CHAPTER THREE

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CHAPTER III

Interconnection Among The Doctrine Of Judicial Review, Rule Of Law, Separation Of Powers And Due Process Of Law

3.1 Rule of Law

3.1.1 Concept of Rule of Law

Man may be a little lower than the angels, he has not yet shaken off the brute and the brute within is apt to break loose on occasions. To curb and control that brute and to prevent the degeneration of society into a state of tooth and claw, we need the rule of law. We also need the rule of law for punishing the deviations and lapses from the code of conduct and standard of behaviour, which the community speaking through its representatives has prescribed as the law of the land. [145]

The modern terminology Rule of Law classically known as in the French term 'la principe de legalite' i.e. principle of legality, or in roman law it was called as 'jus naturale' or the mediaevalists called it 'the law of god', or Hobbesd, Locke and Rousseau termed it as social contract or the natural law. In modern time credit goes to the rule of law to systematically develop the growth of administrative process and for that matter credit goes to dicey who expounded the rule of law. Dicey contemplated reasons while conceptualizing rule of law that there ought to be absence of wide powers in the hands of government officials because

[145] Vide justice H. R. Khanna, (1977) 4 SCC p. 8

whenever there is discretion there is room for arbitrariness which is opponent of the concept of equality.

If law in a community be equated with the expression of the will of organized authority-the body, which holds and wields the power of the community, Rule of Law in a community so organized is a condition in which individual actions and social relationships conform only to the will of the ultimate authority. This interpretation of the Rule of Law implies overriding objectives of 'peace' and 'order'- peace in an essentially negative sense, absence of struggle against or clash with authority; and order meaning unquestioning obedience. An organized government enforcing its commands through channels of legal sanction was the only concept of the Rule of Law. As a synonym of public order, most States had achieved the Rule of Law as a universally recognized principle.

It is difficult to design a precise definition of the expression "Rule of Law", in the modern democratic State, for its dimensions in the prevailing social order are varied and the concept is dynamic; it changes with the growth of the political institutions, with economic development, with the widening of the horizons of the social conscience of the community. But its ideal remains unaltered-the fullest development of the individual's personality, his capacity, his special forte, his dignity assured by providing environment and opportunities congenial to his maximum development social, political and economic.

Rule of Law is not an idealist dream; it is the way of life of a community pointing to the directions as well as to the goal of a more rewarding existence, a better life for the citizen. It is

basically an instrument for ensuring a just society with emphasis not on power, status or wealth but dignity of the man.[146]

The present American doctrine that constitutional government is not a government of men but a government of laws is in essence, a variant of this ancient principle of the Rule of Law as applied to constitutional jurisprudence

3.1.2 Origin and nature of Rule of Law

The origin of the concept of rule of law may be traced in ancient Greek society. Aristotle speaks of a geek polity governed by law wherein there was the distribution of three powers: the deliberative, legislative and adjudicative.[147] The birth of the Roman Empire marked a new phase in the conception of Rule of Law. In this period Rule of Law was associated with the military power. During the middle ages the secular Roman ideal of the Rule of Law was given up and was coloured with the theological notions. The view which prevailed was: " the king ought not to be subject to man, but subject to god and the law, because the law makes him king."[148] In other words, the concept of Rule of Law was applied to explain the Supremacy of Law, which governed, Kings as well as subjects and which sets limits to the prerogatives.

Thereafter, decline in the power and influence of he Catholic Church came down with the breakdown of the feudal system of

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[146] Justice J. C. Shah, "The Rule of Law and the Indian Constitution", p. 22, N. M. Tripathi Pvt. Ltd. Bombay, 1972

[147] Curtis, 'Great political Theories' p. 59 (1961)

[148] Phillips, The Constitutional Law of Great Britain and the Commonwealth (1952) p. 27

middle Ages. And Rule of Law came to mean the superiority of the traditional Common Law over the king and the executive.

The 17th and 18th centuries witnessed the rise of 'reason' in the theory of Social Contract propounded by Hobbes, Locke and Rousseau. According to this theory, men as rational human beings entered into and association and formed a State out of their own free and rational wills and 'law' was the product of 'reason' and its purpose was to enhance the liberty of the individual who was an integral part of a civil society. The function of the law was to define relationship between the individual liberty and social order. The age of Reason and enlightenment, the bloom period of the spirit and science and 'liberalism made the earlier notion of Rule of Law with all its connotations of monarchial or church supremacy of a thing of a past. Now, monarchial supremacy disappeared and Republicanism took its place in the political theory. The content of the concept of rule of Law in this period is to be found in the protection of individual liberty from the arbitrary rule by instituting Republican form of government of the basis of separation of powers.

