. The law of the nation must be certain, and its scope understandably beyond any doubt. It cannot be a judicial riddle, a hidden agenda or the prediction of the judges, more importantly when the judges are not beyond any sort of doubt or criticism.

In May 1999, addressing the Advocate Generals Conference at Shimla, Mr. Justice S.P. Bhurucha frankly stated that, “*the quality of our Judges has regrettably fallen.*” Accumulation of unlimited power is one thing; exercising it with circumspection and self restraint is altogether different thing. Unless the dam is strong enough the reservoir cannot retain water. We need extremely capable, honest and independent Judges, nay statesman, to handle this enormous power of judicial review in the interest of WE THE PEOPLE OF INDIA.<sup>242</sup>

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<sup>240</sup> Subhash C. Kashyap, ‘Working of the Constitution’ in Dr. Subhas C. Kashyap(ed)  
Constitution of India – Review and Reassessment, 23, 2006

<sup>241</sup> AIR 2007 SC 861

<sup>242</sup> Dieter Conrad, ‘Basic Structure of the Constitution and Constitutional Principles’ in Soli J.



Commenting on the decision of Keshavananda case, *Justice S. Ranganathan* in 'Dr. Alladi Memorial Lecture on Four Decades of the Indian Constitution' delivered in 1988 observed: "It does not seem likely that the Constitution makers intended to repose in the Judiciary the power to pronounce even on the validity of a Constitutional Amendment (otherwise than on the ground of its not having been made in accordance with the procedure outlined in the Constitution). time alone can tell whether the present interpretation that the 'Basic Structure' is beyond amendment, will endure after the 42nd Amendment or whether any future situations would arise necessitating a revision of the concepts and enunciated in the judicial decision till today."

The time is ripe enough to formulate the limitation, expressed or implied, whatsoever it may be, in a precise manner. In a written federal Constitution like the Indian national document where the 'Rule of Law' prevails there can be no unwritten higher law than what the Constitution expressly formulates. Let the '*Rule of Law*' prevail everywhere.

### **Some of the Major Substantive Amendments made in the Indian Constitution:**

#### **The Constitution (4<sup>th</sup> Amendment) Act, 1955:**

The Constitution (4<sup>th</sup> Amendment) Act, 1955 brought about significant changes in the Constitution with effect from April 27, 1951. It effected a change in Article 31 and substituted Articles 31-A and 305 with an objective to overcome the decisions and observations of the Supreme Court in cases like the State of West Bengal v. Bella Banerjee<sup>243</sup>. In the mentioned case, the Supreme Court put forth the following principles.

- I. That an owner must be paid full market value, as compensation, in every case of compulsory deprivation of property;
- II. That the court of law is competent to determine whether or not the quantum of compensation was adequate. In view of the above directions of the Supreme Court, it was nearly impossible for the Government to implement any scheme of socio-economic reform which was planned by the state. Hence, this necessitated the amendment of the relevant provisions of the Constitution.

The Constitution (4th Amendment) Act, 1955 therefore provided that Article 31(2) which mentions about an adequacy of the compensation, would be non-justifiable in any court of law. Moreover, the obligation to pay compensation under Article 31(2) was restricted only to two classes of cases namely 'acquisition and requisition' of property. Finally, Article 31-A was broadened in its scope, in order to enable the Government to attain the socialistic pattern of society. It also authorized the state to nationalize any trade.<sup>244</sup>

<sup>243</sup> A.I.R. 1954, S.C. 170.

<sup>244</sup> M.P.Jain, Indian Constitutional law- Amendment in the constitution p.1702(7ed)

**The Constitution (16<sup>th</sup> Amendment) Act, 1963:**

The Constitution (16<sup>th</sup> Amendment) Act, 1963 imposed certain restrictions on the fundamental rights of citizens in the interest of the sovereignty and integrity of the country. It also made changes in the form of oath given in the Third Schedule by adding the words 'I will uphold the sovereignty and integrity of India'.

**The Constitution (25<sup>th</sup> Amendment) Act, 1971:**

The Constitution (25<sup>th</sup> Amendment) Act, 1971 came into force on April 20, 1972. It introduced two significant changes in the Constitution.

- I. It amended Article 31(2) and provided that 'anybody's property may be acquired on payment of an 'amount' instead of 'compensation'. The intention was that the citizen's right to property should be transformed into the state's right to confiscation and the state should be able to deprive anyone of any property in return for any amount, payable at any time, on any terms, and the executive action, however arbitrary, or irrational, should not be subjected to the court's scrutiny.<sup>245</sup>
- II. It also inserted Article 31-C which provides that 'no law giving effect to the policy of the state towards securing the principles specified in clause (b), or clause (c) of Article 39, shall be deemed to be void on the ground that it is inconsistent with, or, takes away or abridges any of the rights', conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy, shall be called in question, in any court, on the ground that it does not give effect to such policy.'<sup>246</sup>

Criticizing the above provision as mentioned in Article 31-C, eminent legal jurist Nani A. Palkhiwala stated, "Article 31-c is monstrous outrage on the Constitution. It has damaged the very heart of the Constitution. This poisonous weed has been planted where it will be trouble us a thousand years. Each age will have to reconsider it."

**The Constitution (42<sup>nd</sup> Amendment), Act, 1976:**

The Constitution (42<sup>nd</sup> Amendment) Act, 1976 was the most comprehensive amendment to the Constitution and carried out major changes. It received the assent of the President on December 18, 1975. Some of the far reaching changes in the Constitution introduced by this amendment are as follows:

<sup>245</sup> R.C.Cooper v. Union of India ,1970, 3, S.C. R. 530

<sup>246</sup> M.P.Jain, Indian Constitutional law- Amendment in the constitution p.1710(7ed)

- I. In the Preamble to the Constitution, it substituted the words 'sovereign, socialist, secular, democratic republic' for the words 'sovereign, democratic republic'. It also substituted the words 'unity and integrity of the nation' for the words 'unity of the nation'.
- II. It amended Article 31-c and provided that no law giving effect to the policy of the state towards securing all or any of the directive principles as laid down in Part IV of the constitution, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the fundamental rights, conferred by the Articles 14, 19 or 31.
- III. It inserted a new article 31-D which provide for saving of laws relating to prevention or prohibition of anti national activities and association. It inserted a new article 32-A which prohibits the Supreme Court from considering the Constitutional validity of any state law, in any proceeding under Article 32.
- IV. It inserted new articles 39-A, 43-A and 48-A in the Constitution. Article 39-A provided for 'equal justice and free legal aid' to economically backward classes'. Article 43-A provided for 'participation of workers in management of industries' and Article 48-A provides for 'protection and improvement of environment and safeguarding of forests and wild life'.
- V. It provided for the 'fundamental Duties' of a citizen of India.
- VI. It amended Articles 83 and 172 to increase the duration of the Lok Sabha and every Legislative Assembly from five to six years during a situation of emergency.
- VII. It asserted the supremacy of the Parliament with regard to the amendment of the Constitution.
- VIII. It curtailed the power of the High Court and the Supreme Court with regard to the issue of writs and Judicial Review.
- IX. It made it obligatory for the President to act on the advice of the Council of Ministers.
- X. It transferred subjects like forests, education, and population control from the State List to the Concurrent List.
- XI. It provided for administrative tribunals for speedy and substantial justice.
- XII. It granted the Union Government the power to deploy armed forces in any state to deal with a 'grave situation of law and order'.
- XIII. It authorized Parliament to make laws to deal with the anti-national activities and such laws were to take precedence over fundamental rights.<sup>247</sup>

### **The Constitution (44<sup>th</sup> Amendment) Act, 1978:**

The Constitution (44<sup>th</sup> Amendment) Act, 1978 received the assent of the President on 30th April. The 44th Amendment is significant because it seeks to remove partially the distortions that were introduced into the Constitution by the Constitution 42<sup>nd</sup> Amendment) Act, 1976. Some of the other features of this amendment are as follows.

<sup>247</sup> M.P.Jain, Indian Constitutional law- Amendment in the constitution p.1714(7ed)

- I. It modified the emergency provisions of the Constitution to ensure that these were not misused in future.
- II. It restored to the Supreme Court and High Courts the jurisdiction and power they enjoyed before the 42<sup>nd</sup> amendment was passed.
- III. It deleted the right to property from the list of fundamental rights.
- IV. It took away from the centre the power to send its armed forces to any state to meet a grave situation there.
- V. A new directive principle was inserted by adding a new clause to Article 35. It stated that the state shall, in particular, strive to minimize the inequality in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only among individuals but also among groups of people residing in different areas or engaged in different vocations.
- VI. The Constitution (42<sup>nd</sup> Amendment) Act, 1976 had amended Article 71 so as to make ministerial advice binding on the President. This provision is now amended by adding a new provision Article 74(1). It stated that the President may require the Council of Ministers to reconsider its advice to him, either generally or otherwise. However, the President shall act in accordance with the advice tendered such reconsideration.
- VII. The Constitution (42<sup>nd</sup> Amendment) Act, 1976 extended the life of Lok Sabha and State Legislative assemblies from five to six years. The 44<sup>th</sup> amendment reduced it again to five years by amending articles 83 and 172 accordingly.<sup>248</sup>

#### **The Constitution (86<sup>th</sup> Amendment) Act, 2002:**

The Constitution (86<sup>th</sup> Amendment) Act, 2002 was carried out in 2002. It made free and compulsory primary education a fundamental right. It stipulated that the government shall provide free and compulsory education to all children from the age of six to fourteen in such a manner as the state may by law determine. Further, it seeks to compel parents to send their children to school by making it a fundamental duty under article 51-A. The amendment also enjoins on the state to make endeavour to provide early childhood care and education to all children till they complete six of age.<sup>249</sup>

#### **The Constitution (92<sup>nd</sup> Amendment) Act, 2003:**

This amendment has added four new languages – Bodo, Dogri, Maithali and Santhali – to the Eighth Schedule of the Constitution. With these additions the total number of languages in the 8th Schedule has risen to 22.<sup>250</sup>

#### **The Constitution (97<sup>th</sup> Amendment) Act, 2011:**

This amendment inserted the words “or co-operative societies” after the words “or unions” in clause (1)(c) of Article 19. A new Part IXB was inserted after Part IXA and a new article, Article 43B in Part IV

<sup>248</sup> M.P.Jain, Indian Constitutional law- Amendment in the constitution p.1726(7ed)

<sup>249</sup> M.P.Jain, Indian Constitutional law- Amendment in the constitution p.1743(7ed)

<sup>250</sup> Ibid p.1747

of the Constitution, after Article 43A was also inserted. All this articles deals with the provisions of Co-operative Societies.<sup>251</sup>

### **The Constitution (119<sup>th</sup> Amendment) Bill, 2013:**

The Bill refers to demarcated land boundaries in accordance with the India-Bangladesh agreement signed on May 16, 1974. This agreement underwent further modification through letters exchanged thereafter and a protocol on September 6, 2011. Exchange of territories: The territories involved are in the states of Assam, West Bengal, Meghalaya and Tripura. Many of these are enclaves (i.e., territory belonging to one country that is entirely surrounded by the other Constitution) The Bill amends paragraphs relating to the territories of Assam, West Bengal, Meghalaya, and Tripura in the First Schedule of the Constitution.<sup>252</sup>

### **The Constitution (121<sup>st</sup> Amendment) Bill, 2014:**

The Constitution (121<sup>st</sup> Amendment) Bill amends the provisions of the Constitution related to the appointment of Supreme Court and High Court judges, and the transfer of High Court judges. Creation of the NJAC: Article 124 (2) of the Constitution provides that the President will make appointments of Supreme Court (SC) and High Court(HC) judges after consultation with the Chief Justice of India and other SC and HC judges as he considers necessary. The Bill amends Article 124 (2) of the Constitution to provide for a Commission, to be known as the National Judicial Appointments Commission (NJAC). The NJAC would then make recommendations to the President for appointments of SC and HC judges.<sup>253</sup>

### **Territorial changes:**

Constitutional amendments have been made to facilitate changes in the territorial extent of the Republic of India due to the incorporation of the former French colony of Pondicherry, the former Portuguese colony of Goa, and a minor exchange of territory with Pakistan. Amendments are also necessary with regard to littoral rights over the exclusive economic zone and the formation of new states by the reorganization of existing states and union territories. Constitutional amendment under Article 368 allows peaceful division of the country provided fundamental rights (Article 13) are ensured in all the resultant countries. The constitution (ninth amendment) Act, 1960 is an example which has ceded territory to old Pakistan.

### **Transitional provisions:**

The constitution includes transitional provisions intended to remain in force only for a limited period. These need to be renewed periodically. For example, for continuing reservation in parliamentary seats for scheduled castes and scheduled tribes a constitutional amendment is enacted once in every ten years.

### **Democratic reform:**

<sup>251</sup> Ibid p.1748.

<sup>252</sup> <http://www.prsindia.org/billtrack/the-constitution-121st-amendment-bill-2014-3360/>

<sup>253</sup> <http://www.prsindia.org/billtrack/the-constitution-121st-amendment-bill-2014-3360/>

Amendments have been made with the intent of reform the system of government and incorporating new "checks and balances" in the Constitution. These have included the following:

- Creation of the National Commission for Scheduled Castes.
- Creation of the National Commission for Scheduled Tribes.
- Creation of mechanisms for Panchayati Raj system.
- Disqualification of members from changing party allegiance.
- Restrictions on the size of the cabinet.
- Restrictions on imposition of an internal emergency.
- Recently the creation of the National Judicial Appointment Commission.

#### **4.8 Parliamentary Supremacy V/s Judicial Supremacy in India:**

Under the U.K. Parliamentary system, Parliament is supreme and sovereign. There are absolutely no limitations on its powers, at least in theory, inasmuch as there is no written Constitution, and the Judiciary has no power of judicial review of legislation.

In the US system, the Supreme Court with its power of judicial review and interpreting the Constitution has assumed supremacy.

In India, the Constitution has arrived at a middle course and a compromise between the British Sovereignty of Parliament and American Judicial Supremacy. As India has written Constitution and powers and functions of every organ are defined and delimited by the Constitution, there is no question of any organ- not even Parliament- being sovereign.

Both Parliament and Supreme Court are supreme in their respective spheres. While the Supreme Court may declare a law passed by the Parliament ultra vires as being violative of the Constitution, Parliament may within certain restrictions amend most parts of the Constitution.

Our Constitutional forefathers have envisaged a close and harmonious relationship between highest Judiciary and the Parliament. The working of both the systems over the last fifty years has proved beyond doubt that the arrangements perfectly justified. The question on Parliamentary Supremacy in India has to be assessed in the context of its relationship to-

- (a) The Constitution,
- (b) The Judiciary and
- (c) The Executive (or even the Prime Minister).

Though the Constitution of India adopted the language of Britain in describing its Legislature at the Centre, and makes the President, like the Monarch of Britain, a constituent part of Parliament, yet the Indian Parliament is not a sovereign legislature like the British Parliament. It functions within the bounds of a written Constitution setting up a federal polity and a Supreme Court invested with the power of judicial review.



The legislative competence of Parliament is limited, during normal times, to the subjects enumerated in the Union List and the Concurrent List in the Seventh Schedule of the Constitution. Besides, its supremacy within its own sphere of jurisdiction is limited by the Fundamental Rights guaranteed to the citizens in Part III of the Constitution.

Article 13 Clause (2) prohibits, subject to specified restrictions, the State from making any law which would take away or abridge any of the Fundamental Rights. Where the State makes a law in contravention of the Fundamental Rights, that law shall, to the extent of contravention be void.

In Britain no formal distinction is made between constitutional and other laws and the same body, Parliament, can change or abrogate any law whatsoever and by the same procedure. The Constitution of India, on the other hand, makes a distinction between statutory law and constitutional law and prescribes a special procedure for amending the latter as incorporated in Article 368.

The Supreme Court held in *Keshavananda Bharati v. the State of Kerala* that Article 368 does not enable Parliament to alter the 'basic structure' or framework of the Constitution. The term basic structure is a vague and general term and the Judges themselves did not offer a common agreed meaning. Some included Fundamental Rights and federation in the concept of basic structure while others saw no limit to the amending power of Parliament. The Constitution (Forty-second Amendment) Act, 1976, provided that Parliament had full power to amend the Constitution and no amendment made under Article 368 could be questioned in any Court on any ground.

The validity of the Forty-second Amendment was questioned and in May 1980, the Supreme Court struck down in the *Minerva Mills* case Section 55 of the Amendment incorporated in Clauses (4) and (5) of Article 368 as it altered or destroyed the basic structure or framework of the Constitution. It was affirmation of the *Keshavananda Bharati* case (1973) judgment. Unless this judgment is reversed by the Court on the review application of the Union Government or a new amendment of the Constitution is enacted and the Supreme Court upholds that amendment, the power of Parliament cannot extend beyond the limitations placed by the Constitution and the Supreme Court.

Despite these limitations on the authority of Parliament, it is the pivot on which revolves the whole machinery of the Government. Its legislative competence embraces a large field and its financial powers are vast. Its sanction is also necessary for declaring war and making peace. Parliament and the State legislatures have equal rights to make laws in respect of subjects in the Concurrent List, but if a law enacted by a State Assembly is not in conformity to the law passed by the Parliament, the law made by Parliament prevails. Parliament can also legislate on any subject in the State List if the Council of States declares by a resolution that it is necessary in the national interest to do so. During emergency, all restrictions on the legislative and financial jurisdiction of Parliament disappear.

