



# JUDICIAL REVIEW AND PARLIAMENTARY DEMOCRACY – BALANCING THE SEPARATION OF POWER

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## INTRODUCTION

It is firmly believed that the Indian governmental machinery has been borrowed from the British functioning but still Indian system has created its unique identity in the world. As in British system the separation of powers is complex but the Indian system has its own well balanced striking feature of “separation of powers”. First of all in establishing the balance of powers the main essential which is to be established is “democracy”. After the rule of Britishers over India for long period of about 200 years the constitution has been framed and enacted in 1950 with an aim to establish rule of law and therefore converting India into a Democratic country. The rule of law is declared by the constitution, as the constitution is “Superma Lex” which is the paramount and fundamental law of land. It specifies the allocation of powers between the three organs of the government and also specifies the concept of judicial review that suggests that the separation of powers is not absolute to run the country more efficiently. No organ of the government is supreme to each other and in this context Supreme Court held in *Ganga Ram Moolchandani v. State of Rajasthan*<sup>1</sup> has “our federal system the most important part that is constitution”. Thus by the supremacy of the constitution is established for the establishment of democracy and thus democracy is also the essential element as guiding force for the proper separation of power. Constitutionalism, constitution and constitutional law are also the terms that have been interchangeably used but each have its own meaning and help in establishing a unique system of government. Constitutionalism is bed rock of democracy in which the democratic parliament is elected by the way of *Universal adult franchise*<sup>2</sup> in which every person above the age of 18 years vote to choose its representative to parliament.

Supreme Court in respect to democratic parliament held in a case *Indira Gandhi v. Raj Narain*<sup>3</sup> “Democracy is the basic feature of the constitution with free and fare elections are also impliedly its basic feature.” Also it has been remarked that in case *R.C. Poudyal v. Union of India*<sup>4</sup> “Democracy is the People’s power and State’s power vest in people” which seeks to establish the concept of popular sovereignty by which democratically elected parliament and separation of powers comes into force. The importance of the constitution has been highlighted in *Keshavananda Bharati*<sup>5</sup> case and which has been repeated in *Minerva mills*<sup>6</sup> case as “Constitution has devised a structure of power relationship with the checks and balance and limits are placed on the powers of every authority instrumentally under the constitution. Therefore the philosophy of constitution being bed rock of republican democratic government becomes an integral part of the doctrine of basic structure as decided by *Keshavananda Bharati* case in 1973”.

Thus it is the constitution which set up the framework for the democratic form of the government, elected parliament, separation of powers and judicial review to a large extent with particular checks and balance imposed on them so as to limit the power thus preventing the abuse of it. The Preamble to the Constitution which is regarded as the key to open the minds of constitution makers or the identity card of the constitution also provide for the word “Republic” which means the head of the state is elected and not a hereditary monarch

<sup>1</sup> AIR 2001 SC 2616

<sup>2</sup> 61<sup>ST</sup> Amendment – voting age is reduced from 21 to 18

<sup>3</sup> AIR 1975 SC 2299

<sup>4</sup> AIR 1993 SC 1804

<sup>5</sup> AIR 1973 SC 1461

<sup>6</sup> AIR 1980 SC 1789



and it is democratic because constitution ensures the creation and existence of the government at will of people, by their participation in the formation of the government at regular intervals on the principle of Universal Adult Franchise that could be read with Article 52 & 53 of Constitution that declare the President as executive head over the government. Hence it can be established that every organ function with a little interplay into the domain of each other with clear segregation of powers so that no one enjoys absolute authority and democratic parliament along with judicial review is essential element to it.

Further, it can be said as the constitution of India is termed as the bag full of borrowed constitutions still the constitution makers while incorporating the qualities of other country's constitutions, yet they have formulated their own unique features making it supreme in the country thereby establishing the rule of law. It can be said that the qualities of the separation of powers could be relatable yet unique in itself from all the countries from where the system of checks and balance has been started giving rise to judicial review which is not an impact process but developed gradually as per the need of the country, its political system and the balance.