From the period of the Renaissance to the period of French revolution we witness the powerful hold of liberalism. And the forces, which gave rise to liberalism, were exactly the forces that moulded the idea of Republicanism, the real basis of which was the Rule of Law. Thus, in the development we find that the concept of Rule of Law is opposed to rule of men, that Rule of Law is closely connected with, or, rather inseparable from, the principle of separation of powers. It was during the mature period of world liberalism that the Rule of Law, as social

philosophy, was transformed into a social conviction about the virtues of a constitution that acknowledged about separation of powers- a principle of government, which has its object the protection of individual liberty against any kind of arbitrariness.[149]

3.1.3 Rule of Law: Dicey's Theory

The Rule of law is a high tenet of constitutional jurisprudence. It is the very soul of constitutional law. According to Prof. Dicey, the rule of law meant " no man is punished or can be lawfully made to suffer in body or goods except for a breach of law established in the ordinary legal manner before ordinary courts of the land"[150] The 'Rule of Law', which forms a fundamental principle of the Constitution, according to Dicey, has three meanings, or may regarded from three different points of view.

In the first place it means the absolute Supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, prerogative or wide discretionary authority on the part of the government. It means law is supreme and above all, and no authority can claim supremacy over that of the law.

In the second place, it means equality before the law, or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. The Rule of Law in this sense, excludes the idea of any exemption of officials or others

[149]S. N. Parikh, "Rule of Law, Judicial Review and the Indian Constitution", p. 188 'Constitutional law: A Miscellaneous', edited by S. P. Singh Makkar, ABS Publication, 1990

[150] Dicey, A. V., Introduction to the Law of Constitution, 9th edition, 1952, p. 188

from the duty of obedience to the law which governs other citizens

Lastly, the ' rule of law' may be used as a formula expressing the fact that the exercise of public power must find its ultimate source in some legal rule and the relationship between the State and individual must be regulated only by law.

Thus, the doctrine of 'Rule of Law' is that laws ought to be equal, general and known. It shall be administered by independent judges. The three organs of the State shall be separate. 'Rule of Law' envisages the pervasiveness of spirit of law throughout the whole range of government. It is the 'met-wand' for harmonizing individual liberty and public order.[151] 'Rule of Law' is the operating instrument of justice in a civilized society. Burian has rightly observed that constitutionalism may be equated to Rule of Law. Thus, where there exists a Constitution, the Rule of Law is manifested. However, these manifestations may not be always specifically apparent. They may be implied. Though our Constitution does not make any direct or specific mention of Rule of Law, it does so indirectly through reference to its essential elements. The preamble to the Indian Constitution declares that Indian is a Republican State. From the beginning to the last wording of the preamble, it is clear that sovereignty resides in the people and all government authority emanates from them, A republican State implies a representative democracy. Its essence is popular representation wherein there is a choice of principal agnates of government through elections and laws are enacted by these agents. Rule of Law is the spirit

[151] M. N. Venkatachaliah, 'A Rule of Law: Contemporary Challenges' p. 50 "Indian Judicial System" edited by S. K. Verma

behind the concept of Republican State. The concept of Rule of Law epitomizes Republican government. The underlying idea is that the State and its government are creations of the people. That is to say, authority of the government is derived from the people and the government is the instrument for securing the aims of justice, liberty, equality and fraternity.[152]

Frederic A. Hayke has given another definition of rule of law in his books: 'Road to Serfdom' and 'Constitution of Liberty'. In the former he stated:

> "Stripped of all technicalities, this means that government in all action is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[153]

In the second book he maintained:

> "The rule of law means that government must never coerce an individual except in the enforcement of a known rule... under the rule of law, government can infringe a person's protected private sphere only as punishment for breaking an announced general rule...the rule of law requires that the executive in its coercive action be bound by rules which prescribe not only when and where it may use

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[152]S. N. Parikh, "Rule of Law, Judicial Review and the Indian Constitution", p. 196 'Constitutional law: A Miscellaneous', edited by S. P. Singh Makkar, ABS Publication, 1990

[153] Hayek Friedrich, "The Road to Serfdom" p. 72 1964

coercion but also in what manner it may do so.... The decision must deductible from the rules of law and from those circumstances to which the law refers and which can be known to the parties concerned. The decision must not be affected by any special knowledge possessed by the government or by its momentary purposes and the particular values it attaches to different concrete aims, including the preferenc3es it may have concerning the effects on different people."[154]

It is much the same as that propounded by the Franks Committee in England:

"The rule of law stands for the view that decisions should be made by the application of known principles or laws. In general such decisions will be predictable, and citizen will know where he is. On the other hand there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of law."[155]

The Rule of law in a democratic society may, in its ultimate analysis, be reduced to the following broad propositions:

1. Without regard to the content of the law, all power in the State is derived from and must be exercised in accordance with the law.

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[154] Hayek Fredrich, "The Constitution of Liberty" p. 205-214, 1960

[155] Franks Committee Report on Administrative Tribunal and Enquires, Command papers U.K. p. 218, 1957

2. The law itself is based on the supreme value of the human personality. For that purpose
   a) Protection of individual's rights is secured through the medium of an impartial judicial authority.
   b) The law must be designed to ensure for the individual equality of status and opportunity' in fields social, political and economic, and provide environment for development of his special forte and his capacities.