However, these immense powers vested in Parliament are, to a large extent, the powers of the Executive; indeed, increasingly, of the Cabinet headed by the Prime Minister. The doctrine of Parliamentary supremacy originated in Britain, but even the supremacy of Parliament was subject to certain practical



and political restraints, such as public opinion, international law and international agreements. Furthermore, India is a federation; as such, there is a separation of powers, and State Legislatures exist as independent legislative bodies. Thus it cannot be accepted that Parliament is sovereign.<sup>254</sup>

*“Ivor Jennings points out that parliamentary supremacy in the modern world are synonymous with unfettered power of the executive. Much of the business of Parliament is initiated by the government. And so long as the ruling party has majority, the government is in complete control of the House of the People. The Constitution certainly makes the Council of Ministers responsible to the Lok Sabha, but a ruling party with a comfortable majority has little to fear from this stipulation.”*

**The factors that limit the sovereignty of Indian Parliament are:**

### **1. written Nature of the Constitution:**

The Constitution is the fundamental law of the land in our country. It has defined the authority and jurisdiction of all the three organs of the Union government and the nature of interrelationship between them. Hence, the Parliament has to operate within the limits prescribed by the Constitution. There is also a legal distinction between the legislative authority and the constituent authority of the Parliament. Moreover, to effect certain amendments to the Constitution, the ratification of half of the states is also required. In Britain, on the other hand, the Constitution is neither written nor there do anything like a fundamental law of the land.

### **2. Federal System of Government:**

India has a federal system of government with a constitutional division of powers between the Union and the states. Both have to operate within the spheres allotted to them. Hence, the law-making authority of the Parliament gets confined to the subjects enumerated in the Union List and Concurrent List and does not extend to the subjects enumerated in the State List (except in five abnormal circumstances and that too for a short period). Britain, on the other hand, has a unitary system of government and hence, all the powers are vested in the Centre.

### **3. System of Judicial Review:**

The adoption of an independent Judiciary with the power of judicial review also restricts the supremacy of our Parliament. Both the Supreme Court and high courts can declare the laws enacted by the Parliament as void and ultra vires (unconstitutional), if they contravene any provision of the Constitution. On the other hand, there is no system of judicial review in Britain. The British Courts have to apply the Parliamentary laws to specific cases, without examining their constitutionality, legality or reasonableness.

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<sup>254</sup><http://www.yourarticlelibrary.com/essay/question-on-parliamentary-supremacy-or-sovereignty-of-india/24895/>

#### 4. Fundamental Rights:

The authority of the Parliament is also restricted by the incorporation of a code of justiciable fundamental rights under Part III of the Constitution. Article 13 prohibits the State from making a law that either takes away totally or abrogates in part a fundamental right. Hence, a Parliamentary law that contravenes the fundamental rights shall be void. In Britain, on the other hand, there is no codification of justiciable fundamental rights in the C./institution. The British Parliament has also not made any law that lays down the fundamental rights of the citizens. However, it does not mean that the British citizens do not have rights. Though there is no charter guaranteeing rights, there is maximum liberty in Britain due to the existence of the Rule of Law. Therefore, even though the nomenclature and organizational pattern of our Parliament is similar to that of the British Parliament, there is a substantial difference between the two.

The Indian Parliament is not a sovereign body in the sense in which the British Parliament is a sovereign body. Unlike the British Parliament, the authority and jurisdiction of the Indian Parliament are defined, limited and restrained. In this regard, the Indian Parliament is similar to the American Legislature (known as Congress). In USA also, the sovereignty of Congress is legally restricted by the written character of the Constitution, the federal system of government, the system of judicial review and the Bill of Rights.<sup>255</sup>

In the Indian Context the contradiction between the principles of parliamentary sovereignty and judicial review that is embedded in India's constitution has been a source of major controversy over the years. After the courts overturned state laws redistributing land from zamindar estates on the grounds that the laws violated the zamindars' Fundamental Rights, Parliament passed the first (1951), fourth (1955), and seventeenth amendments (1964) to protect its authority to implement land redistribution. The Supreme Court countered these amendments in 1967 when it ruled in the *Golaknath v. State of Punjab* case that Parliament did not have the power to abrogate the Fundamental Rights, including the provisions on private property.

On February 1, 1970, the Supreme Court invalidated the government-sponsored Bank Nationalization Bill that had been passed by Parliament in August 1969. The Supreme Court also rejected as unconstitutional a presidential order of September 7, 1970, that abolished the titles, privileges, and privy purses of the former rulers of India's old princely states.<sup>256</sup> In reaction to Supreme Court decisions, in 1971, Parliament passed the Twenty-fourth Amendment empowering it to amend any provision of the constitution, including the Fundamental Rights; the twenty-fifth Amendment, making legislative decisions concerning proper land compensation nonjustifiable, and the twenty-sixth Amendment, which added a constitutional article abolishing princely privileges and privy purses.

<sup>255</sup><http://www.yourarticlelibrary.com/essay/question-on-parliamentary-supremacy-or-sovereignty-of-india/24895/and http://www.vajiramandravi.in/sovereignty-of-parliament.html>

<sup>256</sup> Prakash Talwar, *Human Rights*, Isha Books, Delhi, 2006, p.107.

On April 24, 1973, the Supreme Court responded to the parliamentary offensive by ruling in the *Kesavananda Bharati v. the State of Kerala* case that, although these amendments were constitutional, the court still reserved for itself the discretion to reject any constitutional amendments passed by Parliament by declaring that the amendments cannot change the constitution's "basic structure."<sup>257</sup> During the 1975-77 Emergency, Parliament passed the forty-second Amendment in January 1977, which essentially abrogated the *Keshavananda* ruling by preventing the Supreme Court from reviewing any constitutional amendment with the exception of procedural issues concerning ratification.

The forty-second Amendment's fifty-nine clauses stripped the Supreme Court of many of its powers and moved the political system toward parliamentary sovereignty. However, the forty-third and forty-fourth amendments, passed by the Janta government after the defeat of Indira Gandhi in March 1977, reversed these changes. In the *Minerva Mills* case of 1980, the Supreme Court reaffirmed its authority to protect the basic structure of the constitution.

However, in the *Judges Transfer* case on December 31, 1981, the Supreme Court upheld the government's authority to dismiss temporary judges and transfer high court justices without the consent of the chief justice.<sup>258</sup> The Supreme Court continued to be embroiled in controversy in 1989, when its US\$470 million judgement against Union Carbide for the Bhopal catastrophe resulted in public demonstrations protesting the inadequacy of the settlement.

In 1991 the first-ever impeachment motion against a Supreme Court judge was signed by 108 members of Parliament. A year later, a high-profile inquiry found Associate Justice V. Ramaswamy "guilty of wilful and gross misuses of office and moral turpitude by using public funds for private purposes and reckless disregard of statutory rules" while serving as chief justice of Punjab and Haryana High Court.<sup>259</sup> Despite this strong indictment, Ramaswamy survived parliamentary impeachment proceedings and remained on the Supreme Court after only 196 members of Parliament, less than the required two-thirds majority, voted for his ouster.

During 1993 and 1994, the Supreme Court took measures to bolster the integrity of the courts and protect civil liberties in the face of state coercion. In an effort to avoid the appearance of conflict of interest in the judiciary, Chief Justice Manepalli Narayanrao Venkatachaliah initiated a controversial model code of conduct for judges that required the transfer of high court judges having children practicing as attorneys in their courts. Since 1993, the Supreme Court has implemented a policy to compensate the victims of violence while in police custody.

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<sup>257</sup> A.P. Thakur & Sunil Pandey, *21st Century India: View and Vision*, Global Vision Publishing house, New Delhi, 2009, p. 183.

<sup>258</sup> Showick Thorpe & Edgar Thorpe, *The Pearson General Studies Manual 2009*, Dorling Kindersley (India) Pvt. Ltd., Delhi, 2009, p. 3.55.

<sup>259</sup> Riddhi Dasgupta, *Changing Face of the Law: A Global Perspective*, iUniverse, Inc., Bloomington, 2006, p. 448.

On April 27, 1994, the Supreme Court issued a ruling that enhanced the rights of individuals placed under arrest by stipulating elaborate guidelines for arrest, detention, and interrogation.<sup>260</sup> Moreover, Parliament and the Supreme Court of India are poised for a confrontation over the issue of expulsion of 11 members of parliament (MPs) involved in cash-for-question scam.<sup>261</sup> The legal-constitutional question pertains to the exclusive jurisdiction of Parliament over its authority to define its privileges and manner to protect and maintain it.

The phenomenon of the legislature versus the judiciary is not new to Indian democracy. Indira Gandhi made a series of attempts through 24th, 25th and 42nd constitutional amendments to establish supremacy of parliament over the judiciary. She even tried to demoralize the highest judiciary by appointing a junior judge as the chief justice superseding senior judges. The matter could be settled with the enunciation of the 'basic feature doctrine' in the Kesavananda Bharati case of 1973. The kernel of this judgement is that the Indian constitution has certain basic features, which hold a transcendental position and which cannot be altered by either Parliament or Supreme Court.<sup>262</sup> This judgement was able to establish supremacy of the constitution but only with respect to its 'basic features.' The other vibrant and dynamic democracies of the world have also gone through the process of confrontation between the legislature and the judiciary. However, they have settled it in the process of constitutional development.

Britain, a classic case of a parliamentary system, easily established legislative supremacy. Parliament is not only supreme vis-à-vis other organs of government but it is supreme vis-à-vis constitution as well. In the British model, the legislative supremacy is also established by the fact that the constitution is unwritten and the one chamber of the legislature, House of Lords, acts as the highest judiciary of the land.

The federal constitution of the United States is organized on the principle of supremacy of the constitution. Its supreme court, therefore, enjoys absolute and extensive power of judicial review. No law of the land is beyond judicial scrutiny.<sup>263</sup> But the case of the Indian constitution is typical because of the adoption of parliamentary and federal features simultaneously. Parliamentary form of government hints at legislative supremacy. But the federal nature of the constitution makes it imperative that the highest judiciary is able to exercise the power of judicial review. The roots of the present problem also lie in the design of the Indian constitution.

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

<sup>260</sup> Riddhi Dasgupta, op. cit., p. 468

<sup>261</sup> "Stung: 11 MPs Take Cash to Ask Questions in Parliament", The Times of India, New Delhi, 12 December 2005.

<sup>262</sup> Ashok Desai, "Interventions", in Pran Chopra, The Supreme Court versus the Constitution: A Challenge to Federalism, Sage Publication Pvt. Ltd., New Delhi, 2006, p. 218.

<sup>263</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

responded quickly by expelling all the eleven MPs who figured in the sting operation. The Lok Sabha constituted a special (enquiry) committee and the Rajya Sabha referred the matter to the ethics committee of the house. On the report of the special committee of the Lok Sabha and ethics committee of the Rajya Sabha, both the houses expelled the tainted members and terminated their membership by a motion of each house. The motion was passed on the last day of the winter session, December 23, 2005, amidst a walkout by the BJP, the main opposition party in the Lok Sabha. The BJP already in trouble because of leadership crisis, factional fighting, ideological vacillation, and its vitiating relations with the Rashtriya Swayamsevak Sangh was deeply disturbed. Six out of eleven MPs belonged to the BJP and two of them were ministers in the erstwhile BJP-led national democratic government at the centre.

One expelled member from the BSP, Raja Ram Pal challenged the decision of the Lok Sabha speaker in the Supreme Court on two grounds: procedural and legal. His expulsion resolution was not carried on the report of the Privileges Committee of the Lok Sabha. His expulsion was not based on any of the grounds of disqualification specifically mentioned in Article 102 of the constitution and section 8 of the representation of the People's Act 1951.

The Supreme Court served a notice on the Lok Sabha speaker on January 16, 2006. The court also referred the matter to a constitutional bench of five judges. The Lok Sabha speaker, Somnath Chatterjee called an all-party meeting on January 20, 2006. It was unanimously decided in the meeting that it was the privilege of the house to take disciplinary action against its own members. The expulsion from the house was very much within that disciplinary action. It was further held that the Speaker of the Lok Sabha was the sole custodian of the rights and privileges of the house and, hence, not answerable to the judiciary for his role in that capacity. The BJP in the meeting favoured that the Speaker should not appear personally before the Court but should send his representative to present his views before the highest court.

The then speaker, Chatterjee, later on briefed the media, 'Even if I go there, that cannot lead to the honourable court to assume or to exercise the power in respect of those matters exclusively conferred on Parliament.'<sup>264</sup> He also clarified that 'the Constitution was clear on the jurisdictions of the pillars of democracy' and suggested, 'Let us keep within our lakshman rekha.' The Supreme Court seems in a mood to interpret the powers, privileges and immunities of parliament that remain un-codified so far.

On the other hand, Parliament insists that it being the sole custodian of its rights and privileges it is within its right to define its privileges and immunities. The whole episode has certainly triggered a new kind of situation that has serious implications of which two are legal-constitutional. First pertains to immunities of the legislature from judicial intervention in its proceedings. Second relates to defining powers and privileges of the legislature and its members.

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<sup>264</sup>Vinay Kumar, "Don't Accept Court Notice: All-Party Meet", The Hindu, New Delhi, 21 January 2006.

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

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

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

Article 105 (3) reads 'In other respects, the powers, privileges and immunities of each House, shall be such as may from time to time be defined by Parliament by law, and, until, so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution Forty-fourth Amendment Act 1978.' Before this amendment, it was provided that powers, privileges, and immunities of Parliament and its member shall be those of the House of Commons as it was before the commencement of the Indian constitution. The root of the present controversy lies in the above two issues and related provisions of the Constitution.

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

In *P.V. Narasimha Rao v. State (CBI)*, the Supreme Court took the position as per Article 105 (2), 'The bribe-taker MPs who have voted in Parliament against the no-confidence motion are entitled to protection



of Article 105(2) and are not answerable in a court of law for alleged conspiracy and agreement.<sup>265</sup> However, 'The bribe-takers could be proceeded against by Parliament itself.' This judgement clearly established that parliament is the sole arbitrator of its business and proceedings and the judiciary cannot come in this matter. This judgement has not been superseded by another judgement reversing the position.

The judicial interpretation of powers and privileges of the legislature and its members has not been consistent. In a special reference no. (1) 1964, the Supreme Court observed that the legislature in India unlike the House of Commons does not enjoy the power to regulate its own constitution. Hence, the Indian legislature does not have the same powers and privileges as enjoyed by the House of Commons.<sup>266</sup>

Conclusion: An analysis of above issue of controversial relationships between the two major organs of government has, led us to conclude that there is an ardent need for establishing proper checks and balances in the governmental system so that no organ can supersede other. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect.

Judges should adopt a generous and purposive approach in interpreting a Bill of Rights or Fundamental Rights. In order to restore good governance in any political system it is inevitable to maintain coordinative relationships between the two pivotal branches of the government. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures. This again warrants the system of checks and balance to be put in place so that no single institution gets to dominate the power structure at the cost of others. Therefore, instead of getting bogged down in such meaningless rhetoric as clash amongst institutions, it is necessary to give every state organ what is its due as defined in their respective constitutions.

After judiciary has won its independence, it is now for the legislature to follow suit. In order to attain the goal of good governance, everyone, especially judges, parliamentarians, lawyers as well as entire society should have access to human rights education and value for it.

#### 4.9 CRITICISM: –

The doctrine of "basic structure of the Constitution"<sup>267</sup> is very controversial. This doctrine does not have a textual basis. There is not, in the Indian Constitution, a provision stipulating that this constitution has a

<sup>265</sup>P.V. Narasimha Rao vs. State (CBI) (1998) 4 SCC 626.

<sup>266</sup> Article 105 (3) and Article 194 (3), Constitution of India.

<sup>267</sup>The doctrine of "basic structure" is introduced into India by a German scholar, Dietrich Conrad. See Dietrich Conrad, Limitation of Amendment Procedures and the Constituent Power, 15-16 INDIAN YEARBOOK OF INTERNATIONAL AFFAIRS 375 (1970). For



basic structure and that this structure is beyond the competence of amending power. Therefore the limitation of the amending power by the basic structure of the Constitution is deprived of positive legal validity. Moreover, not having its origin in the text of the constitution, the concept of the “basic structure of the Constitution” cannot be defined. What constituted the basic structure of the Constitution? Which principles are or not included in this concept?

An objective and unanimous answer cannot be given to this question. Indeed, in the *Kesavananda Bharati* case, the majority of judges who admit the existence a “basic structure of the Constitution” did not agree with the list of the principles included in this concept. Each judge drew a different list.<sup>268</sup> If each judge is able to define the basic structure concept according to his own view, a constitutional amendment would be valid or invalid according to the personal preferences of the judges. In this instance, the judges will acquire the power to amend the constitution, which is given to the Parliament in Article 368 of the Constitution. For that reason, as noted by Anuranjan Sethi, the basic structure doctrine can be shown as a “vulgar display of usurpation of constitutional power by the Supreme Court of India.”<sup>269</sup> As illustrated in the case-law of the Indian Supreme Court, when there is no explicit substantive limitation on the amending power, the attempt by a constitutional court to review the

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the D. Conrad’s influence on the Indian Supreme Court, see A. G. Noorani, “Behind the Basic Structure Doctrine: On India’s Debt to a German Jurist, Professor Dietrich Conrad”, 18 FRONTLINE (April 28 - May 11, 2001), available at <http://www.hinduonnet.com/fline/f11809/18090950.html>.

<sup>268</sup> O’ Connel, *supra* note 93, at 70; Sethi, *supra* note 119, at 10; COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS, *supra* note 53, at 1177. For example Chief Justice Sikri affirmed that the concept of basic structure consists of the following features:

- “(1) Supremacy of the Constitution;
- (2) Republican and Democratic form of Government;
- (3) Secular Character of the Constitution;
- (4) Separation of Powers between the Legislature, the Executive and the Judiciary;
- (5) Federal Character of the Constitution”

Justices Shelat and Grover added two features to this:

- “(1) The mandate to build a welfare state contained in the Directive Principles of State Policy;

- (2) Unity and integrity of the Nation;

Justices Hegde and Mukherjea came down with a different list:

- (1) The Sovereignty of India;
- (2) The democratic character of the polity;
- (3) The unity of the country;
- (4) Essential features of individual freedoms;
- (5) The mandate to build a welfare state.

Justice Jaganmohan Reddy give the following list:

- “(1) A sovereign democratic republic;
- (2) Parliamentary democracy
- (3) Three organ of the state” .