#### PARLIMENTARY SYSTEM OF INDIA: THE DEMOCRATIC WAY

The foundation stone of the parliamentary system was laid down in the era of British and it has some common resemblance with the British Parliament as House of Lords and House of Commons are incorporated as the Rajya Sabha and Lok Sabha. India's Parliament is bicameral. The lower House is designated as the 'House of the People' or Lok Sabha, and the Upper House as the 'Council of States' or Rajya Sabha. The two Houses along with the President constituted Parliament (Article 79).<sup>7</sup> The democratic system of the parliament is entrusted by the free and fare elections by the principle of Universal Adult Franchise. Further the parliamentary form of the government is that type of the government that relates and establishes the harmony between the other organs of the government as well. All such system has been entrusted in with the constitution which signifies the parliamentary form of government in a well defined manner.

The Separation of powers is instituted as there is nominal check of the executive on the legislature as given in constitution as appointment of the President as the Executive chief and head of the state<sup>8</sup> but keeping in view the word republic mentioned in the Preamble, the President is though part of the parliament is the elected person not a hereditary monarch. Hence the democratic part of the constitution of the parliament is established the main executive component of it i.e. President is also democratically elected and does not assume the supreme powers as it the head of the state assumes only titular powers as opposed to the head of the government who assumes the real powers as Prime Ministers chosen from among the Parliament.

For the basic framework emphasis is given on the formation of the parliament which is discussed in detail in the Constitution. So as per the Indian constitution the Parliament consists of the President, Lok Sabha and Rajya Sabha<sup>9</sup>. The two houses that is the council of States(Rajya Sabha) and the House of people(Lok Sabha) form an integral part so as the President act as the executive body over the both in the name of whom all the state affairs are conducted. Hence the President though has been held as the head of the state yet he has only the titular authority hence establishing the supremacy of the Parliament. As where we talk about the British Parliament it can make any law and assume the supremacy but its Indian counterpart could not be established as the Supreme as there is the concept of judicial review and judiciary also plays its part limiting the powers of one organ to avoid foul play as absolute power corrupts absolutely.

So it can be interpreted that the separation of powers comes into the play with some interplay into the domain of each other resulting in checks and balances. The parliament has been described in the constitution in brief from article 79 to article 122 which is more of hybrid system merging two or more classical systems. Some qualities of the parliament were based on the British System and some were based on the American principles that have resulted in formation of the unique ideal system in respect of the world. This is why the better separation of powers could be achieved while harmonizing the two systems in contrary and having the new idea.

<sup>7</sup> Jain M.P., Indian Constitutional Law, 7<sup>th</sup> Ed., P.24

<sup>8</sup> Art. 52 of Constitution of India

<sup>9</sup> Article 78



The democracy is the only way that has led to the growth of the system and machinery of the political India and thus ensures better rule so as to fulfill the principles of the Constitution of India as given in the Preamble the basic democratic system has been well maintained. Another aspect around which the country revolves around is the law. The Law making authority is entrusted in the hands of the legislature so as legislature plays big part in it. The main component of the Legislature is Parliament and thus to take care of law as to its formation and amendment is the prime function of the Parliament. However the cabinet is the word that has not been described in the constitution but still being the part of the parliament, assuming vast powers now a day's giving rise to the term "cabinet dictatorship" but still being the part of the Parliament and being chosen from among the members of Parliament this falls within the ambit of the democratic Parliament for the sake of better functioning of the government.

Thus when the Parliament has been entrusted with so much powers and functions than there could have been aftereffects of the excess powers and to control these excess powers gradually with the time passing by concept of judicial activism and judicial review has been developed with the need of hour. Although this judicial review is widely debated concept but still this is the one way by which the three organs of the government do not cross their limits and functions within the ambit of their prescribed areas for a better and well balanced functioning of the government. It is to be noted that, though the Indian Constitution provides for the parliamentary form of Government but unlike Britain, the Parliament is not supreme under the Indian Constitution. In India, the Constitution is supreme. In England, laws passed by the Parliament cannot be declared unconstitutional while the Indian Constitution expressly vests this power in the Courts. The Indian Parliament is the creature of the Constitution and derives all its powers from the Constitution. It is not a sovereign body.<sup>10</sup>