3.1.4 Rule of Law and Indian Constitution

The Indian Constitution embodies and enshrines some of the basic principles of the rule of law. The chapter on Fundamental Rights guarantees the crystallized principles of rule of law. Equality before law and equal protection of the laws, which is basic doctrine of rule of law, is provided in Article 14 of the Constitution. The rule of law in Indian jurisprudence and specially its constitutional jurisprudence ensures however that the government of India or of the State is not in any privileged position in the sense that it may sue or be sued subject to any provision which may be made by statute. There is no immunity of the state or the government from the point of view from the rule of law.

The Supreme Court of India held in *Jaisinghani v. Union of India*,[156]

> "The absence of arbitrary power is the first essential of rule of law upon which our whole constitutional system is

[156] AIR 1967 SC 142

based. In a system governed by rule of law, discretion when conferred upon executive authorities must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law."[157]

Dean Pound has said[158]:

> "The problem is not to discover the fundamental principle or the ultimate conception from which a complete and perfect body of rules may be deduced but to define rightly the respective province of these two elements in the admiration of justice and to give each its proper development in its province."

This is a statement made by Pound about courts. But because of the nature of the task assigned, there can be no dispute that administrative action is needed in a much greater degree than judicial discretion.

The moral is that 'rule of law' is an expression to give reality to something, which is not readily expressible. That is why it is often said that the concept is an unruly horse. The concept of rule of law is based upon liberty of the individual and has as its

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[157] *ibid*

[158] Roscoe Pound, "Jurisprudence" p. 374 Vol. II, 1959

object the harmonizing of the opposing notion of judicial liberty and public order. The notion of justice can alone maintain a balance between the two.

3.1.5 Rule of Law and judicial review

The Concept of rule of law implies equality before law or equal subjection of all classes to the ordinary law. The equality aspect of rule of Law is provided under Article 14 of the Constitution of India.

The three main organs of the state derive their powers from the Constitution of India. They are the creatures of the Constitution and the Constitution of India is Supreme. According to the concept of supremacy of the Constitution, the Supreme authority in both the countries; India and U.S.A. is not the Parliament or the Congress, but the Constitution. In a democratic republic form of government, the elected representatives have to govern the nation in accordance with the Constitution; therefore, it is the Constitution, which becomes supreme. And any law or decision, which is against the Constitution, is void. The principle of supremacy of the Constitution has declared part of the Basic structure of the Constitution by Sikri C.J. in *Keshavananda Bharati* and Marshall C.J. in *Marbury v. Madison.* In *State of Rajasthan v. Union of India,*[159] Beg j. said:

> "neither of the three Constitutionality separate organs of state can, according to the basic scheme of our Constitution today, keep outside its own constitutionality

[159] AIR 1977 SC 1361

assigned sphere or orbit of authority into that of the other. This is logical meaning of supremacy of the Constitution. In U.S.A. the Congress has not been denied the power to amend the Constitution, but such amendment has to be done in accordance with the power given by the Constitution to the Congress and the state Legislatures. Therefore, in Marbury v. Madison, Chief justice Marshall has declared that the Constitution is a superior paramount law, unchangeable by ordinary means. Any law contrary to the Constitution is not a law and the judiciary has a power to control such law."

Every authority i.e. executive, legislature and judiciary; established by the Constitution is subject to constitution. The Constitution, which is supreme, has empowered the legislature to make law and in part IV prescribed the objectives, which are to remain fundamental in the governance of the country. The higher judiciary acts as the sentinel of the fundamental rights of the individual and as a balancing wheel between individual freedom and social control. The rule of Law, under the Constitution, is designed to serve the needs of the people without interfering with their rights. Every institution or political party that functions under the Constitution must accept this aspect or otherwise it has no place in the Constitution.

In this context, Bhagwati, the then C.J. has observed the Supreme Court's power over other organs under the Constitution in following words.

"It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is

Supreme lex, the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining of what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits."[160]

Judicial review is the result of the Supremacy of the Constitution

The countries having written Constitution and the countries where the Constitution is supreme, the Parliament and State Legislatures have been given power to frame laws, and then such laws must be framed in accordance with the provisions of the Constitution. There are two kinds of law, the ordinary law and the Supreme law. The laws passed by the Parliament or State legislatures or the congress is the ordinary laws and the Constitution is a supreme law. The Supreme law is the foundation and source of all other legislative authorities. Any provision of the ordinary law, which contravenes the provision of the supreme law, must be void and there must be some organ

[160] State of Rajsthan v. Union of India, AIR 1977 SC 1361

possessed with the power or the authority to pronounce such ordinary law is void.

So, where constitutional supremacy prevails, the rule of law also includes the judicial review of legislative acts, executive acts, administrative acts and constitutional amendments. The Constitution of India has several express provisions empowering the courts to declare a law or constitutional amendment a void, when it offends against the fundamental rights, (Article 13) or the federal distribution of powers, (Article 254). The power to declare a statute to be unconstitutional is underlined in the Article 367 by providing that the Constitution is to be interpreted as a legal instrument and that the questions as to the interpretation of the Constitution will be dealt with by the High Courts and then by the supreme Court on appeal. (Article 132, 226, 227) A petition on the ground of contravention of a Fundamental right can also be directly brought before the Supreme Court under Article 32.