<sup>269</sup> Sethi, *supra* note 119, at 12. Similarly, S. P. Sathe concluded that “the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to... the legislature” (S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL’Y 29-108, at 88 (2001), available at [http://law.wustl.edu/journal/6/p\\_29\\_Sathe.pdf](http://law.wustl.edu/journal/6/p_29_Sathe.pdf) Likewise, T. R. Andhyarujina said that the “exercise of such power by the judiciary is not only anti-majoritarian but inconsistent with constitutional democracy” (T. R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA 10 (1992), quoted in Sathe, *supra* note 119, at 70

substance of the constitutional amendments would be dangerous for a democratic system in which the amending power belongs to the people or its representatives, not to judges.

### **CONCLUSION:**

So many amendments made to the constitution in a span of 68 years, cannot be regarded as a happy situation. While some of the amendments can be regarded as inevitable, e.g., amendments changing some details which needed to be changed with the lapse of time, some were not necessary at all as they were an attempt to change the balances originally incorporated into the constitution by its framers. It needs to be emphasized that the constitution should be treated with great respect and not made into a play thing by political parties.

A stable constitution gives stability to the country's constitutional process. For example, in the U.S.A., during nearly over 200 years, only 30 amendments have been made and the U.S.A. has progressed tremendously under an old constitution. To achieve this laudable objective, it seems absolutely necessary that the constitutional amending process be rigidified and made more difficult so that an Amendment can be made to the constitution only when there is broad national consensus favoring the same.

## **CHAPTER-5**

## DOCTRINE OF JUDICIAL REVIEW:-

In democratic countries, the judiciary is given a place of great significance. Primarily the courts constitute a dispute-resolving mechanism. The primary function of the courts is to settle disputes and dispense justice between one citizen and another. But courts also resolve disputes between the citizen and the state and the various organs of the state itself.<sup>270</sup>

Constitution is a mechanism by which laws are made. In the words of famous jurist Hans Kelson, “the Constitution represents the highest level of positive law”.<sup>271</sup> All laws enacted by the legislature must conform to the prescriptions and restrictions contained in the Constitution and any deviation from that are invalid. The power to declare law as invalid is vested in the judiciary. If any law runs counter to a provision in the constitution it is declared unconstitutional. If an action on the part of an official of the state is in breach of any provision of law enacted by the legislature, the action questioned or the order passed is declared illegal.<sup>272</sup> The power by which the judiciary declares a law made by the legislature as unconstitutional is called judicial review. The court examines a statute under challenge and pronounces upon its validity.

### 5.0 Meaning of Judicial Review:-

By Judicial Review, we mean the power of the judiciary to determine whether a law passed by the Congress, or any law enacted by a state legislature or any provision in the state constitution or any other public regulation having the force of law is in consonance with the constitution. If it is not, the court refuses to give effect to the statute in question. In determining the constitutionality of the legislation, the court is not concerned with the wisdom, experience or policy of legislation. In the words of Chief Justice Marshall, “It neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitutions; and having done that its duty ends.”<sup>273</sup>

The Court interprets the Constitution to determine the constitutionality of the act challenged. This power to interpret the constitution and determine the constitutionality of the statute is called the power of Judicial Review. Judicial review does not apply to federal and state statutes. Its scope is wider. The constitution of the states, the treaties made by the federal Government and the orders issued by the federal and state executive authorities come within its purview. However, question of political nature do not fall within its jurisdiction. This has resulted in restoration of public confidence in the Courts.<sup>274</sup>

<sup>270</sup> M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1603.

<sup>271</sup> Ref: The Pure Theory of Law, p.222- Judiciary in Indian: Constitutional Perspectives-key note address by: Justice M.N. Rao- Prof. G. Manohar Rao, Dr. G.B. Reddy, V. Geeta Rao- Judiciary in India Constitutional Perspectives

<sup>272</sup> Prof. G. Manohar Rao, Dr. G.B. Reddy, V. Geeta Rao- Judiciary in India Constitutional Perspectives, p.16.

<sup>273</sup> Vishnoolal Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study- The Federal Judiciary p.210(10 ed).

<sup>274</sup> Ibid 211.

The doctrine of judicial review prevails in most of the written constitutions of the world. It reveals that the Constitution is the supreme law of the land and any law inconsistent therewith is void. The court performs the role of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.<sup>275</sup>

### 5.1 Origin of Judicial Review:

It is interesting to discover that how the doctrine of judicial review had originated? The key answer to this concept can be traced out in the United States Constitution where the Supreme Court had pen down this doctrine while interpreting the famous case of *Marbury v. Madison*, which was decided in 1803. The facts of the case were that the Congress had provided in the Judiciary Act of 1789 that requests for the writs of mandamus might originate in the Supreme Court.

On the night of 3<sup>rd</sup> of March' 1801 one Mr. Marbury had been appointed Justice of Peace for the District of Columbia by President Adams, the outgoing president whose term was expired before the commission was delivered. The incoming President Jefferson and his Secretary of State, Madison refused to deliver the commission to Marbury who immediately petitioned in the Supreme Court for the issue of the writ of mandamus under the Judiciary Act of 1789. Chief Justice Marshall, who wrote the judgement, declared that the Supreme Court had no authority to issue the writ because the Judiciary Act of 1789 had enlarged the original jurisdiction of the Supreme Court as prescribed by the Constitution, and therefore, it was null and void. The Congress had no power to enact the Judiciary Act of 1789 under which Marbury applied for writ of mandamus and as the claim was made under an invalid law it was held that Marbury was not entitled to be appointed as a judge.<sup>276</sup>

Chief Justice Marshall said that the Constitution is the Supreme law of the land and therefore must be deemed paramount to any statute in conflict with it. He based the judgement upon the following assumptions:

1. The Constitution is a written document that clearly defines and limits the powers of the government;
2. The Constitution is a fundamental law and superior to ordinary legislative enactment;

<sup>275</sup>There is a wealth of material elucidating the contribution made by the U.S. Supreme Court to the development of the constitution through its interpretative process: Douglas, from Marshall to Mukherjee: Studies in American and Indian constitutional Law, 1956; Court only interprets the law and cannot legislate thereof, if a provision of law gives rise to misuse, it is for the legislature to amend, modify or repeal it, if deemed necessary. Sushil kumar Sharma V. Union of India, (2005)6 SCC 281: AIR 2005 SC 3100.

<sup>276</sup>Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study- The Federal Judiciary p.211(10 ed).

3. An Act of the legislature contrary to the fundamental law is void and therefore cannot bind the courts;
4. The judicial power, together with oaths to uphold the Constitution that judges take, requires that the courts so declare when they believe that acts of Congress violate the constitution.<sup>277</sup>

Some of the passages from the judgment of Chief Justice Marshall which was delivered in 1803 more than 200 years ago are worth remembering by the judicial fraternity adhering to the rule of law all over the world.<sup>278</sup> After this judgment the principle of judicial review was firmly embodied in the American system of government. It is now as clearly established as though it had been expressly provided in the Constitution. Dimmock and Dimmock held, "when the Supreme Court of the United States in validates an act of Congress or of a state legislature on the ground that it is not in conformity with the constitutional powers and provisions, it is exercising the power of judicial review".<sup>279</sup>

Thus now it is an established fact that the Supreme Court determines the validity of the federal and state laws whenever they are challenged before it in the process of litigation. And it's the power of the apex court to reject such laws as are construed to be *ultra vires*.<sup>280</sup>

## 5.2 The Nature of Judicial Review:

Joseph Tanenhaus defines "*judicial review*" as "the process whereby a judicial body determines the constitutionality of activity undertaken by a country's national legislature and by its chief executives." According to Tanenhaus, "a judicial body's refusal to enforce or otherwise legitimize official conduct constitutes judicial review only when the ground for doing so is that the country's constitution has been violated." <sup>281</sup>

The power of judicial review is exercised by a court of law when it *invalidates* (i.e., nullifies, or sets aside) a statute of the legislature or an action of the executive and bases the court decision on a finding that the legislative statute or executive action in question is contrary to one or more provisions of the Constitution and therefore cannot be upheld or enforced.

## 5.3 Importance and Scope of Judicial Review:

The responsibilities which a Court carries in a country with a written Constitution are very much more onerous than the responsibilities of the Courts without a written constitution. The courts in a country like

<sup>277</sup> Ibid p.212(10 ed).

<sup>278</sup> Judiciary in Indian: Constitutional Perspectives-key note address by: Justice M.N. Rao- Prof. G. Manohar Rao, Dr. G.B. Reddy, V. Geeta Rao-Judiciary in India Constitutional Perspectives

<sup>279</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study- The Federal Judiciary p.212(10 ed).

<sup>280</sup> Ibid.

<sup>281</sup> Law.huji.ac.il.-UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS  
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Britain interpret the laws but not the constitution, whereas the courts in a country with a written constitution interpret the provisions of the constitution and thus give meaning to the cold letter of the constitution. The courts thus act as a supreme interpreter, protector and guardian of the supremacy of the constitution by keeping all authorities i.e. legislative, executive, administrative, judicial or quasi-judicial within their legal bounds.

The judiciary has the responsibility to scrutinize all government actions in order to assess whether or not they conform to the constitution.<sup>282</sup> The Courts can declare any exercise of power invalid if it infringes any provision in the constitution. In a constitution having provisions which guarantees fundamental rights of the people, the judiciary has the power as well as the obligation to protect the people's rights from any undue and unjustified encroachment by any organ of the state. Further, in a country having a federal system, the judiciary acts as a balance-wheel of federalism by settling disputes between the centre and the states or among the states inter se.<sup>283</sup>

The task of interpreting the constitution is a highly creative judicial function. A democratic society lives and swears by certain values such as individual liberty, human dignity, rule of law, constitutionalism, limited government, and it is the task of the judiciary to so interpret the constitution and the law as to constantly inculcate these values on which democracy thrives. The courts should also be aware of the fact that the society does not stand still; it is dynamic and not static; the social and economic conditions change continually. Thus, the courts must so interpret the constitution that it does not lack behind the changing contemporary societal needs.<sup>284</sup>

The words of the constitution remain the same but their significance changes from time to time through judicial interpretation. Judicial review has two prime functions:-

1. Legitimizing the action of the government; and
2. To protect the constitution against any undue encroachments by the governmental actions.

Both the above functions are inter-related to each other.<sup>285</sup> While exercising the power of judicial review, the courts discharge a function which may be regarded as crucial to the entire governmental process in the country. The bare text of the constitution does not represent in itself the 'living' law of the country. For that purpose, one has to read the Fundamental text along with the gloss put thereon by the courts. As Dowling has stated while evaluating the role of the U.S. Supreme Court, "the study of constitutional law may be described in general terms as a study of the doctrine of judicial review in action."<sup>286</sup>

## 5.4 Interpretational Classification of Judicial Review:

<sup>282</sup> M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1604.

<sup>283</sup> Ibid

<sup>284</sup> M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1604.

<sup>285</sup> Ibid

<sup>286</sup> Dowling, Cases and Materials on Constitutional Law, 19 (1965)- M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1604.



The interpretative function of the constitution is discharged by the courts through ‘direct’ as well as ‘indirect’ judicial review. In direct judicial review, the court overrides or annuls an enactment or an executive act on the ground that it is inconsistent with the constitution. On the other hand, in indirect judicial review, while considering constitutionality of the statute, the court so interprets the statutory language as to steer clear of the alleged element of unconstitutionality.<sup>287</sup> Justice Douglas characterizes this practice as “tailoring an Act to make it constitutional”.<sup>288</sup>

### 5.5 Presence/Absence of Judicial Review in Different Constitutions of the World:

**Britain** has no written constitution and therefore, there is no direct judicial review present there. But courts do resort to indirect judicial review at times. They interpret constitutional provisions restrictively to protect civil liberties.<sup>289</sup> Some rules to statutory interpretation have been developed with this aim in view, e.g. a criminal law or a tax law should be strictly construed, or that judicial review of delegated legislation cannot be excluded unless there are clear words to that effect.<sup>290</sup>

The Constitution of **Canada** or **Australia** does not contain any express provision for judicial review, yet the process goes on and judicial review has become an integral part of the Constitutional process. The historical origin of judicial review in these countries is traceable to the colonial era. The colonial legislatures were regarded as subordinate legislature’s vis-à-vis the British Parliament and they had to function within the parameters of the statutes enacted by the British Parliament. The colonial laws were therefore, subject to judicial review, and this process continued for long after the colonies ripened into self-governing dominions. The doctrine of judicial review was thus ingrained into the legal fabric of Canada and Australia and therefore, no need was felt to include a specific constitutional provision in the basic law of these countries.<sup>291</sup>

The doctrine of Judicial Review is an integral part of the **American** judicial and constitutional process although the U.S. Constitution does not explicitly mention the same in any provision. The Constitution merely says that it would be the supreme law of the land. Before the Constitution was established, the legislation of the American colonies was only subject to judicial review. But after the Constitution, in 1803, in the famous case of *Marbury v. Madison*,<sup>292</sup> in one of its most creative opinions, the U.S. Supreme Court very clearly and specifically claimed that it had the power of judicial review and that it would review the constitutionality of the Acts passed by the Congress. The Court argued that the constitution seeks to define and limit the powers of the legislature, and there would be no purpose in doing

<sup>287</sup> M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1605.

<sup>288</sup> Ibid

<sup>289</sup> Wade, Constitutional Fundamentals, 65. Also see, J.A.G. Griffith, The Politics of Judiciary (1977)- M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1605.

<sup>290</sup> M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1605.

<sup>291</sup> Edward McWhinny, Judicial Review, 49-75(1969); Lederman, The Courts and the Canadian Constitution(1964)- M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1605.

<sup>292</sup> 1 Cranch 137; 2 L Ed 60- M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1605.



so if the legislature could overstep these limits at any time.<sup>293</sup> Thus, the theoretical foundation of the doctrine of judicial review in the U.S.A. is that in exercise of its judicial functions, the Supreme court has the power to say what the law is, and in case of conflict between the constitution and a legislative statute, the court will follow the former, which is the superior of the two laws and declare the later to be unconstitutional.

The *Swiss* Federal Court on the other hand possesses limited judicial review in the sense that it is empowered to declare the cantonal law as unconstitutional if it conflicts with the federal Constitution or even cantonal Constitution. it does not possess the power to declare federal law as unconstitutional. This right is earmarked for the federal Assembly to the final verdict of the people through Referendum.<sup>294</sup>

The *French* Judiciary negates the doctrine of judicial review in toto. It means that there is absence of judicial review concept under the French Constitution. The Courts in France have no power to declare laws passed by the Parliament as unconstitutional. In France the Courts derive their powers from the parliament unlike that of U.S.A. the French citizen has no rights to approach a court to declare a law as unconstitutional. However the constitutionality of a law can be determined before its promulgation, from the Constitutional Council by the President of the Republic, the Prime Minister or the President of either Chamber of the Parliament. It is only these officials who can invoke the issue of constitutionality of Acts passed by the Parliament. Once the law has been promulgated, its constitutionality cannot be questioned.

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The Supreme Court of *Japan* is empowered to declare any ordinance, law or executive decree as unconstitutional in case it violates the spirit of the Constitution. Thus like that of the American Supreme Court, the Supreme Court of Japan too enjoys the power of judicial review. But under the old Meiji Constitution the apex Court did not have the power of judicial review and was subordinate to the Emperor and could not declare his orders or laws as unconstitutional.<sup>296</sup>

The Judicial System of *China* does not possess the power of judicial review. In other words there is no judicial review power vested in the Supreme People's Court of China. The constitution framed by the top leadership of the party is to be safeguarded by the party itself. Hence, laws passed by the National People's Congress (NPC) or its Standing Committee cannot be declared null and void by the Supreme People's Court or any other court at lower level on the plea that they contravene the Constitution. No bill passed by the legislature can be contrary to the Constitution unless it is so desired by the party bosses. Likewise, no act of the executive can be repugnant to the constitution. Hence, the judiciary is not

<sup>293</sup> M.P.Jain, Indian Constitutional law- Constitutional Interpretation p.1605.

<sup>294</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study- The Federal Judiciary of Switzerland p.264(10 ed).

<sup>295</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study- The French Judiciary p.326(10 ed).

<sup>296</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study- The Judiciary of Japan p.296(10 ed).

empowered to sit in judgment over the acts of the Congress or the orders of the executive and declare them as unconstitutional.<sup>297</sup>

The Supreme Court of *Russia* is neither the custodian of the constitution nor the guardian of the rights and liberties of the people of the Russian Federation unlike America and India.<sup>298</sup>

## 5.8 JUDICIAL REVIEW & PARLIAMENTARY SUPREMACY:

### SOVEREIGNTY OF PARLIAMENT:-

The doctrine of 'sovereignty of Parliament' is associated with the British Parliament. Sovereignty means the supreme power within the State. That supreme power in Great Britain lies with the Parliament. There are no 'legal' restrictions on its authority and jurisdiction. Therefore, the sovereignty of Parliament (parliamentary supremacy) is a cardinal feature of the British constitutional system.

According to *AV Dicey*, the British jurist, this principle has three implications:

1. The Parliament can make, amend, substitute or repeal any law. *De Lolme*, a British political analyst, said, 'The British Parliament can do everything except make a woman a man and a man a woman'.
2. The Parliament can make constitutional laws by the same procedure as ordinary laws. In other words, there is no legal distinction between the constituent authority and the legislative authority of the British Parliament.
3. The Parliamentary laws cannot be declared invalid by the Judiciary as being unconstitutional. In other words, there is no system of judicial review in Britain. The Indian Parliament, on the other hand, cannot be regarded as a sovereign body in the similar sense as there are 'legal' restrictions on its authority and jurisdiction.