### SEPARATION OF POWERS AND JUDICIAL REVIEW IN INDIA

A truly liberal constitutional document is one which grants power, act as the ultimate statute but also provide for the powers which cut down the powers and avoid arbitrary use by one particular organ of the government. The cutting down and balancing of powers can be done in various ways and basically the constitution plays its part in limiting the powers and hence there are three ways in which this happens in Indian Constitution. *First, the Constitution enumerates those things which the State cannot do and also enumerates all those things it must do. Secondly, the Constitution being federal, the power of the State is divided between the Union and the states. Thirdly, there is separation of powers, which is divided the powers of the state among the legislature, the executive and the judiciary by the Constitution itself.*<sup>11</sup> In this way it can be said that no single body of organs of the government could be entrusted with the absolute powers and hence some concept has to be originated that decides the abuse of the authority and foul play in a particular organ and so the words like 'judicial reviews' or 'judicial activism' are originating in which the Judiciary assumed and originated as the interpreter of the Constitution. It can further be said the division of power is the main essential by which the scope of the democracy could be widened and properly used and it is quoted "*By division of powers, government becomes the servant of the people and not the master.*"<sup>12</sup>

In India, the judiciary has claimed to be the protector of law in achieving that object and there has been conflict of ideals that what so ever is the reason the judiciary is acting in the domain of the Parliament i.e. legislature but still while fulfilling the basic principle of the separation or division of powers, this is regarded as the unavoidable and necessary function of the judiciary. In such process of judicial activism, unelected judges have effectively replaced the notion of the separation of powers among three governmental branches with a Unitarian claim of formal judicial supremacy, but in order to maintain the balance this supremacy is only regarding the check and balance on the immense powers of the Parliaments but still it evolves a controversy regarding its constitutional validity.

The concept of rule of law is been binding by the provisions of the constitutions and judicial review in general produce no hindrance in adopting the functionary based on the rule of law. The concept of the rule of law is

<sup>10</sup> Dr. Pandey J.N., Constitutional Law of India, 54<sup>th</sup> Ed., P. 503

<sup>11</sup> (Hidayatullah 1966: 64-66)

<sup>12</sup> Montesquieu



believed to establish this clam, but whether judicial supremacy – either as such or as exercised by the Indian Supreme Court – actually upholds the rule of law remains an open question so as to its constitutional validity but still owing to its far reaching effects the balance has been established, even the questions and concerns have been raised by the Legislature repeatedly. But the situation in the Indian constitution is not unfavorable to the judicial review as directly or indirectly the constitution also mandates to confer the powers to the judiciary in order to establish a perfect and fine balance in the functioning of the three organs of the state.

*In order to understand how this situation has come about, it is helpful to know that in India, the power of judicial review is more or less explicitly spelled out in the 1950 Constitution, and that this Constitution has a dual goal. On the one hand, as a basic law in the liberal tradition, it seeks to check the power of government and to safeguard individual rights and liberties. On the other hand, it is the work of framers who believed, with good cause, that their country needed a state with the capacity to intervene massively in society in order to overcome structural injustices grave enough to threaten liberal democracy itself<sup>13</sup>. So the Constitution aims to bring harmonization into the three organs of the government and establish a check along with the division of powers and separation of powers and in doing so the concept of judicial review evolved with the need of the democracy.*

An independent Judiciary, having the power of ‘Judicial review’, is another prominent feature of our Constitution. We have avoided the other-extreme, namely, that of ‘judicial supremacy’ which may be a logical outcome of an over-emphasis on judicial review, as the American experience demonstrates. The Judicial power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution held in *G.C. Kanungo v. State of Orissa*<sup>14</sup>. Indeed, the harmonization which our Constitution has effected between Parliamentary Sovereignty and a written Constitution with a provision for Judicial Review is a unique achievement of the framers of our Constitution. An absolute balance of powers between the different organs of government is an impracticable thing and, in practice, the final say must belong to some one of them. This is why the rigid scheme of Separation of Powers and the checks and balances between the organs in the Constitution of the United States has failed in its actual working, and the Judiciary has assumed supremacy under its powers of interpretation of the Constitution to such an extent as to deserve the epithet of the ‘safety valve’ or the ‘balance-wheel’ of the Constitution<sup>15</sup>.