The interpretations given by the Supreme Court to the Constitution under various provisions of the Constitution is given finality and made binding on all authorities in India under Article 141 and 144. Thus, from various provisions of the constitution of India it is clear that 'Rule of Law' is its one of the most important features. In *S. P. Gupta v. Union of India,*[161] Justice Bhagwati observed that if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution it is the judiciary which is entrusted with the task of keeping every organ

[161] AIR 1982 SC 149

of the state within the limits of the law and thereby making the Rule of law meaningful and effective.

In *A. D. M. Jabalpur v. Shivkant Shukla,*[162] Justice M. H. Beg expressed the view that we need not find Rule of Law outside the Constitution; whatever the principles of natural law or common law, our courts can enforce are, under our system, the necessary consequences of constitutional provisions when their operations are not suspended. Chief justice Ray observed in this case that there cannot be any rule of law other than the Constitutional law, nor can there be any rule of law to nullify the constitutional provisions during the emergency.[163] Rule of Law in India really suffered a heavy blow by the decision of majority judges in the Habeas Corpus case.[164] The principal feature of rule of Law is that the executive must show authority in some law for whatever action it takes. It cannot act arbitrarily without the authority of law. And the court would not invalidate the law violating Rule of Law, but notion of judicial review changed from the decision given in *A. D. M. Jabalpur v. Shivkant Shukla.*[165] In this case, detention orders were challenged for violation of the Rule of Law, as the "obligation to act in accordance with the rule of law..... is a central feature of our constitutional system and is a basic feature of the Constitution."

In *Indira Nehru v. Raj Narain,*[166] Supreme Court invalidated clause 4 of Article 3429-A, so inserted by the Constitution (Thirty Ninth Amendment) Act, 1975, which immunized election

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[162] AIR 1976 SC 1207
[163] ibid
[164] AIR 1976 SC 1207
[165] AIR 1976 SC 1207
[166] AIR 1975 SC 2299

of the Prime Minister from judicial review power. Khanna and Chandrachud J. J. held that Article 329-A violated the concept of the concept of basic Structure.

In *P. Sambamurthy v. State of A.P.*[167], Supreme Court held that Article 371-D (5) of the Constitution clearly violates Rule of law, a basic structure and an essential feature of the Constitution. The proviso had authorized the state government of Andhra Pradesh to nullify the decision of Administrative Service Tribunal Court held that executive authority be conditioned by Constitution and in accordance with Law. Power of judicial review is conferred to ensure that Law is observed and compliance is made with requirement of law by executive. It is only by means of judicial review power; the rule of law, conferred there upon by the Constitution is maintained.

Also, the Indian Courts have gone further to insist on specific positive content of the rule of law obligation by incorporation of principles of Natural justice into scope of rule of law. Requirements of Natural justice have always a differing view of judicial interpretation, but basic part remains in application with a broad width is as it is. The rule of law has been extended to secure fair dealing to the individual in his economic activity. For example, the government is bound by its assurance to individuals in business transaction by way of estoppel.

Now a days in a changed notion of justice, Court's duty to observe the presence of rule of law in society by insisting fairness on the part of the State. In *Sheela Barse v. State of*

[167] AIR 1987 SC 362

Maharashtra,[168] the court insisted fairness to women in police lock-up and provided guidelines on fairness of women prisoners. In *State of M.P. v. Rama Shankar Raghuvanshi*,[169] the court secured fairness in public employment by holding that reliance in public report is entirely misplaced in a democratic republic.

Thus, The Rule of Law begins with self-engineering and self-management precedes social engineering. If law is regarded as the fulcrum of social order, respect for law should be enforced only through force of law and not by law of force. Law controls both the State and the People.

The essence of the democratic concept and rule of law is that democratic government is limited in its method and objects, that the division of powers among the executive, legislative and judicial branches is the core of liberty, that the federal balance in normal times between the States is the secret of strength without tyranny and self government without provincialism and parochialism, that the people manifest their wisdom not in determining or dictating policies but in choosing representatives, and that the maximum or ultimate goal of the state is to prevent force from interfering with the self-development of the individual.[170]

Thus, democracy aims at establishing a just society and the judiciary is logically and inevitably associated with it. Both are complimentary to each other. If democracy prepares the ground to realize lofty ideals of life, the Court acts as a sentinel on the

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[168] AIR 1983 SC 378
[169] AIR 1983 SC 374
[170] Justice H. G. Bal Krishnan, " New Dimensions of Law and Justice", p. 131, Snow White Publications Pvt. Ltd., 1983

'qui vive'. Judicial review is a watchword when democracy- especially in India-a land of religion and philosophy- aims at providing people all good conditions, which make life work living. To prevent and to redress abuse of power judicial review is indispensable in democracy; judicial review becomes more logical and necessary for the safe existence of democracy and for survival of the Constitution.