In any constitutional system, the lines of demarcation between governmental action allowed and governmental action prohibited by the Constitution are sufficiently hazy, or blurred, to cause occasional disputes over whether particular decisions and actions of the government are constitutional or unconstitutional--disputes over whether the governmental decisions and actions accord with or violate the Constitution. If a society's political regime is to remain genuinely constitutional in character, the disputes over the boundaries between constitutionally permissible and constitutionally impermissible governmental activity must be settled peacefully, and hence there must be present political institutions whose legitimate functions include effective performance of this important type of conflict resolution.<sup>299</sup>

In most contemporary constitutional democracies, the function is performed by political parties and the legislature, generally through the parliamentary vote of no confidence and through the electoral process.

<sup>297</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study- The Judiciary System of People's Republic of China p.517(10 ed).

<sup>298</sup> Vishnoo Bhagwan, Vidya Bhusan, Vandana Mohla World Constitutions-a comparative study- Judiciary of Russian Federation p.580(10 ed).

<sup>299</sup> www.scholarship.lawduke.edu/cgi.

In some of today's constitutional democratic societies--e.g., the U.S.A., Canada, Australia, Germany, Austria, Italy, Norway, Japan, and the Republic of Ireland--one or more courts of law (either the regular courts or a special high court) play an important role in resolving constitutional boundary disputes, doing so through exercise of the power of judicial review.

In the U.S.A., judicial review, exercised by the regular law courts, is the most important method of resolving controversy over the constitutional lines of demarcation between permissible and impermissible action on the part of the legislature; disagreements over the boundaries between what the government may do and what it may not do under the Constitution are resolved by the courts rendering judicial decisions which authoritatively determine the meaning and intent of the relevant provisions of the Constitution.<sup>300</sup>

### **The American Constitutional System--Operation of the Principle of Judicial Review:**

Exercise of the power of judicial review by the courts of law is a very important part of the American constitutional system and is strongly supported by American political culture. Judicial review, though not mentioned in so many words in the Federal Constitution, is widely recognized and accepted as an integral part of what is described in Article III of the U.S. Constitution as "the judicial power of the United States," extending to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made under their Authority," and vested by the Constitution in the U.S. Supreme Court and in "such inferior lower Courts as the Congress may from time to time ordain and establish."<sup>301</sup>

A basic political belief, or perception, widely shared by Americans is the assumption that the power of a law court to invalidate a legislative statute or an executive decision or action, on the ground that it violates the Constitution, is a legitimate and inseparable component of the judicial authority of the court--its authority to construe, or interpret, the relevant law in a legal case or controversy brought before the court for trial and judgment. According to this fundamental perception\_\_.

- the Constitution is a law--the basic and supreme law of the land,
- the authority of a court to construe all aspects of the law that are relevant to a case or controversy before the court includes, most importantly, the right and duty to interpret any provisions of the Constitution which are relevant to the case or controversy, and
- the authority of the court to interpret constitutional provisions relevant to the case or controversy entails the right and obligation to compare these provisions of the basic law with the relevant decisions and actions of the legislative and executive branches of government and, if the latter are in conflict with the former, to uphold the basic and supreme law of the land and decline to enforce or allow implementation of the unconstitutional policies of the legislature and the executive.

<sup>300</sup> [www.scholarship.lawduke.edu/cgi](http://www.scholarship.lawduke.edu/cgi).

<sup>301</sup> [www.ecoweb.enud.edu/constitution.us/supremecourt.html](http://www.ecoweb.enud.edu/constitution.us/supremecourt.html).

In the U.S.A., the power of judicial review is exercised by the *ordinary courts of law*, not by a specialized tribunal, like *Germany's Federal Constitutional Court*, which was constitutionally ordained and established with exclusive authority to resolve questions regarding the federal constitutionality of acts of the legislature and decisions and actions of the executive. Ordinary law courts in the U.S.A. exercise the power of judicial review during the course of their performance of the traditional judicial function of resolving legal disputes through authoritative determination of (1) the meaning and intent of established principles and rules of law and (2) the application of these general principles and rules to the special situations with which particular legal cases and controversies are concerned.<sup>302</sup>

The authority of American courts, unlike that of the law courts in *Great Britain*, is not limited to settling legal disputes between private parties, ascertaining and protecting the rights of citizens under common and statutory law, ruling on the statutory authority for specific decisions and actions of administrative officials, and reshaping existing law and public policy through creative interpretation of statutes enacted by the legislature. American courts can and do go behind legislative statutes, considering and deciding questions regarding the constitutional authority of the legislature to enact the statutes. When an American court, in deciding a case, rules that, under the Constitution, the legislature lacked the authority to pass a law which is still in existence and which happens to be relevant to the case at hand, the court not only refuses to enforce the statute but also forbids implementation of the statute by the executive and administrative offices of government.<sup>303</sup>

All federal and state courts in the U.S.A. exercise the power of judicial review. However, state and lower federal court decisions resolving federal constitutional questions are subject to review by the United States Supreme Court, which may uphold, modify, or overturn any of these decisions. The U.S. Supreme Court is supreme in interpreting the Constitution of the United States. Its authority to review and then affirm, alter, or reverse the rulings of other courts on federal constitutional questions makes the Federal Supreme Court the highest and final judicial authority in the U.S.A.--the highest and final decision maker in the adjudication of legal cases and controversies involving questions as to the federal constitutionality of decisions and actions of America's national, state, and local governments.<sup>304</sup>

A decision of the U.S. Supreme Court interpreting the Federal Constitution cannot be modified or reversed by any other judicial body. There are only two ways such a decision of the Supreme Court can be changed: First the Court changes its mind on a point of law it established in an earlier case, reversing itself in a later case concerned with a federal constitutional issue identical or very similar to the issue dealt with in the earlier case. And, Secondly Congress or a Federal Constitutional Convention proposes

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<sup>302</sup> [www.ecoweb.enud.edu/constitution.us./supremecourt.html](http://www.ecoweb.enud.edu/constitution.us./supremecourt.html).

<sup>303</sup> [www.ecoweb.enud.edu/constitution.us./supremecourt.html](http://www.ecoweb.enud.edu/constitution.us./supremecourt.html).

<sup>304</sup> Ibid

and at least three-fourths of the states approve an amendment to the U.S. Constitution which has the effect of rescinding or substantially modifying the Supreme Court's decision.<sup>305</sup>

American courts, especially the U.S. Supreme Court, function as guardians of the Federal Constitution. American courts perform this function in legal cases and controversies coming before them for hearing and judgment, upholding legislative statutes and other governmental decisions and actions which the courts find to be in accord with the Constitution and nullifying those which they find to be in violation of the basic law.<sup>306</sup>

## **The British Constitutional System--Legislative Supremacy and Absence of Judicial Review:**

The contemporary British constitutional system is based on the principle of *Legislative Supremacy*, or *Parliamentary Supremacy*. Parliament can enact any statute it wishes, including one affecting significantly the fundamental character of Great Britain's governmental system and therefore amounting to a major amendment to the British Constitution. In law and theory, Parliament can do this either by simple majority vote in each of its two chambers or by simple majority vote in the House of Commons to override the objections of the House of Lords to the legislation. In short, Parliament--ultimately, the House of Commons--possesses the right of final decision as to whether or not a proposed statute will be enacted into law, even a statute of such importance that, after parliamentary passage, it attains constitutional status.<sup>307</sup>

In contrast, the American Congress cannot amend the U.S. Constitution by simple majority vote in the Senate and House of Representatives. The process of amending the basic law of the land is much more involved and difficult in the U.S.A. than it is in the United Kingdom. Amending the Constitution requires the support of an extraordinary majority in the U.S.A., but such action in Britain, at least on the surface, requires merely the approval of a simple majority in Parliament. While Parliament is supreme in the British constitutional system, Congress is by no means supreme in the American system.<sup>308</sup>

In Britain, the threat of 'legislative dictatorship' or 'majoritarian tyranny' inherent in parliamentary supremacy is, to a significant extent, mitigated by three conditions:

Firstly, the legislative activity of Parliament is subject to self-imposed limitations--restrictions which each Parliament imposes on its decision making authority through its adherence to the conventions of the British Constitution.

Secondly, no statute effecting a major change in Britain's Constitution has ever been and probably never can be enacted by a very slim parliamentary majority or without full and prolonged debate on the bill.

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<sup>305</sup> [www.ecoweb.enud.edu/constitution.us./supremecourt.html](http://www.ecoweb.enud.edu/constitution.us./supremecourt.html).

<sup>306</sup> Ibid

<sup>307</sup> Ibid

<sup>308</sup> [www.ecoweb.enud.edu/constitution.us./supremecourt.html](http://www.ecoweb.enud.edu/constitution.us./supremecourt.html).

Thirdly, the British electoral system and competition among rival political parties place some very real practical political limitations on the degree to which Parliament can act contrary to the basic values, norms, and beliefs comprising Britain's political culture and therefore on the types of legislation that Parliament can pass. Legally and technically speaking, however, the Parliament has unlimited authority to pass any statute it pleases.

Hence, judicial review is not a part of the British constitutional system. In the United Kingdom, the courts of law lack the authority to review acts of Parliament and rule on their constitutional validity. No British court possesses the power to declare a parliamentary statute unconstitutional and set it aside.<sup>309</sup>

The British courts, in hearing and judging legal cases and controversies brought before them, review the actions of executive and administrative officials, inquiring into and rendering decisions regarding the legality of these governmental actions. The courts do this when engaged in the act of determining and protecting the rights of British subjects under parliamentary statutes and under those aspects of the Common Law that have not been superseded by statutory enactments.

Court review of governmental actions also occurs when the courts entertain and answer questions concerning the *statutory* authority of actions taken by executive and administrative officials. When dealing with the question of the statutory authority of an executive or administrative action, a court must determine whether the authority delegated by the statute to the executive or administrative office is broad enough to cover the particular action which the office has taken and which is being questioned in the case before the court.

If the statutory grant of authority is found to be insufficient, the British court, like an American court, invokes the doctrine of *ultra vires*: in cases where any action of a governmental executive or administrative office or agency exceeding the authority assigned to it by statute is, by definition, unlawful; or the coercive powers of government cannot legally be employed to carry out, or enforce, the executive or administrative decision or rule. In invoking the doctrine of *ultra vires*, the court declares the agency or office to be acting *ultra vires*, i.e., acting beyond its legal powers. The court orders the agency or office to cease its unlawful action and grants appropriate relief to the aggrieved party or parties to the case.<sup>310</sup>

While a British court may review an executive or administrative action and rule on its statutory authority, the court cannot rule on the *constitutional* authority of Parliament to enact a statute. The court may declare an executive or administrative action unlawful and set it aside, on the ground that the action violates one or more statutory provisions or the agency or office, in taking the action, exceeded its authority under the statute. The court, however, cannot declare a legislative statute unconstitutional and

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<sup>309</sup> [www.ecoweb.enud.edu/constitution.us./supremecourt.html](http://www.ecoweb.enud.edu/constitution.us./supremecourt.html).

<sup>310</sup> Ibid



null and void, on the ground that the statute violates the Constitution or that Parliament, in passing the statute exceeded its authority under the Constitution.<sup>311</sup>

The British Constitution is not and has never been conducive to development and legitimization of the doctrine of judicial review. The content of the British Constitution, many parts of which are unwritten, has never been precisely defined or delimited. There is no single body of clearly recognizable and relatively stable, written basic law called "the Constitution" to which an attorney representing a party to a legal case or controversy can refer in order to make points in his argument challenging or defending the constitutionality of a statute, or to which a court can refer in deciding on the constitutional validity of a statute, thereby resolving the issue through an authoritative interpretation of the relevant provision or provisions of the Constitution.

The Constitution is subject to change and development as Parliament carries on the ordinary process of enacting legislative statutes and as the basic political values, norms, and beliefs of the general populace and leadership elites are modified and molded by changing conditions and problems in British society. The Constitution is changed when Parliament enacts statutes impacting significantly on the basic character of Britain's political regime-statutes which are not likely to be enacted without supportive changes and developments in British political culture.

The Constitution is also modified when unwritten customs, traditions, usages, and conventions governing operation of the governmental system undergo change. The Constitution is an evolving body of written and unwritten law, evolving as Parliament enacts statutory legislation which attains constitutional status and as the unwritten parts of the Constitution gradually develops and changes. Hence, there is no place for determination by a judicial body of the constitutionality of parliamentary legislation.<sup>312</sup>

Parliament, functioning in a constitutional system based on the principle of legislative supremacy, has the power of final decision regarding the content of the British Constitution and the correct interpretation of any written or unwritten part of that body of fundamental law. It is the function of Parliament, rather than that of the courts of law, to serve as guardian of the Constitution. Parliament is the guardian of the British Constitution as well as the supreme legislative and executive authority in the United Kingdom.<sup>313</sup>

### CONTRAST:

British constitutional democracy is monarchical in form. Great Britain's chief of state is a hereditary monarch, in whose name the government is carried on. Under the Constitution, however, the authority of the Monarch is limited to performance of purely symbolic and ceremonial functions, the real power of government is in the hands of the voters' elected representatives in the lower chamber of Parliament, and

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<sup>311</sup> [www.ecoweb.enud.edu/constitution.us./supremecourt.html](http://www.ecoweb.enud.edu/constitution.us./supremecourt.html).

<sup>312</sup> [www.ecoweb.enud.edu/constitution.us./supremecourt.html](http://www.ecoweb.enud.edu/constitution.us./supremecourt.html).

<sup>313</sup> [www.ecoweb.enud.edu/constitution.us./supremecourt.html](http://www.ecoweb.enud.edu/constitution.us./supremecourt.html).



the Prime Minister, as the top leader of the majority in the lower chamber and as chairman of the Cabinet, is the effective head of government.

American constitutional democracy is republican, not monarchial, in form. The President, elected by the American voters through the medium of the Electoral College, performs the symbolic functions of ceremonial chief of state as well as the active political leadership and governing functions of national chief executive, or effective head of the national government. Every other government office is filled either by election or by appointment according to law. There are no hereditary offices in the government.

The British governmental system is characterized by concentration of political authority. Under the Constitution, the legislative and executive powers of government are lodged in the hands of the House of Commons, the lower, popularly elected chamber of Parliament. These powers are exercised by the Prime Minister and Cabinet, supported by the majority in the Commons.

The American governmental system, in contrast to the British system, is characterized by diffusion of political authority. The powers of the U.S. national government are constitutionally divided and distributed among separate and largely independent organs of governmental organs which are equal in rank and have strong motives as well as the constitutional right to oppose and check each other. The power to make and carry out decisions on national public policy is concentrated in neither the President nor a single chamber of Congress. That power is dispersed among three very potent and independent power centers in the national government--the President, the U.S. Senate, and the U.S. House of Representatives. Authoritative decisions on highly controversial, very divisive issues of national policy cannot be made and enforced without the approval of the President and majorities in the two houses of Congress.

The British governmental system operates on the principle of straight majority rule. The system is constitutionally biased toward rapid political decision-making by simple majority of the voters in a single national election and by a simple majority of the voters' elected representatives in the House of Commons. Authoritative decisions on national policy issues or even the most controversial issues are easily and quickly made and carried out by the Prime Minister and Cabinet, as long as they enjoy the support of a stable majority in the Commons. And majority support in the House of Commons is the normal situation in British politics, since British political parties are cohesive, highly disciplined organizations and the Prime Minister is the clearly recognized chief leader of the majority party in the Commons as well as head of the Cabinet, the top executive authority in the government and the steering committee of the majority in the Commons.

The American governmental system, again in contrast to the British system, tends strongly to delay majority decision-making and action. The American system was designed to prevent quick and easy decision-making by the voters in national elections and by their elected representatives in the national government. The governmental system is constitutionally biased toward operation of numerous checks and balances, necessitating delay and prolonged debate, deliberation, negotiation, bargaining, and compromise. The support of a consensus considerably more than a simple majority of the voters

nationwide is required for authoritative decision-making and action on highly controversial issues of national public policy. Consensus support is derived from the national government's taking into consideration and accommodating the interests and views of many different segments of American society.

Finally, the American and British constitutional systems differ significantly, as regards the role of judicial bodies in authoritatively determining the constitutional validity of decisions and actions of the legislative and executive branches of government: In the U.S.A., the courts of law, in cases and controversies brought before them for trial and decision, exercise the power of judicial review--the power to rule on the constitutionality of statutes of the legislature and decisions and actions of the executive.

An American court has the authority to review and pass on the constitutional validity of any legislative statute or executive decision or action relevant to the case before the court and to nullify the statute or other governmental action, if the judges of the court are of the opinion that the governmental action violates the Constitution. Through exercise of the power of judicial review, American courts play a major role in defining and maintaining the lines of demarcation between governmental action that is constitutionally permitted and governmental action that is constitutionally prohibited. Courts in the U.S.A. are guardians of the Constitution.

Ultimately, the U.S. Supreme Court is *the* guardian of the Constitution of the United States, since it is the highest judicial body in the U.S.A., with authority to review and uphold, modify, or overturn all state and lower federal court rulings on federal constitutional questions and thus the right of final decision in judicial determination of the meaning and intent of provisions of the U.S. Constitution. A decision of the U.S. Supreme Court interpreting a provision of the Federal Constitution can be changed only by adoption of a federal constitutional amendment through the action of Congress and the states or by the Supreme Court reversing itself in a later but similar case.<sup>314</sup>

While judicial review is a very important part of the American constitutional system, it has no place in the British system. No judicial body in Great Britain possesses authority to declare unconstitutional and prevent enforcement of a statute duly enacted by Parliament. Operating in a system characterized by legislative supremacy, a majority in Parliament, technically speaking, can do anything it wishes to do, and no court of law may set aside a parliamentary statute because the judges on the court are of the opinion that the statute is contrary to the British Constitution.