It is hard to say what are the necessary and sufficient conditions under which independent judicial review will arise and take hold of the necessary elements so as there is no violation of the basic principle of separation of powers. It used to be a common argument that *successful constitutional judicial review is caused and required by strong federalism. Federalism requires a ‘referee’ to protect boundary arrangements, the logic ran, so each unit of a federation will, despite incentives to deviate, support the creation and maintenance of some central institution designed to identify and stop noncompliance by others. The nature of the federal arrangement in India has turned on how judicial power is exercised, and judicial review has often eroded rather than strengthened federalism*<sup>16</sup>.

The Indian Constitution wonderfully adopts the via media between the American systems of Judicial Supremacy and the English principle of Parliamentary Supremacy, by endowing the Judiciary with the power of declaring a law as unconstitutional if it beyond the competence of the legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution or of any other mandatory provision of the Constitution, e.g., Arts. 286, 299, 301, 304; but, at the same time, depriving the Judiciary of any power of ‘judicial review’ of the wisdom of legislative policy.<sup>17</sup>

<sup>13</sup> Mehta 2007: 114

<sup>14</sup> AIR 1995 SC 1655

<sup>15</sup> Dr. Basu D.D., Introduction to the Constitution of India, 22<sup>nd</sup> Ed., P.43

<sup>16</sup> Mehta 2007: 114

<sup>17</sup> Ibid



### CONSTITUTIONAL VALIDITY OF JUDICIAL REVIEW: WITH VIEW OF IMPORTANT CASE LAWS

The constitution is the grundnorm from where all the official functions of the state obtain their validity so as the concept of the judicial review. Judicial review is also originated from the constitution itself and it cannot be termed as a vague concept. The constitutional sanctity can be interpreted by the courts and that's what the courts did in developing and using the concept of the judicial review. Constitution of India prescribes *that the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void.*<sup>18</sup> This has been the base of the judicial review as in order to restraint the Parliament to go beyond the constitution and assume supremacy. Even the rise of the complex matter to the judiciary has led to rise in the judicial activism and this is not evolved in one particular day but achieved with passing time and facing the test of new certain condition each time. *In the initial years post independence, the Supreme Court tried to its strike a balance between the much-needed programmers of economic and social reform (for example, land reform and land redistribution) on the one hand and establishing the credibility of the newly-born Indian State. It tried to promote the rule of law and respect the rights vested under laws that preceded independence and the very Constitution itself.*<sup>19</sup>

*Shankari Prasad Singh v. Union of India*<sup>20</sup> In the case the question was raised whether the 1<sup>st</sup> Amendment Act, 1951 seeking to abridge the right to property was constitutionally void or not. The petitioner's argument against the validity of the Act was that Article 13(2) prohibited enactment of any law abrogating a fundamental right. The court, however, rejected this argument saying that the word 'law' referred in Article 13 did include only 'legislative law', that is the law made by the legislature ordinarily, not the 'constituent Law' i.e. a law made to amend the constitution.

In *Sajjan Singh v. State of Rajasthan*<sup>21</sup> the validity of the Seventeenth Amendment was challenged in this case. The main contention before the five-judge bench of the Supreme Court was that the Seventeenth Amendment limited the jurisdiction of the High Courts and, therefore, required ratification by one-half of the States under the provisions of article 368. The court unanimously disposed of this contention, but members of the court chose to deal with a second submission, that the decision in the Shankari Prasad case should be reconsidered. The words "amendment of this constitution" in article 368 plainly and unambiguously meant amendment of all the provisions of the Constitution; it would, therefore, be unreasonable to hold that the word "law" in article 13(2) took in Constitution Amendment Acts passed under article 368.

In *Golaknath v. State of Punjab*<sup>22</sup> a highly confusing stand of the Supreme Court was apparent in a very sensitive field of constitutional structure, which is the limitation upon the power of Parliament to amend the Constitution. In this case the Supreme Court held by a majority of 6 to 5 that Parliament had no power to amend any of the provisions of Part III of the Constitution so as to take away or abridge any of the Fundamental Rights enshrined therein. The Supreme Court held that in the context of Article 13 of the constitution the law includes the amendments with the result that Article 13(2) affects the amendment made under the Article 368. In *Keshavananda Bharati v. State of Kerala*<sup>23</sup> the constitutional validity of the 24th amendment, along with the 25th and 29th Amendments, was challenged before the Supreme Court in Keshavananda Bharati case in 1973. The Supreme Court reversed its earlier ruling in Golaknath's case and upheld the validity of 24th Amendment, Parliament's power to amend the Constitution. The court held that the parliament's power of amending the constitution was always subject to implied limitations. The phrase 'basic structure' remained delightfully vague and has become subject to judicial interpretation. Obviously the verdict of this case significantly increased the court's authority of judicial review.