When the representative body becomes tyrannical or dictatorial, the judiciary takes up cudgels for the noble cause on eve. That is why the architects of the Indian constitution preferred the American doctrine of "limited government" to the English doctrine of "Parliamentary sovereignty". The verdict of the Supreme Court in regard to many cases of public interest has proved the fact that Judicial Review is a check upon tyrannical and treacherous democrats. As P.A. Sangama had remarked, " Our judiciary has rendered yeoman service in the area of public interest litigation. Executive dormancy does trigger off judicial activism."[171]

3.2 Doctrine of Separation of Powers

3.2.1 Concept of doctrine of Separation of Powers

In a Constitutional set-up Separation of Powers has a great significance and practical utility. It creates democratic balance in the different branches of the government. The U. S. Supreme Court has held that Separation of Power is to save the people

[171] vide The Hindustan Times, March 9, 1997

from autocracy.[172] Though in India theoretically there is no strict separation of governmental powers, in practical application three branches of the government have their separate sphere of work. The legislative branch cannot delegate its essential legislative power to executive and in the case of such delegation, the judiciary intervenes and judiciary has implied constitutional power to declare the excessive delegation of the legislative power unconstitutional. Such power the Court possesses as matter of constitutional mandate, express or implied, to maintain balance of the legislative power.

Thus, independency of judiciary is a predominant feature under Separation of powers. Judicial independence has been and is being cherished not only in India but also in England and America. Separation of powers, even in America, does not mean complete independence of three branches of the government. Judicial review renders a great check on the legislative and the executive branches of the government and maintain there by the democratic balance. This constitutional principle of checks and balances rest partly on the specific provision of judicial review incorporated in the Constitution of India and partly by implications.

Essence of constitutionalism rests in limitation as well as diffusion of powers between central and state government in a federal character of the Constitution. Formally constitutionalism means the principles which restraint the political powers by rules, which determine the validity of legislative and executive actions. Disregard of such rules imply violation of Constitution

[172] Myers v. US 272 US 52 (1926)

and therefore require the action to be pronounced as ineffectual by court whose main function is to strike balance and maintain spirit and sanctity of Constitution.

A French scholar Montesquieu conceived the principle of separation of Powers. He found that concentration of power in one person or a group of persons resulted in tyranny. He, therefore, felt that governmental powers should be vested in three different organs, the legislature, executive and judiciary. The principle can be stated as follows:

iii. Each organ should be independent of the other;
iv. No one organ should perform functions that belong to the other.

A variant of this doctrine was that the judiciary and the executive may have their own views different from the views of the Legislatures for their own purposes. Judge Learned Hand was at first inclined to think that It was plausible-indeed to my mind an unanswerable-argument that judicial review invaded that "separation of powers" which as many believed was the condition of all free Governments.[173]

A similar view was also expressed by Hans Kelsen who said:

> "The judicial review of legislation is an obvious encroachment upon the principle of separation of powers."[174]

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[173] The Bill of Rights (1858), p. 10 Harvard University Press,
[174] A. Wedberg, "General Theory of Law and State", p. 269, 1961

Such a rigid view of separation of powers is held in France where the review of legislation by the judicial branch is thought to be impermissible. The powers of government are conceived as separated in the sense of partitioned off or isolated from each other.

On the other hand, in the Anglo-American usage, the idea underlying the separation of powers or functions is that the three branches of Government, when separated, may legitimately check or act upon each other and indeed they are separated precisely so that they may exercise such mutual check on each other and thereby keep a balance powers.

Montesquieu praised the British system of Constitution for its separation of powers. His observation has been differently interpreted. Montesquieu emphasized the need to keep judicial and executive powers in different hands and also spoke of the mutual balancing and restraining of the legislative and executive powers. What is the theory behind this balance of powers? Geoffrey Marshall attempts a tentative answer as follows:

> "Perhaps, through a running together of the checking and balancing theories of mixed government with the separation of persons doctrine, neither Montesquieu nor many others down to the present day seem clear as to whether 'checking' of one branch by another is a participation in the other's function and a partial violation of the separation of powers doctrine, or whether it is actually an exemplification of the doctrine, which carries

out the very purpose of the three branches of government.[175]

Another view of separation of powers is that there are only two powers in a State, namely,

- The power to make laws, that is, the legislative power, and
- The power to apply or enforce the laws, that is, the executive power.

This theory brackets the judicial power with the executive power as both of them consist of the application of the law made by the Legislature. The apprehension underlying this theory is that the recognition of the judicial power as a check on the legislative power would be contrary to the democratic theory by which the people vest the sovereign powers in the Legislature. One answer to this theory is that people may choose to separate the constituent legislative powers from the ordinary legislative powers by enacting written constitutions, which would stand as the fundamental law above ordinary legislation. Prof. Upendra Baxi regards the judicial power to review legislation as a co-ordinate constituent and legislative power.[176] Hans Kelson also regards the judicial power to review legislation as a restriction of the powers of legislature, which creates a negative Legislature parallel to the positive Legislature, namely the Legislature proper.[177]

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[175] Constitutional theory, p. 103 Clarendon Press, Oxford,
[176] (1974) 1 SCC (Journal) 45
[177] General theory of Law and State, p. 157

3.2.2 Doctrine of Separation of Powers - Structural classification

Doctrine of Separation of Powers signifies three formulations of structural classification of government powers.