Although a British court may entertain and answer questions regarding the statutory authority of actions of the executive and administrative agencies of the government, the court may not rule on the constitutional authority of Parliament to enact particular statutes. Parliament determines the boundaries separating governmental action which is constitutionally permissible from that which is constitutionally

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<sup>314</sup> Constitutional Amendment: An Analytical Reconsideration of the Doctrine of 'judicial review' - Sanjit Kr.Chakraborty- available at: <http://ssrn.com/abstract=1745439>

impermissible. Parliament, ultimately the House of Commons, has the power of final decision concerning the content of the Constitution and the true meaning and proper application of a particular part of the Constitution, written or unwritten. Parliament, rather than any court of law, is guardian of the British Constitution.<sup>315</sup>

## 5.6 COMPETENCY OF THE COURTS TO USE JUDICIAL REVIEW:

### DO COURTS HAVE THE COMPETENCE TO REVIEW CONSTITUTIONAL AMENDMENTS:-

To answer the question of whether the courts have competence to rule on the constitutionality of constitutional amendments in a given country, one should examine this country's constitution in the first place. If there is a provision in the constitution regarding this competence, this question will be answered in accordance with this provision. Nonetheless, a constitution may be silent on this point. One must, therefore, distinguish between countries where there are and there are not constitutional provisions concerning the competence of the constitutional court to review constitutional amendments.<sup>316</sup>

### WHEN THERE IS NO CONSTITUTIONAL PROVISION CONCERNING THE QUESTION OF COMPETENCE OF JUDICIAL REVIEW:

A constitution may be silent as to the judicial review of the constitutionality of constitutional amendments. Apart from the Turkish, Chilean, Indian and Romanian Constitutions, the other constitutions researched for this article did not contain a provision providing for the review of the constitutionality of constitutional amendments. For instance, the Austrian Constitution of 1920, the French Constitution of 1958, the German Basic Law of 1949, the Hungarian Constitution of 1949, the Indian Constitution of 1950 (before 1976), the Irish Constitution of 1937, the Slovenian Constitution of 1991, the Turkish Constitution of 1961 (before 1971), and the United States Constitution does not regulate the issue of whether, in these countries, constitutional courts or supreme courts have the jurisdiction to review the constitutionality of constitutional amendments.

When the constitution is silent on the question of the judicial review of constitutional amendments, in order to answer this question, it is necessary to make a division between the '*American*' and '*European*' models of judicial review.<sup>317</sup>

<sup>315</sup> Constitutional Amendment: An Analytical Reconsideration of the Doctrine of 'judicial review' - Sanjit Kr.Chakraborty- available at: <http://ssrn.com/abstract=1745439>.

<sup>316</sup> <https://books.google.co.in>-Judicial Review of Constitutional Amendments- a comparative study by Kemal Gozler

<sup>317</sup> For a comparison on the differences of these two models of judicial review, see Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38 at 40-42 (Louis Henkin and Albert J. Rosenthal eds., Columbia University Press 1990). The same division is made by Mauro Cappelletti in terms of "centralized" and "decentralized judicial review." See Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CAL. L.

## THE AMERICAN MODEL OF JUDICIAL REVIEW:

Under the American model of judicial review, all courts have jurisdiction to examine the constitutionality of legal acts and norms in the course of deciding legal cases and controversies. In countries where there is an American model of judicial review, the jurisdiction of the courts, and in the last resort the supreme court, to review the constitutionality of constitutional amendments can be easily established, because in a legal case before the courts and the supreme court, the constitutionality of a constitutional amendment can be challenged by the parties claiming that this amendment is enacted contrary to the procedure of constitutional amendment, or that its substance violates the limitations imposing on constitutional amendments. In such a case, the fact that the courts or a supreme court examine this claim means that they review the constitutionality of this amendment. Therefore, under the American model of judicial review, the constitutionality of constitutional amendments may be reviewed by the courts, even if the constitution does not expressly vest the courts with this competence because, under such a model, the courts do not need to receive a special competence for this; under this system, every court has the power to examine the admissibility of the grounds invoked by the parties in the course of legal proceedings. Indeed, in the countries following the American model of judicial review, the constitutionality of constitutional amendments was examined by courts in several cases.<sup>318</sup>

For example, in the cases of *Hollingsworth v. Virginia*<sup>319</sup>, *National Prohibition*<sup>320</sup>, *Dillon v. Gloss*<sup>321</sup>, *United States v. Sprague*<sup>322</sup> and *Coleman v. Miller*<sup>323</sup> before the United States Supreme Court; in the cases of *State (Ryan) v. Lennon*<sup>324</sup> and *Abortion Information*<sup>325</sup> before the Supreme Court of Ireland; and in the cases of *Golaknath v. State of Punjab*<sup>326</sup>, *Kesavananda Bharati v. State of Kerala*<sup>327</sup>, *Indira Nehru Gandhi v. Raj Narain*<sup>328</sup>, *Minerva Mills Ltd. v. Union of India*<sup>329</sup>, and *Waman Rao v. Union of India*<sup>330</sup> before the Supreme Court of India, it is claimed that different constitutional amendments are unconstitutional. The United States and Irish Supreme Courts rejected these claims and upheld the validity of attacked constitutional amendments, but the Indian Supreme Court, in some cases, accepted

REV. 1017 (1970).

<sup>318</sup> <https://books.google.co.in-Judicial Review of Constitutional Amendments- a comparative study by Kemal Gozler>

<sup>319</sup> 3 U.S. (3 Dallas) 378,1798

<sup>320</sup> 253 U.S. 350(1920)

<sup>321</sup> 256 U.S. 368 (1921)

<sup>322</sup> 282 U.S. 716 (1939)

<sup>323</sup> 307 U.S. 433 (1939)

<sup>324</sup> [1953] 170 I.R. 198(Ir).

<sup>325</sup> In Re [1995] IESC 9(12/05/1995)-[www.bailii.org/ie/cases/1995/9.html](http://www.bailii.org/ie/cases/1995/9.html).

<sup>326</sup> AIR 1967 S.C 1643

<sup>327</sup> AIR 1973 S.C 1461

<sup>328</sup> AIR 1975 S.C 1590; 1975 S.C.C(2) 159

<sup>329</sup> AIR 1980 S.C 1789, 1981 S.C.R. (1) 206, at 207

<sup>330</sup> AIR 1981 S.C.R. 1, 1980 S.C.C. 587.

these claims, and declared unconstitutional of some constitutional amendments. The acceptance or rejection of these claims implies a judicial review of constitutional amendments.<sup>331</sup>

### THE EUROPEAN MODEL OF JUDICIAL REVIEW:

Under the *European* model of judicial review, only a specialized court (called generally “constitutional court”) has jurisdiction to adjudicate the constitutionality of laws. In the countries where there is a European model of judicial review, the competence of the constitutional courts to review the constitutionality of constitutional amendments must explicitly emanate from a constitutional provision. In other words, even if the constitution does not expressly prohibit the judicial review of constitutional amendments, this review is not possible if there is not a constitutional provision expressly vesting the constitutional court with the competence to review constitutional amendments, because under the European model, being a specialized court, the constitutional court does not have a “general jurisdiction”, but only a “limited and special jurisdiction.”<sup>332</sup>

In other words, under this model, constitutional courts do not have jurisdiction to review all legal norms and acts,<sup>333</sup> but only those for which the constitution explicitly give them the competence to review. Consequently, under this model, in order to have competence, a constitutional court should be expressly vested with this competence by the constitution. If the constitution is silent on the constitutional court’s competence to review constitutional amendments, it means that the constitutional court does not have competence to rule on the constitutionality of the constitutional amendments.<sup>334</sup>

In order to support this conclusion, the maxim “*Expressio unius est exclusio alterius*”<sup>335</sup> may be invoked. According to this canon of interpretation, the fact that the constitutional provision determining the competence of the constitutional court expressly enumerated legal acts, such as laws, decrees having force of law, which are subjected to the review of constitutional court means that the legal acts, such as constitutional amendments, which are not enumerated in this constitutional provision are not subjected to this review.

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<sup>331</sup> <https://books.google.co.in-Judicial Review of Constitutional Amendments- a comparative study by Kemal Gozler>

<sup>332</sup> Ibid.

<sup>333</sup> For example, constitutions, laws, codes, statutes, acts, bills, edicts, legislation, enactments, treaties, conventions, agreements, charters, pacts, decrees having force of law, ordinances, bylaws, regulations, rules, rulings, decisions, verdicts, orders, directives, circulars, measures, principles, guidelines, instructions, standards, statements, announcements, Proclamations, pronouncements, declarations, settlements, resolutions, etc.

<sup>334</sup> <https://books.google.co.in-Judicial Review of Constitutional Amendments- a comparative study by Kemal Gozler>

<sup>335</sup> Express mention of one thing implies the exclusion of another.

If the constituent power wanted to vest the constitutional court with the competence to review the constitutionality, not only of laws, but also constitutional amendments, it could do it expressly. The fact that it does not means that it did not want to vest the constitutional court with such competence. This conclusion is confirmed by the case-law of the *French Constitutional Council and the Hungarian and Slovenian Constitutional Courts*.<sup>336</sup>

### French Constitutional Council

The French Constitutional Council, in its decision of November 6, 1962, No. 62-20 DC, ruled that it did not have the jurisdiction to review the constitutional amendments adopted by way of referendum.<sup>337</sup> Likewise, the French Constitutional Council, in a decision dated March 26, 2003, No. 2003-469 DC, declared that it did not have the jurisdiction to decide on the constitutional amendments adopted by way of Parliament.<sup>338</sup> In the last case, several articles in the 1958 Constitution were amended by the Constitutional Law on Decentralized Organization of the Republic.<sup>339</sup> This Constitutional Law was referred to the Constitutional Council by more than 60 senators on the ground that it was contrary to the Constitution with respect to its form and substance.<sup>340</sup>

After noting that its jurisdiction is strictly defined by the Constitution and it is unable to rule on cases, other than those expressly specified by the provisions of Constitution, the Constitutional Council ruled that “Article 61 of the Constitution vests the Constitutional Council with the power to review the constitutionality of institutional acts and ordinary laws when they are referred to in the Constitutional Council under the conditions laid down by this Article. The Constitutional Council did receive, neither from Article 61, Article 89, nor from another Article in the Constitution, the jurisdiction to rule on a revision of the Constitution.”<sup>341</sup>

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<sup>336</sup> <https://books.google.co.in-Judicial Review of Constitutional Amendments- a comparative study by Kemal Gozler>

<sup>337</sup> CONSEIL CONSTITUTIONNEL [CC] (Constitutional Council) decision no. 1962-20DC, November 6, 1962, RECUEIL DES DECISIONS DU CONSEIL CONSTITUTIONNEL [CONSTITUTIONAL COUNCIL REPORTS] 27 (1962). An English translation can be found in COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 97-98 (Norman Dorsen *et al.*, eds., Thomson West 2003).

<sup>338</sup> CONSEIL CONSTITUTIONNEL [CC] (Constitutional Council) decision no. 2003-469 DC, Mar. 26, 2003, RECUEIL DES DECISIONS DU CONSEIL CONSTITUTIONNEL [REC.] [CONSTITUTIONAL COUNCIL REPORTS] 293 (2003). An English précis of this decision is available in CODICES database of Venice Commission, at <http://codices.com.int> (FRA-2003-1-004).

<sup>339</sup> Law No. 2003/276 of March 28, 2003, JOURNAL OFFICIEL DE LA RÉ- PUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF THE FRENCH REPUBLIC], Mar. 29, 2003, p. 5570. For an English analysis of this Constitutional Amendment, see Xavier Philippe, France: The Amendment of the French Constitution "on the Decentralized Organization of the Republic," 2 INT'L J. CONST. L. (I.CON) 691 (2004).

<sup>340</sup> [https://books.google.co.in-Judicial Review of Constitutional Amendments- a comparative study by Kemal Gozler-the original French text of the grounds of applicants, available at <http://www.conseil constitutionnel.fr/decision/2003/2003469/saisine.htm>](https://books.google.co.in-Judicial Review of Constitutional Amendments- a comparative study by Kemal Gozler-the original French text of the grounds of applicants, available at http://www.conseil constitutionnel.fr/decision/2003/2003469/saisine.htm) (last visited Feb. 21, 2007).

<sup>341</sup> CONSEIL CONSTITUTIONNEL [CC] (Constitutional Council) decision No. 2003-469 DC, Mar. 26, 2003, *supra* note 27 (The quotation above is the author's own translation from the original French text).



As noted by the Constitutional Council, in Article 61, or other articles of the Constitution, there is not a provision empowering the Constitutional Council to review the “constitutional amendments”, or more precisely “constitutional laws” (*lois constitutionnelles*). Article 61 vests Constitutional Council with the authority to review the constitutionality of “laws” (*lois*), but this Article does not even mention the term “constitutional laws” (*lois constitutionnelles*). Because the Constitutional Council based its conclusion on a strict interpretation of Article 61 of the 1958 Constitution, it is easy to understand why the Constitutional Council reached the conclusion that it did not have proper jurisdiction to rule on constitutional amendments.<sup>342</sup>

### Hungarian Constitutional Court

The constitutionality of the Constitutional Amendment adopted on October 14, 1997 was challenged in a case No.1260/B/1997 before the Hungarian Constitutional Court. The petitioner argued that this Amendment is unconstitutional because it violated the principles of sovereignty and certainty of law as protected by Article 2 of the Hungarian Constitution. The Constitutional Court first examined the question of whether it has jurisdiction to rule on constitutional amendments. After having observed that Article 32/A of the Hungarian Constitution<sup>343</sup> and Article 1 of Act XXXII of 1989<sup>344</sup> empower the Constitutional Court to review the constitutionality of *laws*, and not constitutional amendments, the Hungarian Court, in its decision of February 9, 1998, declared that the scope of its jurisdiction did not extend to the review of the constitutionality of laws amending the Constitution.<sup>345</sup>

### Slovenian Constitutional Court

The Slovenian Constitutional Court, in a decision dated April 11, 1996, no. U-I-332/94, ruled that the provisions of the nature of constitutional norm did not fall within its jurisdiction. In that decision, the Slovenian Constitutional Court narrowly interpreted the word “statutes” in the phrase “conformity of statutes with this Constitution”, found in Article 160 of the Constitution determining its competence, and declared that this word did contain norms of a constitutional nature.<sup>346</sup>

### Irish Supreme Court:

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<sup>342</sup> <https://books.google.co.in-Judicial Review of Constitutional Amendments- a comparative study by Kemal Gozler>

<sup>343</sup> CONSTITUTION OF THE REPUBLIC OF HUNGARY (Act XX of 1949 as revised and restated by Act XXXI of 1989), Art. 32/A. An English translation of Hungarian Constitution is available in CODICES database of Venice Commission, at <http://codices.coe.int>; select Constitutions > English > Europe > Hungary .

<sup>344</sup> Act No. XXXII of 1989 on Constitutional Court, Art. 1. An English translation of this law is available in CODICES database of Venice Commission, at <http://codices.coe.int>; select Laws > English > Europe > Hungary.

<sup>345</sup> HUNGARIAN CONSTITUTIONAL COURT, Decision of Feb. 9, 1998, No.1260/B/1997, Alkotmánybírósági Közlöny [Official Digest], 2/1998. An English précis of this decision is available in CODICES database of Venice Commission, at <<http://codices.coe.int>> (HUN- 1998 -1-001) .

<sup>346</sup> The English translation of this decision is available at the official website of the Constitutional Court of Slovenian Republic, at <http://odlocitve.usrs.si/usrs/us-odl.nsf/o/8EBF190D9E2129ECC12571720029D40D> .



The Irish system of constitutional review is a “mixed model.” In Ireland, constitutional review is exercised by the Supreme Court and the High Court, and not a specialized constitutional court; however, concerning the competence of constitutional review, the Irish system is similar to the European model, rather than the American model because this competence is accorded to the Supreme Court and the High Court by the Constitution.<sup>347</sup>

In other words, the competence of these courts emanates from the text of the constitution; therefore, these courts do not have a “general jurisdiction”, but only a “limited and special jurisdiction.” For this reason, in Ireland, the judicial review of constitutional amendments is not possible because the constitution does not expressly grant this power neither to the Supreme Court nor to the High Court. This conclusion is confirmed by the Irish Supreme Court in the *Riordan v. An Taoiseach*, case in which the Court ruled that it could not review the constitutionality of a constitutional amendment.<sup>348</sup> In this case, the constitutionality of the Nineteenth Amendment was challenged. This Amendment was approved on May 22, 1998 by referendum and signed and promulgated by the President of Republic on June 3, 1998. Mr. Denis Riordan requested the Supreme Court to declare that “the 19th Amendment of the Constitution Act, 1998 is repugnant to the Constitution and is therefore unconstitutional, null, void and inoperative.”

The Supreme Court of Ireland rejected this request on the ground that a constitutional amendment is different in kind from ordinary legislation. Whereas ordinary legislation requires the participation of the President and the two houses of Parliament, a constitutional amendment requires the co-operation of the President, the two houses of Parliament and the people. A proposed amendment to the Constitution will usually be designed to change something in the Constitution and will therefore, until enacted, be inconsistent with the existing text of the Constitution, but, once approved by the people under Article 46 and promulgated by the President as law, it will form part of the Constitution and cannot be attacked as unconstitutional. When the President promulgates a Bill to amend the Constitution duly passed by the people in accordance with Article 46<sup>349</sup> “as a law” within the meaning of Article 46 s.5<sup>350</sup> she is promulgating it as part of the basic law or “bunreacht” because it is an amendment to the Constitution duly approved by the people. Such “law” is in a totally different position from the “law” referred to in Article 15 s.4<sup>351</sup> of the Constitution which refers only to a law “enacted by the Oireachtas.”<sup>352</sup> It can be

<sup>347</sup>Irish Constitution (Bunreacht Na Héireann) [Ir. CONST.,] 1937, art. 34, *available at* <http://www.taoiseach.gov.ie/index.asp?docID=262> .

<sup>348</sup>*Riordan v. An Taoiseach* [1999] IESC 1 (May 20, 1999, Appeal No. 202/98) (Ir.), *available at* <http://www.bailii.org/ie/cases/IESC/1999/1.html>.

<sup>349</sup> Article 46 of the 1937 Irish Constitution regulates the procedure of the constitutional amendment.

<sup>350</sup> Section 5 of the Article 46 stipulates as follows: “A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law” (Ir. CONST., 1937, art. 46 § 5).