<sup>18</sup> Article 13(2)

<sup>19</sup> Sri Sankri Prasad Deo V. Union of India

<sup>20</sup> AIR 1951 SC 458

<sup>21</sup> AIR 1965 SC 845

<sup>22</sup> AIR 1967 SC 1643

<sup>23</sup> AIR 1973 SC 1461



In *Minerva Mills v. Union of India*<sup>24</sup> the court held “The amendment made to Art.31C by the 42nd Amendment is invalid because it damaged the essential features of the Constitution. Clauses (4) and (5) are invalid on the ground that they violate two basic features of the Constitution viz. limited nature of the power to amend and judicial review. The courts cannot be deprived of their power of judicial review. The procedure prescribed by Cl. (2) is mandatory. If the amendment is passed without complying with the procedure it would be invalid. The Judgment of the Supreme Court thus makes it clear that the Constitution is Supreme not the Parliament. Parliament cannot have unlimited amending power so as to damage or destroy the Constitution to which it owes its existence and also derives its power.”

In *L.Chandra Kumar v. Union of India*<sup>25</sup>, the Supreme Court has held that the power of judicial review of legislative action as vested in the High Court under Article 226 and in the Supreme Court Article 32 is part of the basic structure of the Constitution and cannot be ousted or excluded even by the Constitutional amendment.

#### JUDICIAL REVIEW OF LEGISLATIONS INCLUDED IN NINTH SCHEDULE

The Judiciary has gained ground by itself declaring that ‘judicial review’ is a ‘basic feature’ of our Constitution, so long as the Supreme Court itself does not revise its opinion in the behalf, any amendment of the Constitution to take away judicial review of legislation on the ground of contravention of any provision of the Constitution shall itself be liable to be invalidated by the Court. All amendments to the Constitution made on or after 24April 1973 by which Ninth Schedule is amended by inclusion of various laws therein shall be tested on the touchstone of the basic or essential features of the Constitution as reflected in article 21, 14, 19 principles underlying them<sup>26</sup>. Now no blanket protection available to the laws inserted in the Ninth Schedule by constitutional amendments on or after 24April 1973 and shall be a matter of constitutional adjudication by examining the nature and extent of infraction of fundamental right by a statute, sought to be constitutionally protected.<sup>27</sup>

In *Waman Rao v. Union of India*,<sup>28</sup> the court had clarified that the doctrine of basic features will apply to Amendment Acts passed subsequent to 24-4-1973 (when Keshavanand Bharati’s judgment was delivered) i.e. it will apply prospectively and not retrospectively to earlier legislation. The question whether a law which has been found by a court as abrogating or abridging a fundamental right is saved by putting it in the Ninth Schedule was referred to a larger bench in the below-discussed case.

In *I.R.Coelho (dead) by LRS v. State of Tamil Nadu*<sup>29</sup>, In this landmark judgment, held that any law placed in the Ninth Schedule of the Constitution after April 24,1973 will be open to challenge. The court observed that even though an Act is put in the ninth schedule by a constitutional amendment, its provisions would be open to challenge on the ground that they destroy or damage the basic feature or structure of the constitution, for instance, if the fundamental rights are taken away or abrogated. Further, the power of judicial review which forms integral part of basic structure cannot be abrogated by any Act. The Parliament cannot, by inclusion in the ninth schedule, grant immunity and exclude examination by the court after the enunciation of the doctrine of basic structure.