1. The same person should not form part of more than one of the three organs of the government. For example, ministers should not sit in the Parliament.
2. One organ of the government should not interfere with any other organ of the government.
3. One organ of the government should not exercise the functions assigned to any other organ.

American Constitution is based on this doctrine. Article I Section1 vests all legislative powers in the Congress. Article II Section 1 vests all executive powers in the President of the United States. Article III Section 1 vests all judicial powers in the Supreme Court. Due to strict application of this doctrine, American Supreme Court cannot decide political question. So its right of interference is also curtailed in executive functions. The Constitution itself lays down no overriding powers to Supreme Court by means of judicial review. However, in view of the growing modern complex structure of the government, it is felt that exact departmentation in government functions is not possible. Intrusion to some extent is unavoidable. Though it was clear that doctrine in its strict sense cannot be applied, its attraction to makers of the Constitution could not be avoided in U.S.A. and U.K. In France, doctrine has brought another result by eliminating court's jurisdiction of reviewing validity of legislative and administrative actions.

3.2.3 Doctrine of Separation of Powers and Indian Constitution

In India, there is functional and personnel overlapping found in all the three organs. In *Keshavananda Bharti's case*[178] Supreme Court made it very clear that it has the power to declare void the laws passed by the legislature, and actions taken by the executive if they have violated any provision of the Constitution or of any law passed by the legislature in the case of executive actions. Even the power to amend the Constitution by the parliament is subject to judicial scrutiny of the court. The Court can declare any amendment void if it changes the 'Basic structure' of the constitution.[179]

In *Keshavananda Bharati v. State of Kerala,*[180] Justice ray observed that, if the power of amendment of the Constitution was coextensive with the power of the judiciary to invalidate a law, the democratic process and the co-ordinate nature of the great departments of the State could be maintained. He agreed that the democratic process was maintained because the will of the people to secure the necessary power to enact laws by amendment of the Constitution was not defeated. It was also respected when the legislature accepted in good grace the judiciary's striking down a law on the ground of lack of power or on the ground of violation of a limitation on power; or when the legislature acquired the necessary power through a validity enacted amendment to pass the same law again. According to

[178] AIR 1973 SC 1461

[179] ibid

[180] AIR 1973 SC 1461

the judge, this process harmonized with the theory of our Constitution that the great departments of the State-the legislature, the judiciary and the executive are co-ordinate and that none is superior to the other.[181]

3.2.4 Doctrine of separation of power and judicial review

In U.S.A., judicial review is corollary to the doctrine of separation of powers. To follow the doctrine, a series of balance and check system is developed to impose restraints upon government to see each other's limit. The limited role of judiciary if perceived is to only see whether the other two wings viz. legislature and executive watch and follow the constitutional mandate. Despite of the fact that growth of powers of legislature is upward at more cost of executive and less cost of judiciary, principle of separation of powers and its supplementary system of check and balances are still vital roles to play in the hands of judiciary in American life. So far as judicial review power in U.S.A. is concerned, the Supreme Court has begun to use its power since the commencement of the Constitution.

Marshall C. J. laid down that[182] in a case, where a law and Constitution are in conflict duty, judiciary is to see as to which of these two comfortably apply to a given case to bring about adjudication upon it.

An essential element of a Republican State and which has a direct bearing on the operation of the Rule of Law is the doctrine of separation of powers. In view of various types of functions of

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[181] *ibid* at p. 1632
[182] Marbury v. Madison, Cranch 137, 2 L. Ed. 60 (1803)

the modern state, strict adherence to the principle of separation of powers is not possible; still however, the Indian Constitution has recognized the doctrine of separation of powers. Though the Constitution of India does not formally recognize the doctrine of separation of powers in its absolute rigidity, framers have meticulously differentiated functions of various organs of the government. Each organ has to function within its own sphere demarcated under the Constitution. The principle of 'checks and balances' obtaining in our democracy necessitated this. Each organ has to function within This is clear, inter alia, from the provisions like Articles 53(1), 154(1), 79, 168, 124 and 214. The doctrine of separation of power has been held by the Supreme Court of India as one of the basic features of the Constitution, which cannot be impaired by even by amending it.[183] However, in the first important presidential reference[184] under Article 143, the majority of the Supreme Court judges negatived the strict application of the doctrine of separation of powers. In *Ram Javya Kapoor v. state of Punjab*[185], Mr. Justice Mukherjee observed:

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

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[183] Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461; Smt. Indira Nehru v. Raj Narain, AIR 1975 SC 2299

[184] re Delhi Laws Act case, AIR 1951 SC 332

[185] AIR 1955 SC 549

In *Indira Nehru v. Raj Narain*,[186] Ray C.J. observed that the doctrine of Separation of Powers has a broad application and not the strict on as in U.S.A. and Australia. However, the Court held that[187] though the constituent power is independent of the doctrine of Separation of Powers, it cannot encroach upon it as the doctrine is the part of the Basic Structure of the Constitution as held in *Keshavananda Bharti v. State of Kerala.*[188] Beg J further added that as Separation of Powers is in operation, three organs cannot assume function of one another even not by resorting to Article 368.