<sup>351</sup> Section 4 of Art. 15 of the 1937 Irish Constitution states as follows: “1° The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof. 2° Every law enacted by the Oireachtas which is in any respect

observed that the Supreme Court of Ireland does not consider itself competent to review the constitutionality of constitutional amendments because, according to the Court, the constitutional amendments are different from ordinary laws which are subject to its jurisdiction.

Under the *European* model, the judicial review of constitutional amendments is not possible if there is not an express constitutional provision empowering the constitutional court to rule on constitutional amendments. But under such system, there is certainly a constitutional provision vesting the constitutional court with the competence to review the constitutionality of *laws*.<sup>353</sup> Can the competence of the constitutional court to review constitutional amendments emanate from this provision? This question can be answered in the affirmative, if *constitutional amendments* are deemed to be *laws*. If constitutional amendments can be included in the word “law”, they can be reviewed by constitutional courts without any need of additional competence because constitutional courts already have competence to review the constitutionality of *laws*. But, can constitutional amendments fall within the meaning of the word “law” used in constitutional provisions determining the competence of the constitutional courts? In order to support the idea that *constitutional amendments* are deemed to be *law*, the following arguments can be advanced:

First, constitutional amendments are indisputably *laws* with respect to their *form* as evidenced by the fact that, in many countries, constitutional amendments take the form of *laws*. As such, they are referred to as *laws*, as well as promulgated under the title of *laws* in the official gazettes. To illustrate that constitutional amendments are laws, in many countries, constitutional amendments are called “law on the amendment to the constitution”, “law amending the constitution”, or “constitutional law.”

Furthermore, some constitutions specify that a constitutional amendment is made by a “law.” For example, Article 79(1) of the 1949 German Basic Law states that “this Basic Law may be amended only by a *law* expressly modifying or supplementing its text.”<sup>354</sup> If constitutional amendments, as their names indicate, were “laws”, the constitutional courts could review their constitutionality, even in the absence of a special competence with regard to those amendments. But the idea that the constitutional amendments can be deemed to be *laws* presents several weaknesses.

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repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid (Ir. CONST., 1937, art. 15 § 4).

<sup>352</sup> Riordan v. An Taoiseach [1999] IESC 1, available at <http://www.bailii.org/ie/cases/IESC/1999/1.html> (last visited Mar. 6, 2007).

<sup>353</sup> For example, art. 93 of the German Basic Law, art. 140(1) of the Austrian Constitution, and art. 147 of the 1961 Turkish Constitution.

<sup>354</sup> GRUNDGESETZ [GG] [Constitution] art. 79(1) (1949) (F.R.G). An English translation of the 1949 German Basic Law [*Grundgesetz für die Bundesrepublik Deutschland*] is available in CODICES database of Venice Commission, at <http://codices.coe.int/>; select Constitutions > English > Europe > Germany.

Secondly although *laws of constitutional amendments* and *ordinary laws* are similar to each other with respect to the procedure and the form in which they are enacted; their legal force is, nonetheless, different because constitutional amendments have a higher rank in the hierarchy of legal norms. Secondly, the validity of the opinion stating that the constitutional amendments can be included in the term “law”, and consequently, can be reviewed by constitutional courts, depends on the question of whether the term “law” can be broadly interpreted.

The term “law” in a constitutional provision determining the competence of constitutional courts cannot be broadly interpreted, since, as noted above, under the European model of judicial review, the constitutional courts do not have a “general jurisdiction”, but only a “limited and special jurisdiction.” In other words, for constitutional courts, *not having* jurisdiction is the general rule, while *having* it is the exception. As a result, constitutional provisions vesting constitutional courts with the jurisdiction to review the constitutionality of legal norms are of an exceptional nature, and therefore they should be interpreted narrowly due to the principle of *exceptio est strictissimae interpretationis*.<sup>355</sup>

Despite these weaknesses, the *German, Austrian* and *Turkish* Constitutional Courts have adopted a positive answer to the question of whether constitutional amendments can be deemed to be “laws.” These Courts declared that they have jurisdiction with regard to constitutional amendments, and thus have reviewed their conformity with the constitution.

### **German Constitutional Court:**

The competence of German Constitutional Court is determined by Article 93 of the 1949 Basic Law. In this Article, there is not a provision vesting the Constitutional Court with the jurisdiction to review the “constitutional amendments”, and the term “constitutional amendment” is not even mentioned in that Article. Article 93(1)(2) empowers the Constitutional Court to rule on “the formal and material compatibility of *federal or land legislation* with this Basic Law.” However, the German Constitutional Court, in its decisions of December 15, 1970, April 23, 1991, April 18, 1996, May 14, 1996, and March 3, 2004, reviewed the constitutionality of constitutional amendments.<sup>356</sup>

In those decisions, even if the question of whether the constitutional amendments can be included in the term “federal legislation” (*Bundesrecht*) was not separately discussed, it is plausible to conclude that the Constitutional Court has implicitly interpreted the term “federal legislation” to include not only ordinary federal laws, but also the “law expressly modifying or supplementing the text of Basic Law” (*i.e.*, constitutional amendments), because, if the Constitutional Court would have interpreted the term “federal legislation” in another manner, it would have declared itself incompetent to review of the constitutionality of constitutional amendments.

<sup>355</sup> Exceptions must be interpreted in the strictest manner.

<sup>356</sup> GRUNDGESETZ [GG] [Constitution] art. 93(1)(2) (1949) (F.R.G).

### Austrian Constitutional Court:

The same observation is valid also for the Austrian Constitutional Court. Article 140(1) of the Austrian Constitution empowers to the Constitutional Court to rule on the constitutionality of “a federal or land law” (*eines Bundes- oder Landesgesetzes*). Although this Article does not mention the terms “constitutional laws” (*Verfassungsgesetz*) or “constitutional provisions” (*Verfassungsbestimmung*), the Austrian Constitutional Court has interpreted the term “federal law” (*Bundesgesetzes*) to include not only “ordinary laws”, but also “constitutional laws” (*Verfassungsgesetz*) and “constitutional provisions” (*Verfassungsbestimmung*). If this were not the case, the Constitutional Court could not have reviewed the constitutionality of constitutional amendments in its decisions dated December 12, 1952, June 23, 1988, September 29, 1988 and March 10, 2001.<sup>357</sup>

### Turkish Constitutional Court:

The 1961 Turkish Constitution, before 1971 amendment, does not include a specific provision relating to the review of the constitutionality of constitutional amendments. Between 1961 and 1971, Article 147 of the 1961 Constitution stipulated that “the Constitutional Court shall review the constitutionality of laws.” The Turkish Constitutional Court, nonetheless, in its decisions of June 16, 1970, No. 1970/31 and April 3, 1971, No.1971/37, declared itself competent to review the constitutionality of constitutional amendments because, according to the Constitutional Court, “laws of constitutional amendment” are also “laws” which are subjected to its jurisdiction.<sup>358</sup>

One can conclude that the term “law” does not include the “laws of constitutional amendment”, and consequently, that the decisions of the German, Austrian and Turkish Constitutional Courts are ill-founded. Hence, if a constitutional court interprets the term “law” as including “law of constitutional amendment”, and consequently declares that it has the jurisdiction to rule on the constitutionality of constitutional amendments, the validity of this decision cannot be challenged. This decision can be criticized, but it is, nonetheless, valid and produces legal consequences. To illustrate, the United States Supreme Court, in the famous case *Marbury v. Madison*, declared that it had the jurisdiction to review the constitutionality of laws,<sup>359</sup> even though the United States Constitution does not explicitly provide that the U.S. Supreme Court shall have the authority to review the constitutionality of laws.

Thus, for two centuries, the U.S. Supreme Court has reviewed the constitutionality of laws, and in some instances, declared some of them unconstitutional. Many lawyers and scholars have severely criticized some of the U.S. Supreme Court’s decisions, but the Court continues to review the constitutionality of

<sup>357</sup> BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] art.140, 1(Austria).

An English translation of the 1920 Austrian Federal Constitution (*Bundes-Verfassungsgesetz*) is available in CODICES database of Venice Commission, at <http://codices.coe.int>; select Constitutions > English > Europe > Austria.

<sup>358</sup> ANAYASA [Constitution] art. 147 (1961) (Turkey). For an the English translation of the 1961 Turkish Constitution, before amendment of 1971, available at <http://www.anayasa.gen.tr/1961constitution-text.pdf>

<sup>359</sup> 5 U.S. (1 Cranch) 137 (1803).

laws. The same could be said with respect to the review of the constitutionality of constitutional amendments. Even if the constitutional courts did not receive special competence from the constitution, they could declare themselves competent to review the constitutionality of constitutional amendments, and although its decisions could be criticized, they would be valid. As explained above, the judicial review of constitutionality of constitutional amendments is possible in some countries such as Austria, Germany, India, Romania, Turkey and the United States.

## **WHEN THERE IS A CONSTITUTIONAL PROVISION CONCERNING THE COMPETENCE TO REVIEW CONSTITUTIONAL AMENDMENTS:**

If there is a provision in a country's constitution relating to the competence of constitutional court for the review of constitutional amendments, the question of whether the judicial review of the constitutional amendment is or is not possible may be answered according to this provision. If the constitution provides that the constitutional court can review the constitutionality of constitutional amendments, such a review would be possible. On the other hand, if the constitution expressly prohibits the judicial review of constitutional amendments, it would not be possible. The first hypothesis is illustrated by the 1961 and 1982 Turkish, 1980 Chilean Constitution and 1991 Romanian Constitution. The second hypothesis is illustrated by the 1950 Indian Constitution, as amended in 1976.

## **THE CONSTITUTIONS EMPOWERING THE CONSTITUTIONAL COURTS TO REVIEW CONSTITUTIONAL AMENDMENTS:**

*The 1961 and 1982 Turkish Constitutions, the 1980 Chilean Constitution and the 1991 Romanian Constitutions* expressly vest the constitutional court with the competence to review the constitutionality of constitutional amendments.

### **The Turkish Constitutions of 1961 and 1982:-**

Article 147 of the 1961 Turkish Constitution, as amended in 1971, stipulated that the Turkish Constitutional Court can review the formal regularity of constitutional amendments.<sup>360</sup> From 1971 to 1980, the Turkish Constitutional Court rendered five decisions reviewing the constitutionality of constitutional amendments.<sup>361</sup> The Turkish Constitution of 1982 also specifically regulates the judicial review of constitutional amendments. Article 148(1) of the Constitution explicitly empowers the Constitutional Court to review the constitutionality of constitutional amendments; however, it limits this

<sup>360</sup> ANAYASA [Constitution] art. 147(1) (1961, amended 1971) (Turkey). For an the English translation of the 1961 Turkish Constitution, as amended in 1971, see THE TURKISH CONSTITUTION AS AMENDED (Mustafa Gerçek, Erhan Yasar and Orhan Tung trans., Directorate General of Press and Information 1978), available at <http://www.anayasa.gen.tr/1961constitution-amended.pdf>.

<sup>361</sup> Decision of June 16, 1970, No. 1970/31- 8 AMKD 313 (1970) ; Decision of April 3, 1971, No. 1971/37- 9 AMKD 416 (1970) ; Decision of April 15, 1975, No. 1975/87- 13 AMKD 403 (1975); Decisions of March 23, 1976, No. 1976/19- 14 AMKD 118 (1976) and October 12, 1976, No. 1976/46- Id. at 252-285.; Decision of January 28, 1977, No. 1977/4- 15 AMKD 106-131 (1977).



review to form.<sup>362</sup> Under the 1982 Constitution, the Turkish Constitutional Court has only had one occasion to rule on the constitutionality of constitutional amendments under the 1982 Constitution.<sup>363</sup>

## 2. The Chilean Constitution of 1980:

Under Article 82(2) of the 1980 Chilean Constitution, the Chilean Constitutional Court has the power “to resolve on questions regarding constitutionality which might arise during the processing... of constitutional amendment... submitted to the approval of Congress.”<sup>364</sup> Therefore in Chile, the Constitutional Court can review the constitutionality of constitutional amendments submitted to Congress for approval, during the process. The author is unaware of any decisions of the Chilean Constitutional Court concerning the constitutionality of constitutional amendments.

## 3. The Romanian Constitution of 1991:

The Constitution of Romania established a preventive (*a priori*) review of the constitutionality of constitutional amendments. Article 144(a), in its original form in the Constitution of 1991, (now Article 146(a) of the 2003 version of the Constitution)<sup>365</sup> empowers the Constitutional Court “to adjudicate... as *ex officio*, on initiatives to revise the Constitution.” Before Parliament begins the procedure to enact a constitutional amendment, the project of the constitutional amendment must be submitted to the

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<sup>362</sup>ANAYASA [Constitution] art. 148(2) (1982) (Turkey). An English translation of the 1982 Turkish Constitution is available at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm>.

<sup>363</sup>Until now (December 2006), the Turkish Constitutional Court has only had one occasion to rule on the constitutionality of constitutional amendments under the 1982 Constitution. In that case, concerning the Law on Constitutional Amendment of May 17, 1987 one-fifth of the members of the Turkish Parliament submitted an application for annulment action to the Constitutional Court, on the ground that the enactment of the Law on Constitutional Amendment was in conflict with the Provisions of the Constitution. The Constitutional Court, in its decision dated June 8, 1987, No. 1987/15,76 ruled that it did not have the jurisdiction to accept an application for annulment action based on any grounds other than those mentioned in Article 148(1) of Constitution, (*i.e.*, whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with); therefore, the Constitutional Court declared that the application was inadmissible for the reason that the pleas in law on which the application was based, was not one of the procedural irregularities restrictively enumerated in Article 148(1). [ANAYASA [Constitution] art. 148(2) (1982) (Turkey). An English translation of the 1982 Turkish Constitution is available at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm> (last visited Mar. 5, 2007), 23 AMKD 282 (1987).]

<sup>364</sup>CONSTITUCIÓN [CONST.] [Constitution] art. 82(2) (1980) (Chile). An English translation of Chilean Constitution of 1982 is available at <http://confinder.richmond.edu/admin/docs/Chile.pdf>.

<sup>365</sup>The Constitution of Romania of 1991 was amended and republished, in 2003, with Updated denominations and a new number sequence of the text. For the English translation of both texts, see CODICES database of Venice Commission, at <http://codices.coe.int>; select Constitutions > English > Europe > Romania.

Constitutional Court, which will rule on its constitutionality within 10 days. The initiative to revise the Constitution may be deposited to the Parliament only with the decision of the Constitutional Court.<sup>366</sup>

The Romanian Constitutional Court reviewed *ex officio* the constitutionality of the initiatives for the revision of the Constitution in three cases in 1996, 2000, and 2003.<sup>367</sup> The first two initiatives were halted from continuing their legislative course because they failed to meet the constitutional requirements prescribed for a revision of the Constitution.<sup>368</sup> The constitutionality of the third legislative proposal was examined by the Constitutional Court in 2003. The Constitutional Court, in its decision no. 148, of April 16, 2003, declared certain provisions of this proposal unconstitutional on the ground that they transcended the limits on constitutional amendments as provided by Article 148 (2)<sup>369</sup> of the 1991 Romanian Constitution.<sup>370</sup>

Later, Parliament debated and approved the text of the proposal which was modified according to decision of the Constitutional Court.<sup>371</sup> But after Parliament's approval; the constitutionality of the constitutional amendment was challenged before the Constitutional Court, by way of an objection of unconstitutionality. The Court, in the Decision No. 686 of September 30, 2003, rejected this objection on the ground that it does not have competence to review the law of constitutional amendments after the approval by the Parliament because the Constitutional Court has jurisdiction to exercise only a preventive (*a priori*) review on the initiative for constitutional amendments. Concerning Romania, it can be concluded that the judicial review of the constitutional amendments is possible, but only in a framework of an *a priori* review of the initiatives for constitutional amendments; not an *a posteriori* review of the enacted constitutional amendments.

## THE CONSTITUTION EXPRESSLY PROHIBITING THE REVIEW OF THE CONSTITUTIONAL AMENDMENTS:

<sup>366</sup>Gheorge Iancu, Doina Suliman and Monica Ionescu, Rapport de la Cour constitutionnelle de Roumanie [Report of the Constitutional Court of Romania], 2ème Congrès de l'ACCP UF [Proceedings of the 2nd Symposium of ACCPUF], Libreville, September 14-15, 2000), [http://www.accpuf.org/congres2/II-RAPPO/rapport\\_rom.pdf](http://www.accpuf.org/congres2/II-RAPPO/rapport_rom.pdf).

<sup>367</sup>Nicalae Popa, The Constitutional Court of Romania, Twelve Years of Activity: 1992 2004—Evolutions over the Last Three Years, 7 THE CONSTITUTIONAL COURT'S BULLETIN (May 2004), available at <http://www.ccr.ro/default.aspx?page=publications/buletin/7/popa>.

<sup>368</sup>Ibid

<sup>369</sup>Art. 148(2) stipulates as follows: "Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or the safeguards thereof" (CONST. art.148(2) (2001) (Romania)).

<sup>370</sup>Romanian Constitutional Court, Decision No. 148 of April 16, 2003, on the issue of constitutionality of the legislative proposal for the revision of the Constitution of Romania, OFFICIAL GAZETTE OF ROMANIA, May 12, 2003, No. 317. The English translation of this decision is available at the website of the Romanian Constitutional Court at [http://www.ccr.ro/decisions/pdf/en/2003/D148\\_03.pdf](http://www.ccr.ro/decisions/pdf/en/2003/D148_03.pdf).

<sup>371</sup>Ibid.



## THE 1950 INDIAN CONSTITUTION (AS AMENDED IN 1976):-

If the constitution expressly prohibits the judicial review of constitutional amendments, this review, of course, would not be possible. This hypothesis is illustrated by the 1950 Indian Constitution as amended in 1976. Clause 4 of Article 368 of the 1950 Indian Constitution, which was added by the 42nd Amendment in 1976, stipulated that “no amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article... shall be called in question in any court on any ground.”<sup>372</sup>

Therefore in India, as of 1976, the Supreme Court of India was precluded from reviewing the constitutionality of constitutional amendments. There is no doubt on this issue because clause 4 of Article 368 of the Indian Constitution explicitly prohibits the judicial review of constitutional amendments. Moreover, clause 5 of the same Article states that “there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article.” This clause also provides that constitutional amendments cannot be judicially reviewed because the Indian Constitution does not impose any limitations on the power of the Indian Parliament to amend the constitution.