The Ninth Schedule, which was introduced through Article 31-B by the first Constitution (Amendment) Act, 1951<sup>30</sup>, aimed to save land reforms laws enacted by various States from being challenged in the Court. Later on, however, it became an omnibus and every kind of law whether it related to elections, mines and minerals, industrial relations, requisition of property, monopolies, etc. were included in it. No principle underlies this selection of laws under the Ninth Schedule. In the present case, the petitioners had challenged the validity of the various Central and State laws put in the Ninth Schedule including the Tamil Nadu Reservation Act. The T.N.

<sup>24</sup> AIR 1980 SC 1789

<sup>25</sup> AIR 1997 SC 1125

<sup>26</sup> Dr. Basu D.D., Introduction to the Constitution of India, 22<sup>nd</sup> Ed., P.44

<sup>27</sup> I.R. Coelho ( dead) by LRs v. State of T.N., (2007) 2 SCC 1

<sup>28</sup> AIR 1981 SC 271

<sup>29</sup> AIR 2007 SC 861

<sup>30</sup> Amendment 1,1951



Act provided for the reservation of 69% of seats in government jobs for the OBCs. The said Act was added in the Ninth Schedule because of the Supreme Court's ruling in the *Mandal case*<sup>31</sup> that overall reservation cannot exceed 50%.

The Apex Court said that the validity of any Ninth Schedule law has been upheld by this court and it would not be opened to challenge it again. But, if a law is held to be violate of fundamental rights incorporated in Ninth Schedule after the date of judgment in *Keshavananda Bharati*<sup>32</sup> case, such a violation would be open to challenge on the ground that it destroys or damages the basic structure of Constitution. The court further said that this court is duty bound to uphold constitutional values and enforce constitutional limitation. A constitutional amendment is permissible subject to the limitation of the doctrine of the basic structure. The court held: that the constitutional of the Ninth Schedule Laws on the touchstone of basic structure doctrine can be adjudged by the applying the direct impact and effect test, i.e., rights Test, which means the form of an amendment, is not the relevant factor, but the consequences thereof would be determinative factor.

In *Ashoka Kumar Thakur* case<sup>33</sup> the court further observed: The "width test" asks if an amendment is so wide that in effect (actual or potential), it goes beyond parliament's amending power. What is relevant is that the real consequences can be taken into account while judging the width of the power. The court cannot ignore consequences to which a particular construction would lead. Thus, anticipatory challenge to an enabling constitutional amendment on the ground that amendment concerned created the potential for a violation of the basic structure is valid. Constitutional amendments by their very nature are often enabling provisions. If they clear the way for future legislation that would in fact violate the basic structure, the court need not wait for a potential violation to become an actual one. It can strike down the entire amendment *ab initio*.

#### CONCLUSION

The rule of law is declared by the constitution, as the constitution is "*Superma Lex*" which is the paramount and fundamental law of land. It specifies the allocation of powers between the three organs of the government and also specifies the concept of judicial review that suggests that the separation of powers is not absolute to run the country more efficiently. Thus it is the constitution which set up the framework for the democratic form of the government, elected parliament, separation of powers and judicial review to a large extent with particular checks and balance imposed on them so as to limit the power thus preventing the abuse of it. The democracy is the only way that has led to the growth of the system and machinery of the political India and thus ensures better rule so as to fulfill the principles of the Constitution, hence judicial review and separation of powers needs to be discussed at par with democratic parliament. Further it is relevant to mention that in India, the judiciary has claimed to be the protector of law in achieving that object and there has been conflict of ideals that what so ever is the reason the judiciary is acting in the domain of the Parliament i.e. legislature but still while fulfilling the basic principle of the separation or division of powers, this is regarded as the unavoidable and necessary function of the judiciary. So it could be said that the concept of rule of law is been binding by the provisions of the constitutions and judicial review in general produce no hindrance in adopting the functionary based on the rule of law. It is hard to say what are the necessary and sufficient conditions under which independent judicial review will arise and take hold of the necessary elements so as there is no violation of the basic principle of separation of powers. The history of judicial power and its exercise in India suggests that the concept of separation of power is not the concept that is crystal clear and it offers lots of scope to develop and to originate different ways so as to ensure the proper division without any arbitrariness so its relevance with the separation of power increased along with some conflict to the Legislature.

<sup>31</sup> AIR 1993 SC 477

<sup>32</sup> AIR 1973 SC 1461

<sup>33</sup> (2008) 6SCC 1