Though the strict application of the doctrine of Separation of Powers is not possible in India and some encroachment upon judicial functions by executive and legislative is inescapable, Supreme Court of India in *Indira Nehru v. Raj Narain* case[189] held that adjudication of specific dispute is a judicial function and Parliament cannot take away even by constitutional amendment. Also in this case, Chanrachud J. observed that political usefulness of the doctrine is now widely recognized. Some check and balance system is inevitable to preserve the basic value of the Constitution. The courts do not interfere with 'political ticket' or 'businesses. Parliament on the other hand should respect court's own destiny. The doctrine of Separation of Powers is the principle of restraint on all three organs.[190]

A distinction is very much necessary between essential and incidental powers of an organ of the government. Government is

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[186] AIR 1975 SC 2299
[187] ibid
[188] AIR 1973 SC 1461
[189] AIR 1975 SC 2299
[190] *ibid*

not a machine but a living thing. Its life is dependant upon cooperation of its organs, which are interdependent. An organ may exercise some of the incidental powers of another organ. However no organ of the government is supreme. Each organ is limited to the exercise of the powers confided to it under the law of its creation, viz. the Constitution. The Cabinet is a hyphen, which joins, or a buckle, which fastens, the legislative part of the state to its executive part. The Constitution in Article 50, however, specifically ordains separation of the judiciary from the executive. The vitality of the doctrine of separation of powers lies not in any rigid separation of functions, but in a working synthesis with the guarantee of judicial independence.

3.2.5 Doctrine of separation of powers: Present trend

Principle of Separation of Power is outmoded in view of attitude adopted by many countries in which concentration of governmental authority and appreciable growth in legislative powers show a sharp upward trend, and therefore judicial review has become an institution of constantly less significance. Now a days application of the doctrine of judicial review is not restricted up to balancing mechanism for legislative and executive relation but also for the protection of fundamental Human Rights.

Critics who invoke the traditional Separation of Powers rationale as the assured constitutional basis for keeping the Constituent function of Parliament as sacrosanct and beyond the bounds of judicial process are not reconciled to the extensions by the Supreme court of its jurisdiction to matters which engage the amendatory process under Article 368 of the Constitution. They

consider 'Keshavananda, as a usurpation of the constituent power of Parliament by majority judges of the Supreme Court. But the fact remains that the Indian Supreme Court has now set for itself the role of the ultimate arbiter of disputes in which constitutional validity of amendments to the Constitution is contested. It has brushed aside objections

3.3 Due Process of Law

3.3.1 Concept of Due process of law

The phrase 'due process' has come to mean judicial law making of an 'activist' nature.[191] The concept of 'due process' of law in 5th and 14th amendment to the Constitution of U.S.A. was derived from the expression 'save by the law of the land' used in Article 29 of the Magna Carta[192], which said:

> "No man shall be taken or imprisoned, diseased or outlawed, or exiled, or in any way destroyed, save by the lawful judgment of his peers or by the law of the land."

However at same time it has been established that this clause of the Magna Carta has undergone a metamorphosis in the course of its being engrafted in the American Constitution. The aforesaid clause of the Magna Carta was intended as procedural safeguard against the arbitrary government of absolute monarch. In England the phrase 'Due process of law' implied conformity to the natural and inherent principle of justice and

[191] William Swindler, Court and Constitution in the 20th Century, The New Legality, 1932-1968, 1970

[192] Vide Maitland, Constitutional history of England p. 52 Cambridge, 1965

avoidance of arbitrary government but based on the whims of monarch.

At the root of the 'due process' concept, American theory of law lies, according to which law is not a mere 'command of sovereign' as Austin thought.

So far as procedural branch of 'due process' is concerned, the Americans imported the English common law principle of natural justice, as embodied in twin maxims.

- *Nemo debet esse judex in propria causa*
- *Audi alterm Partem*

But the difference between the English and the American attitude lies in the extent to which the judiciary would go in its crusade against a Legislature, which denies these principles of natural justice.[193]

However, an American Court, armed with the constitutional limitation and the power of judicial review, would invalidate the statute itself where a statute denies 'due process', which embodies the requirement of natural justice.

The 'due process clause' acquire a 'procedural' significance, as guaranteeing fair procedural treatment to persons who have dealing with certain government agencies, or guaranteeing certain forms of judicial procedure in determining the question of guilt or innocence of individuals who have violated the law, or

[193] Hogan v. Reclamation District, (1884) 110 U.S. 516

even as guaranteeing the right to be informed of the charges that have been preferred against one, the right to be informed of the charges that have been preferred against one, the right to a fair, open trial and the assistance of adequate legal counsel. The requirements of due process as a matter of procedure are as Prof. Willis says[194],

1. Notice,
2. An opportunity to be heard
3. An impartial tribunal
4. An orderly course of procedure

So, the requirement of the 'due process of law' in the United States Constitution imposes limitation upon all the powers of all branches of government-legislative, executive and judicial. Due process of law has never been defined by the judges and jurist in America. However, in 1949 Mr. Justice Frankfurter tried to explain it: "Due process of law conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights, which the courts must enforce because they are basic to our free society.... Representing as it does a living principle, Due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essential of fundamental rights."[195]