In the *Minerva Mills Ltd. v. Union of India* case, however, the Supreme Court of India reviewed the 42nd Amendment of the Indian Constitution and declared that this amendment was unconstitutional on the ground that it violated the “basic structure of the Constitution.”<sup>373</sup> The opinion of the Court in *Minerva Mills* is highly debatable because the Supreme Court of India does not have jurisdiction to rule on the constitutionality of constitutional amendments, and it is clear that the Court used a competence it does not possess. The Supreme Court usurped the power to amend the Constitution as this power was solely conferred to Parliament by way of Article 368 of the Constitution. Additionally, the concept “basic structure of the Constitution” does not have a textual basis since it is not defined in the Constitution; thus it is a vague concept which may be defined differently as already been

## 5.7 AN ANALYSIS ON THE JUDICIAL REVIEW:

The question of whether the constitutional amendments can be reviewed by constitutional courts can be answered in the following way: If country's constitution includes a provision concerning this question, whether the judicial review of the constitutional amendment is or is not permissible would be governed

<sup>372</sup> INDIA CONST.art. 368 § 4: amended by the Constitution (Forty-second Amendment) Act, 1976, available at <http://lawmin.nic.in/coi.html>.

<sup>373</sup> *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C., 1789, 1981, available at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=4488> (last visited Mar. 7, 2007). For comments on this judgment, see Anuranjan Sethi, Basic Structure Doctrine: Some Reflections, <http://ssrn.com/abstract=835165>, p. 11-13 (last visited Mar. 4, 2007); Rory O'Connell, Guardians of the Constitution: Unconstitutional Constitutional Norms, 4 J. CIVIL LIBERTIES 48, 72-73 (1999); S. P. SATHE, JUDICIAL ACTIVISM IN INDIA 87 (Oxford University Press 2002).

by this provision. If the constitution provided that the constitutional court can review the constitutionality of constitutional amendments, such a review would be possible. This hypothesis is illustrated by the Turkish, Chilean and Romanian Constitutions. But if the constitution expressly prohibits the judicial review of constitutional amendments, it would not be possible. This hypothesis is illustrated by the 1950 Indian Constitution as amended in 1976.

If the constitution (such as the Austrian, French, German, Hungarian, Irish, Slovenian, and the United States Constitutions) is silent as to the judicial review of constitutional amendments, such review is possible under the American model of judicial review because under such a system, in a legal case before the courts, the constitutionality of a constitutional amendment can be challenged by the parties claiming that the procedure by which the amendment has been adopted is contrary to the constitution or that its substance violates the limitations imposed on the constitutional amendments. The admission or rejection of this claim by the courts implies the judicial review of constitutional amendments, as illustrated by the case law of the United States and Indian Supreme Courts.

Under the European model of judicial review, the judicial review of constitutional amendments is not possible, if there is not an express constitutional provision empowering the constitutional court to review constitutional amendments, because in that model, the competence of the constitutional court emanate only from the Constitution. This is confirmed by the case-law of the French Constitutional Council and the Hungarian and Slovenian Constitutional Courts. But, under the European model, some constitutional courts, such as the Austrian, German and Turkish Constitutional Courts, have declared themselves competent to review the constitutionality of constitutional amendments. According to these courts, constitutional amendments can be deemed to be “laws”, and consequently the courts can review their constitutionality, without any need to receive additional competence, because they already have competence to review the constitutionality of *laws*. In the countries where the judicial review of the constitutional amendments is possible, the scope of this review must be determined.

The judicial review of the constitutional amendments is possible if there are, in the constitution, substantive limits on the amending power; but if there are not such limits, such review is not possible, because such a review consists in verifying whether the provisions of a constitutional amendment are compatible with these limits. If these limits do not exist, this review will be logically impossible.

The German and Turkish Constitutions impose substantial limits on the amending power, by providing some immutable principles and provisions. Therefore in Germany and Turkey, the judicial review of the constitutional amendments is possible. In fact, the German Constitutional Court has reviewed the conformity of constitutional amendments with the immutable principles enumerated in Articles 1 and 20 of the 1949 Basic Law. Likewise, the Turkish Constitutional Court, under the 1961 Constitution, reviewed the conformity of constitutional amendments with the intangibility of republican form of state.

When it comes to the substantive limits on the power to amend the constitution, some scholars are not satisfied with enumerating the substantive limits written in the text of the constitution and they argue that there are some substantive limits on constitutional amendments which are not written expressly in the

text of the constitution. This kind of limits is called “implicit substantive limits” as opposed to “explicit substantive limits.”

The theory of the existence of the implicit substantive limits on the amending power is highly problematic and controversial. Without accepting the natural law theory, it is impossible to admit to the legal validity of these “alleged” implicit substantive limits, because they do not have any textual basis. The United States Supreme Court, the German Constitutional Court (after 1970), and the Irish Supreme Court have rejected the idea that there are implicit substantive limits on the power to amend the constitution. But the Indian Supreme Court has admitted the existence of the implicit substantive limits on the amending power.

The Supreme Court of India, in the *Golaknath v. State of Punjab* case, affirmed that the amending power cannot alter the Part III (fundamental rights) of the Constitution. The same Court, in *Kesavananda Bharati v. State of Kerala*, *Indira Nehru Gandhi v. Raj Narain*, *Minerva Mills Ltd. v. Union of India*, *Waman Rao v. Union of India*, held that the amending power cannot modify the “basic structure of the Constitution” and invalidated the constitutional amendments which violate this structure. The German Constitutional Court, in *Southwest Case* and *Article 117 Case* also asserted the existence of some implicit limits on the amending power, but it was only as *obiter dicta*, and the German Court has never invalidated a constitutional amendment on the basis that it violates the implicit substantive limits.

## 5.9 CRITICISM:

The quest for a higher and just law to escape the rigors of strait-jacketed logic has compelled those enjoined with the delicate duty of interpreting the written law to resolve contemporary predicaments to evolve strategies to strike a harmonious balance between the unchanging letter of the law and the changing needs of the society. Judges had done it then, and continue to do it now- only the label changes but the contents remain the same.<sup>374</sup>

Judicial review is an evolutionary process common to both Civil Law and Common Law countries. First, there was a period of ‘natural justice’ when the Acts of the Crown and the Parliament alike were said to be the subject to a higher, though unwritten law. Then with the “Glorious Revolution” in England and the French Revolution, a century later, came the era of ‘positive’ or ‘legal justice’, characterized by the primacy of the written statute and the popular legislature and the relative powerlessness of both judges and natural law theory to control this primacy. This era carried a new flag to the citadel of justice: the ‘principle of legality’.<sup>375</sup>

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<sup>374</sup> Constitutional Amendment in India: An Analytical Reconsideration of the Doctrine of ‘judicial review’ -Sanjit Kr. Chakraborty-Electronic copy available at: [http : // ssrn.com / abstract=1745439](http://ssrn.com/abstract=1745439)

<sup>375</sup> Ibid

Judicial review is often said to be anti-democratic process because it allows a few unelected and virtually unshakeable lawyers to override the considered appointed judges have the power to declare enactments of legislatures and other representative institutions void because they offend constitutional guarantees of individual rights. *For Example:* The Supreme Court of the United States spends much, if not most, of its time on a task which is not delegated to the Supreme Court by the Constitution. That task is: Hearing cases wherein the constitutionality of a law or regulation is challenged. The Supreme Court's nine Justices attempt to sort out what is, and what is not constitutional. This process is known as Judicial Review. But the states, in drafting the Constitution, did not delegate such a power to the Supreme Court, or to any branch of the government.

Since the constitution does not give this power to the court, you might wonder how it came to be that the court assumed this responsibility. The answer is that the court just started doing it and no one has put a stop to it. This assumption of power took place first in 1794 when the Supreme Court declared an act of congress to be unconstitutional, but went largely unnoticed until the landmark case of *Marbury v Madison* in 1803. *Marbury* is significant less for the issue that it settled (between *Marbury* and *Madison*) than for the fact that Chief Justice John Marshall used *Marbury* to provide a rationale for judicial review. Since then, the idea that the Supreme Court should be the arbiter of constitutionality issues has become so ingrained that most people incorrectly believe that the Constitution granted this power to the federal judiciary.<sup>376</sup>

Article III of the Constitution provides for the establishment of a judicial branch of the federal government and Section 2 of that article enumerates the powers of the Supreme Court. Here is Section 2, in part: Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

- to all Cases affecting Ambassadors, other public Ministers and Consuls;
- to all Cases of admiralty and maritime Jurisdiction;
- to Controversies to which the United States shall be a Party;
- to Controversies between two or more States;
- between a State and Citizens of another State;
- between Citizens of different States;
- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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<sup>376</sup> Constitutional Amendment in India: An Analytical Reconsideration of the Doctrine of 'judicial review' -Sanjit Kr. Chakraborty-Electronic copy available at: [http : // ssrn.com / abstract=1745439](http://ssrn.com/abstract=1745439)

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. Now let us feel free to examine the entire text of *Article III* to assure that no power of Judicial Review is granted by the Constitution. Well, we might say, "someone has to review laws for constitutionality. Why not the Supreme Court? Some possible answers:

- First and foremost, it is not a power granted to the Supreme Court by the Constitution. When the Supreme Court exercises Judicial Review, it is acting unconstitutionally.
- It is a huge conflict of interest. The Federal Government is judging the constitutionality of its own laws. It is a classic case of "the fox guarding the hen house."
- The Constitution's "checks and balances" were designed to prevent any one branch of government (legislative, executive or judicial) from becoming too powerful and running roughshod over the other branches. There is no such system of checks and balances to protect the states and the people when multiple branches of government, acting in concert, erode and destroy the rights and powers of the states and the people.
- Even if the Supreme Court could be counted on to keep the Executive and Legislative branches from violating the Constitution, who is watching the Supreme Court and will prevent the judicial branch from acting unconstitutionally? Unless we believe that the Supreme Court is infallible (and, demonstrably, it is not), then allowing the Supreme Court to be the sole arbiter of Constitutionality issues is obviously flawed.
- Justices are appointed, not elected and may only be removed for bad behavior (which has happened in the distant past but these days, appointment to the Supreme Court is like a lifetime appointment). If the court upholds unconstitutional laws, there is no recourse available. We the People cannot simply vote them out to correct the situation. It is the Constitution, not the Supreme Court, which is the Supreme Law of the Land. Even the Supreme Court should be accountable for overstepping Constitutional limits on federal power. Thomas Jefferson wrote, in 1823:

*"At the establishment of our constitution, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance. In truth, man is not made to be trusted for life, if secured against all liability to account."*

- Judicial review turns the Constitution on its head. The Judiciary was created as the weakest branch, controlled by both the Legislative and Executive branches. Judicial review makes the Judiciary master of both the Legislature and Executive, telling them both what that may and may not do.
- There are only nine Justices and, under the current system, it takes only a simple majority — five votes — to determine a case. Given the supermajority requirement mandated by the Constitution to pass Constitutional amendments, a simple majority requirement by the Supreme Court, to uphold a suspect law, defies the spirit of the Constitution. If 44.44% of the Supreme Court justices (four of nine) think a law is not constitutional, we should err on the side of caution and declare it unconstitutional.
- The people and the states have little control over the makeup of the Supreme Court. Officials in all three branches of government take an oath of office to uphold the Constitution. The Supreme Court Justices, Senators, Congressmen, and Vice President, and other federal officers, all take an oath of office to "support and defend" the Constitution. (The president's oath of office in Article II, Section 1, requires that he "preserve, protect, and defend the Constitution of the United States.") Why is the Supreme Court's version of "constitutional" considered more authoritative? Is the Judicial branch more to be trusted than the Executive or Legislative branches? Prudence dictates that we be wary of all three branches (and especially wary of the one unaccountable branch).
- Given that it was the people and the states which established the Constitution, it is the states who should settle issues of constitutionality. The Constitution is a set of rules made by the states as to how the government should act. The "judicial review" paradigm allows the government to make its own rules with no say by the original rule-makers — the states.
- The Constitution was created by the states and any question as to the meaning of the Constitution is rightly settled by the states. When you make rules for your children, do you permit your children to interpret your rules in any manner they like? Of course not. Yet, the states are permitting the federal government — the "child" of the states — to do exactly that.
- Since the power of Judicial Review is not expressly granted to the Supreme Court by the Constitution, this power, per the tenth amendment, is "reserved to the States respectively, or to the people."

The Constitution is very clear; any power to review laws to see if they are constitutional belongs to the states and to the people. Therefore, the Supreme Court is itself acting unconstitutionally when it exercises the power of 'Judicial Review.' It would require a Constitutional Amendment specifically granting this power to the court in order for 'Judicial Review' to be constitutional! And just how should the determination of "constitutionality" is handled? For that answer, it helps to understand how the Constitution is (supposed to be) amended.

The problem with the precedent of Judicial Review is that the impediments to challenging an unconstitutional law are numerous and difficult to overcome while the passing of laws of questionable



constitutionality is just as easy as passing the constitutional ones. Hence, the various rules and mechanisms put into effect by the federal government do indeed place the Constitution "*on a level with ordinary legislative acts*" changeable "*by ordinary means*" for all practical purposes.<sup>377</sup>

## CHAPTER 6

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<sup>377</sup> Constitutional Amendment in India: An Analytical Reconsideration of the Doctrine of 'judicial review' -Sanjit Kr. Chakraborty-Electronic copy available at: [http : // ssrn.com / abstract=1745439](http://ssrn.com/abstract=1745439)

## JUDICIAL REVIEW IN INDIA:

The power of judiciary to review and determine the validity of a law or an order may be described as the powers of Judicial Review'. It means that the constitution is the supreme law of the land and any law inconsistent therewith is void through judicial review. It is the power exerted by the courts of a country to examine the actions of the legislatures, executive and administrative arms of government and to ensure that such actions conform to the provisions of the nation's Constitution. Judicial review has two important functions, like, of legitimizing government action and the protection of constitution against any undue encroachment by the government.<sup>378</sup>

### Concept of Judicial Review in India:

The Supreme Court of India and the High Courts of various States has been vested with the power of judicial review. It means that the Supreme Court may review its own Judgment or order. Judicial review can be defined as the competence of a court of law to declare the constitutionality or otherwise of a legislative enactment. Being the guardian of the Fundamental Rights and arbiter of the constitutional conflicts between the Union and the States with respect to the division of powers between them, the Supreme Court enjoys the competence to exercise the power of reviewing legislative enactments both of Parliament and the State's legislatures.<sup>379</sup>

The power of the court to declare legislative enactments invalid is expressly provided by the Constitution under Article 13, which declares that every law in force, or every future law inconsistent with or in derogation of the Fundamental Rights, shall be void. Other Articles of the Constitution (131-136) have also expressly vested in the Supreme Court the power of reviewing legislative enactments of the Union and the States.

The jurisdiction of the Supreme Court was curtailed by the 42nd Amendment of the Constitution (1976), in several ways. But some of these changes have been repealed by the 43rd Amendment Act, 1977. But there are several other provisions which were introduced by the 42nd Amendment Act 1976 not repealed so far.<sup>380</sup> **These are:**

- (i) Articles 323 A and 323B<sup>381</sup>. The intent of these two new Articles was to take away the jurisdiction of the Supreme Court under Article 32 over orders and decisions of Administrative Tribunals. These Articles could, however, be implemented only by legislation. Article 323A has been implemented by the Administrative Tribunals Act, 1985.
- (ii) Articles 368 (4) and 368(5). These two Clauses were inserted in Article 368 with a view to preventing the Supreme Court to invalidate any Constitutional Amendment Act on the theory of

<sup>378</sup> [www.legalserviceindia.com/constitution/constitution-of-india1.html](http://www.legalserviceindia.com/constitution/constitution-of-india1.html); [www.clearias.com](http://www.clearias.com).

<sup>379</sup> Ibid

<sup>380</sup> Ibid

<sup>381</sup> Articles relating to Administrative Tribunals and Tribunals for other matters- The Constitution of India.

‘basic features’ of the Constitution. These Clauses have been emasculated by the Supreme Court itself, striking them down on the ground that they are violative in the two ‘basic features’ of the Constitution:

- I. the limited nature of the amending power under Article 368; and
- II. Judicial review in the *Minerva Mills* case<sup>382</sup>.

The court was very reluctant and cautious to exercise its power of Judicial Review, during the first decade, when the Supreme Court declared invalid only one of total 694 Acts passed by the Parliament. During the second decade the court asserted its authority without any hesitation which is reflected in the famous *Golak Nath*'s<sup>383</sup> case and *Kesavananda Barti*'s<sup>384</sup> case. In these cases the Supreme Court assumed the role of constitution making. Indian Judiciary has been able to overcome the restriction that was put on it by the 42nd amendment, with the help of the 43rd and 44th amendments. Now the redeeming quality of Indian judiciary is that no future governments could clip its wings or dilute its right of Judicial Review. In fact, now the ‘Judicial Review’ is considered to be the basic feature of our Constitution.<sup>385</sup>

## 6.1 Constitutional Provisions for Judicial Review:

The Indian Constitution adopted the Judicial Review on lines of U.S. Constitution. Parliament is not supreme under the Constitution of India. Its powers are limited in a manner that the power is divided between centre and states. Moreover the Supreme Court enjoys a position which entrusts it with the power of reviewing the legislative enactments both of Parliament and the State Legislatures. This grants the court a powerful instrument of judicial review under the constitution. Both the political theory and text of the Constitution has granted the judiciary the power of judicial review of legislation. The Constitutional Provisions which guarantee judicial review of legislation are Articles 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372.<sup>386</sup>

- Article 372 (1) establishes the judicial review of the pre-constitution legislation.
- Article 13 declares that any law which contravenes any of the provisions of the part of Fundamental Rights shall be void.
- Articles 32 and 226 entrusts the roles of the protector and guarantor of fundamental rights to the Supreme and High Courts.
- Article 251 and 254 states that in case of inconsistency between union and state laws, the state law shall be void.
- Article 246 (3) ensures the state legislature’s exclusive powers on matters pertaining to the State List.

<sup>382</sup> *Minerva Mills Ltd. V. Union of India* AIR 1980 SC 1789

<sup>383</sup> *L.C. Golaknath v. State of Punjab* AIR 1967 SC 1643

<sup>384</sup> *Keshavananda Bharti v. State of Kerala* AIR 1973 SCC 255

<sup>385</sup> *I.R. Coelho v. State of Tami Nadu* AIR 2007 SC 861

<sup>386</sup> <http://Judis.nic.in/supremecourt/grydisp.asp?tfnm>.

- Article 245 states that the powers of both Parliament and State legislatures are subject to the provisions of the constitution.

The legitimacy of any legislation can be challenged in the court of law on the grounds that the legislature is not competent enough to pass a law on that particular subject matter; the law is repugnant to the provisions of the constitutions; or the law infringes one of the fundamental rights. Articles 131-136 entrusts the court with the power to adjudicate disputes between individuals, between individuals and the state, between the states and the union; but the court may be required to interpret the provisions of the constitution and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land. There is no express provision in our constitution empowering the courts to invalidate laws, but the constitution has imposed definite limitations upon each of the organs, the transgression of which would make the law void. The court is entrusted with the task of deciding whether any of the constitutional limitations has been transgressed or not.<sup>387</sup>

## 6.2 Constitutional Amendments and the Use of Judicial Review:

Until 1967, the Supreme Court upheld that the Amendment Acts were not ordinary laws and could not be struck down by the application of Article 13 (2). It was in the famous *Golak Nath's* case<sup>388</sup> in 1967, where the validity of three constitutional amendments (1st, 4th and 17th) was challenged, that the Supreme Court reversed its earlier decision and uphold the provision under article 368 which put a check on the Parliament's propensity to abridge the fundamental Rights under chapter III of the Constitution.

In the *Kesavananda Bharti's*<sup>389</sup> case in 1973, the constitutional validity of the twenty-fourth, twenty fifth and twenty ninth amendments was challenged wherein the court held that even though the Parliament is entitled to amend any provision of the constitution it should not tamper with the essential features of the constitution; and that Article 31c is void since it takes away invaluable fundamental rights.

The court balances the felt 'necessities of the time' and 'constitutional fundamentals' when scrutinizing the validity of any law. *H.M. Seervai* has enumerated some of the canyons, maxims and norms followed by the court:

1. There is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; and the onus to prove that it's unconstitutional lies upon the person who challenges it.
2. Where the validity of a statute is questioned and there are two interpretations, one of which would make the law valid, and the other void, the former must be preferred and the validity of the law will be upheld.

<sup>387</sup> <http://Judis.nic.in/supremecourt/qrydisp.asp?tfnm>

<sup>388</sup> L.C. Golaknath v. State of Punjab AIR 1967 SC 1643

<sup>389</sup> Kesavananda Bharti v. State of Kerala AIR 1973 SCC 255

3. The court will not decide constitutional questions if a case is capable of being decided on other grounds.
4. The court will not decide a larger constitutional question than is required by the case before it.
5. The court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.
6. Ordinarily, courts should not pronounce on the validity of an Act or part of an Act which has not been brought into force, because till then the question of validity would be merely academic.
7. In a later case, the *Minerva Mills* case, the Supreme Court went a step ahead. The 42nd Constitutional Amendment of 1976 among other things had added a clause to Article 368 placing a constitutional amendment beyond judicial review. The court held that this was against the doctrine of judicial review, the basic feature of the Constitution.<sup>390</sup>

### 6.3 Judicial Review and Statutes of the Legislature:-

Judicial review involves, most importantly, the authority of a law court to invalidate--to nullify, set aside, or veto--a statute which the legislature has enacted and which, in the opinion of the judges of the court, violates the Constitution. In reviewing the legislative statute, the court passes on its *constitutional validity*, rendering a decision as to whether or not the statute is in harmony with the provisions of the Constitution. If the court finds that the act of the legislature is in conflict with the Constitution, the court declares the legislation *unconstitutional* and *null and void* (of no force and effect). Treating the Constitution as a law superior to and taking precedence over all ordinary laws (i.e., the statutes, the laws enacted by the legislature), the court upholds the superior, or higher, law of the Constitution and rules out enforcement of the statute which the court deems to be unconstitutional.

The court's interpretation of the relevant provision or provisions of the Constitution--the judges' determination of the meaning and intent of the constitutional provisions--prevails over the opinion and action of a majority in the legislature. In other words, operation of the principle of judicial review in a political society's constitutional system means that a decision of a judicial body may override and abrogate a decision of the legislature; a court decision interpreting the Constitution can revoke a law enacted by the legislature.

### 6.4 Judicial Review under Private Law:

There are remedies against the actions of the executive under private law. A suit can be filed under section 9 of the Code of Civil Procedure. The suit can be for damages from the government or other public authority when right is violated and an injury is suffered. It can also be for a declaration of the illegality of the administrative action. A suit can be filed for issuing injunction against the act that threatens the rights of persons. These remedies can, however, be specifically excluded by a statute under which the administration acts. In such cases the statute will provide alternative remedies. If it does not, or

<sup>390</sup> [www.slideshare.net/history-of-indian-constitution](http://www.slideshare.net/history-of-indian-constitution).

if the alternative remedies provided are not adequate or sufficient the aggrieved person will have a right to file a suit. When the alternative remedies are effective the citizen will have the right only to resort to those remedies and not the remedy under the Code of Civil Procedure. These rules are laid down through judicial decisions.

### 6.5 Strategy of Judicial Review:

The strategy of judicial review can be divided broadly into public law review and private law review. Under the Constitution, legislative and administrative actions can be reviewed by courts under Articles 32, 136, 226 and 227. Such review is called public law review. Article 32 guarantees the right to move the Supreme Court if any fundamental right in question has to be reviewed under this provision. One can move to High Court of their respective State under Article 226 which is more often, used for reviewing the action of administration. The High Court can issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto, and certiorari for the enforcement of fundamental rights or for any other purpose.<sup>391</sup>

- Habeas corpus is a writ issued by the court to bring before the court a person from illegal custody. The court will examine the legality of detention and release the person if detention is found illegal.
- Mandamus is issued to a public authority to do an act which under law, it is obliged to do or to forbear from doing.
- Prohibition is a writ to prevent a court or tribunal from doing something in excess of its authority. High Court has power to issue an order of prohibition to the executive authority prohibiting it from acting without.
- Certiorari is a writ issued to a judicial or quasi-judicial authority to correct its order. This writ is issued on specified grounds like violation of natural justice; excess, abuse or lack of jurisdiction; fraud; and error of law apparent on the face of the record.
- Quo-warranto is a writ issued to a person who unauthorizedly occupies a public office to step down from that office. High courts and the Supreme Court have the power to issue not only these writs but also appropriate directions and orders.

### 6.6 Judicial Review and Contempt of Court:

It is mandatory that an administrative officer or authority should obey the directions of a court and execute the decisions of the court. What action can be court take if they do not do this? The court has neither the sword nor the purse like the executive. It has a potential power. It has the power to take action of contempt of court. Those who violate or disobey the decisions of the courts are proceeded against under this power. They can be punished and sent to jail. Obviously the contempt power is the only weapon in the hand of judiciary to see that their decisions are executed.<sup>392</sup>

<sup>391</sup> <https://en.wikipedia.org/wiki/judicialreview-amendment-of-the-constitution-of-india>.

<sup>392</sup> <https://en.wikipedia.org/wiki/judicialreview-amendment-of-the-constitution-of-india>.



## 6.7 Limitations on Judicial Review:

We are all acquainted with the adage that “Power corrupts and absolute power corrupts absolutely”. The power of judicial review is of such dimension that unless it is kept under certain limitations, it may tend to produce arbitrariness. In United States judicial review power is exercised under certain limitations. These limitations are generally self-imposed. In India judicial review power is limited by:<sup>393</sup>

- i. **Constitutional Limitations:-** The Indian Constitution excludes many Acts from judicial review. Powers of judicial review is expressly barred in Articles 31-A, 31-B read with 9<sup>th</sup> Schedule. Articles 31-C, 74(2), 105(2), 122 etc.
- ii. **Intrinsic Limitations:-** These limitations are nothing but commonly accepted norms such as “Judicis est decreta non dare” that is judges only decide but not legislate. May be at present out of social necessity, the judges sometimes do not hesitate to legislate what is commonly termed as judicial activism. Instances of judicial legislations are law made by the Supreme Court against sexual harassment in *Visakha’s case*<sup>394</sup> or law relating to inter-country adoption in *Laxmi Kanta Pandey’s case*.<sup>395</sup>
- iii. **Self-Imposed Limitations:-** The Indian Supreme Court adopted self-imposed limitation while discharging judicial review power. D.D. Basu has delineated the following area where Indian Courts have exercised self-imposed limitations. They are as follows: Actual case or controversy; controversy must be real and not hypothetical; substantial constitutional question must be involved; constitutionality to be decided not in the last resort; issue must be justifiable and not political; presumption in favour of constitutionality of legislations and respect of legislative determination.

Some other limitation on judicial review includes ‘Locus Standi’. This means that only a person aggrieved by an administrative action or by an unjust provision of law shall have the right to move the court for redressal. Under this traditional rule a third party who is not affected by the action cannot move the court. Another limitation is that before a person moves the High Courts and the Supreme Court invoking their extraordinary jurisdiction, he should have exhausted all alternative remedies. For example, there may be a hierarchy of authorities provided in legislation to look-into the grievances of the affected party. The aggrieved person should first approach these authorities for a remedy before invoking extraordinary jurisdiction of the courts.

However, the alternative remedies should be equally efficacious and effective as the remedies available from the courts are. If they are not, the jurisdiction can be invoked. In cases of manifest injustice and the violation of procedural fairness, alternative remedy is not a bar. A rule has been evolved to avoid repeated adjudication on the same matter between the same parties. If the case is finally disposed of on

<sup>393</sup> Basu D.D., “Commentary on the Constitution of India” 5<sup>th</sup> Edn. Vol. 1 p.170.

<sup>394</sup> *Vishaka vs. State of Rajasthan* AIR 1997 SC 3011

<sup>395</sup> *Laxmi Kanta Pandey vs. Union of India* AIR 1984 SC 469

merits the same issue cannot be re-agitated by any of the parties filing another case. This limitation is called *res judicata*.<sup>396</sup>

Lastly the Act or the Statute or any enactment in question is going against the spirit of the Constitution or is in violation of Fundamental Rights of the Individuals.

### **6.8 Changing Trends in Judicial Review:**

Recently there is a rising trends in the name of Judicial Activism in the land. The doors of the judiciary are kept open for redressing the grievances of persons who cannot ordinarily have access to justice. The strict observance of the traditional rule of *locus standi* will do injustice to certain persons who do not have the money, knowledge and facilities of approaching court.

In such cases if a public spirited person comes forward on their behalf courts relax the rules and adjudicate over the matter. Thus, in the matter of socially and economically backward groups or persons who are not aware of their rights or not capable of pursuing their case in a court, the complex and rigorous procedural formalities are not insisted upon. At this level there are cases when press reports were taken as write petitions and reliefs granted. Letters addressed to the courts were also 'treated as petitions.

Judicial review is one of the important techniques by which the courts examine the actions of the legislature, the executive and the other governmental agencies and decide whether or not these actions are valid and within the limits set by the Constitution. Therefore, with the power of judicial review the courts act as a custodian of the fundamental rights. The Indian Judiciary, given the federal structure of the Constitution, also settles conflicts of jurisdiction in legislation between the centre and the states. With the growing functions of the modern state judicial intervention in the process of making administrative decisions and executive them has also increased.<sup>397</sup>

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<sup>396</sup> <https://en.wikipedia.org/wiki/judicialreview-amendment-of-the-constitution-of-india>.

<sup>397</sup> [www.slideshare.net/history-of-indian-constitution](http://www.slideshare.net/history-of-indian-constitution).

# CHAPTER 7

*“A Constitution is an ever growing thing and is perpetually continuous as it embodies the spirit of the nation. It is enriched at present by the past influence and it makes the future richer than the present.” - Edmund Burke.*

## CONCLUSION:

The judiciary in India has been assigned a prominent role under the Indian Constitution to develop Constitutional norms and principles. For the last six decades, the judiciary has played a vital role with near perfection, although on certain occasions it failed to respond to the aspirations and need of the common man. The role and function of each organ of the Government has been clearly laid down under the Constitution. Clauses like ‘Parliamentary Supremacy’ or ‘Judicial Supremacy’ have no meaning for constitutional lawyers.

While making constitutional amendment the parliament is exercising its power to change the constitution as per desire and aspiration of the people as such conferred power on the parliament ensures that there can be smooth changes in the constitution. so many amendments have been made to the Constitution in a span of almost 68 years from the inception of the Indian Constitution and this cannot be regarded as a happy situation. Though some of the amendments can be regarded as inevitable, e.g., amendments changing some details which needed to be changed with the lapse of time, some were not necessary at all as they were an attempt to change the balances originally incorporated into the constitution by its framers. It needs to be emphasized that the Constitution should be treated with great respect and honour and should not make a play thing by the politicians and their respective parties to simply satisfy their own whims and fancies. A stable constitution gives stability and order to the country’s constitutional process.

For example, in the United States of America, during over nearly 200 years of their inception of the Constitution, only 30 amendments have been made and it has progressed tremendously under an old constitution. To achieve this laudable objective it seems absolutely necessary that the constitutional amending process be rigidified and made more difficult such like by incorporating the process of referendum by the public at large so that an amendment can be made to the constitution only when there is broad national consensus favoring the same.

On the other hand the role of judiciary under the Indian constitution has been clearly laid down by the Constitution. The Courts were assigned the task of interpreting the Constitution through the process of judicial review. They were vested with the power to test the validity of action of any authority under the Constitution in order to ensure that the authority exercising the power conferred by the Constitution does not transgress the limitations imposed by the constitution on the exercise of that power.

The higher judiciary in India has changed in its outlook and functioning since its establishment for the last almost six decades. It took time to shed the colonial hang over and now it has been able to establish a culture of its own. In spite of the fact that the framers of the constitution did not want the judiciary under the constitution to be the supreme, it has been elevated to an equivalent position for all practical purposes, as it is (the Supreme Court of India the final interpreter of the law. It is endowed with a very wide judicial review

power. The scope of judicial review extends to the actions of all branches be it legislative, executive or its own action.

*“Judicial review has sound justifications in the function of upholding constitutional supremacy. The supremacy of the Constitution itself is embedded in convincing facts of public confidence as such that judicial review is an instrument of public confidence rather than anti-majoritarian device. The role of judiciary in such context is that of sentinel qui vive (on guard). It is with great caution and keeping in mind the promotion of public interest and support to public reason that judiciary has to exercise its judicial review such that it results in the experience of the domain of review of legislative and administrative action that has reinforced faith of people in good law and governance.”- Prof. P. Ishwara Bhatt.*

### SUGGESTION:

- After going through my research work I came to the conclusion that Amendment to the Constitution is a very crucial aspect of any country's socio- economic and political development. As such the Constitution provides for the Fundamental rights of individuals as well as structural organization of government and their powers and functions, their adaptation to the changing times and circumstances is inevitable. So to cope up with these changes of social and political spheres of life there should be a change in the fundamental law of the land which is must.

Thus an amendment to the constitution is one of the vital and necessitated subject of concern as what was the law in the past may not be suited to the present situation of fast changing lifestyle. Thus to make the fundamental law which was drafted some decades back must be altered or modified or harmoniously constructed to make it deem fit and workable with effective force and authority in the present context of advancement of public welfare.

But on the other hand we should also keep in mind that such change or amendment should not be misuse or abuse by the political entities or parliamentarians who are authorized to make laws according to their selfish whims and fancies. It should not be made a playful thing in the hand of law-makers who may in turned by enacting some selfish legislations becomes the law-breakers and abused their power effecting the welfare of the people and the country as well.

Therefore there must be some effective mechanism which may put a check and stop the respective authorities from making unwanted and selfish motivated legislations. Such a participation of public in the law making process like referendum being practice in Australia is one of the efficient measures which provides for the control of abuse of law-making power by the legislators. Example can also be cited by making a reference to the American Constitution where less number of amendment have resulted in tremendous development as compared to more number of amendments in the Indian constitution have resulted in political instability and slow progress of public welfare schemes. Hence strict observance and

vigilance is the utmost need of the hour for our Indian constitution so far as the amendment procedure is concerned for a better and good governance and welfare of the masses at large.

- The role of judiciary by the application of the doctrine of judicial review power in the recent past has been commendable. The judiciary has elevated its level and status where it along with the legal profession has shown to the world that it is well competent, courageous and powerful enough to give justice and deliver the same to its own people. Right from road to parliament, from lane to Delhi or from classroom to court room the role of judiciary in creating, developing and preserving the laws has been praise worthy.

But the experience has shown that there has been some handful of cases or occasions when some very few members of judiciary have lowered its stature by their conduct which has brought the judiciary into dispute. There have been cases when the corruption in the judiciary is brought to notice. Allegations, favouratism, cronyism and nepotism etc., have been showered on the judiciary. In the light of changing circumstances it has become incumbent to re-vision the role of judiciary and peep seriously into the allegations of misbehavior, incapacity, lack of integrity and corruption against the judiciary, to the check if those are true and if yes take immediate remedial steps. The indifferent attitude of the judiciary has also been a moot point at times. Nothing is more drastic for the members of the society than the indifferent attitude of the temple of justice which is the only visible hope of the people.

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