Thus, though there has not been any clear and precise definition of 'Due process of law' in America the judges of the Supreme Court of America have worked with strict caution and judicial clarity in applying this doctrine in determination of

[194] Wills, Constitutional Law of the United States, 1936, p. 664
[195] Wolf v. Colorado, 338, US 25 (1949)

constitutionality of legislative acts. 'Due Process' clause has helped immeasurably in creating a democratic balance by declaring arbitrary laws illegal and the judges of the Supreme Court of United states of America has exercised 'due process' clause with prudence and judiciousness. Thus, it is very clear from the constitutional history of the United States of America that 'Due process' clause has rendered a great service in moulding the American national life.

3.3.2 Due process of law and Indian Constituent Assembly

Indian Constituent Assembly was the most familiar with the version of 'due process' as it figured in the 'new deal' crisis. In the initial stages of its deliberations, the Assembly as well as various expert committees favoured the clause notwithstanding its then recent implications. It was perhaps assumed that the future Indian Supreme Court would not interpret it so extensively to produce the results obtained by the United States Supreme Court. Alternatively, the Assembly and the expert committee were willing to take gamble in order to satisfy fully their 'liberal democratic instincts in creating powerful Supreme Court to guard the liberties of the future citizens of India. The 'due process clause' could not become the part of India's Constitution because of the strong opposition to it by three influential members of the Assembly, Sri Govind pant, Alladi Krishnaswamy Ayyer and B. N. rau. B. N. Rau's tour of the U.S.A., his meeting with justice frankfurter led to omission of 'due process clause'. K. M. Munshi regretted at the omission of the clause. Both Munshi and Ambedkar had included the clause

in their Fundamental Rights.[196] B. N. Rau and Alladi Krishnaswamy Ayyar appear to have taken a neutral stand in their initial stage.[197]

The proceedings of the Drafting committee on 31st October 1947 show one interesting change made in 'due process' clause. In "No person shall be deprived his life or liberty without due process of law," "personal" was added before liberty. That altered reading would seem to reduce due process to procedural due process only and could have comfortably in the constitution if it could have reconciled with preventive detention.

It is not clear from the records at what stage 'due process' was substituted by "procedure established by law"- a formula used by Japanese and Irish constitution. Perhaps B. N. Rau and Dr. Ambedakar, with no other members present made the substitution as early as 20th January 1948.[198]

It would be correct to say that the framers might have been anxious to summarize, or in other ways clarify, the rights vis-à-vis the necessary social or public control, in order that the courts might not produce conflicting interpretations regarding basic matters clearly established under many Constitutions, notably, that of U.S.A. It is also true that they did not wish to see any 'abuse' of judicial review. But they undoubtedly wished to see a use of judicial review. Otherwise all their efforts in drawing up Fundamental Rights would have been pointless. The mere omission of 'due process' certainly could not mean that the

[196] B. Shiva Rao, Vol. II, p. 75 & 86
[197] B. Shiva Rao, VOL. II P. 58
[198] B. Shiva Rao, Vol. III p. 109

judicial review in some manner dwarfed. The clause is not the only form in which to bestow judicial review. Even in the U.S.A., it is by no means true that the Supreme Court has consistently regarded the clause as enabling it to act as a 'super legislature'. The new deal cases made several Americans and expert, felt that the Supreme Court was acting contrary to the wishes of the majority and what is of greater importance.

Sometime the question arises in our mind whether the 'due process' and 'reasonableness' clauses are qualitatively different. Can the former be wider in its scope than the latter? Or is it really something for the Courts to build on and, therefore, much depends on what they make of it? The United Supreme Court imported 'Natural law' into the 'due process' clause to secure property rights. That was in the last century and it is not likely that the United Supreme Court or any other Court or any other Court in any other country, would seek to rely on the notions such as to secure any right. It should be also clear that whatever the expression, it is open to us to urge judicial restraint in particular issues. But H. M. seervai appears to take the view that the question of 'reasonable' restriction is much easier for courts to decide than 'due process'. He said:

> "With the departure from American model of the Bill of rights, the framers of our Constitution believed that they had removed any possibility of abuse of judicial review and had made it bulwark of freedom. No doubt most of the fundamental rights were subject to reasonable restrictions, and it was for the Courts to decide that what was 'reasonable' but to lawyers brought up in the Anglo-Indian law this would cause no uneasiness, for the concept of

reasonableness ran right through the whole law. The reasonable man, reasonable doubt, reasonable time, reasonable care, reasonable price and reasonable notice had presented no serious difficulties...and it was assumed that 'reasonable restrictions would present no difficulties...[199]

3.3.3 Due process and Indian Constitution

If the concept of 'due process' be founded on universal principles of justice, it cannot but be that its essential must enter into our constitutional jurisprudence, even though we may not agree with its detailed application to particular situations, or the scheme of our Constitution may not permit our judges to use it to the full length to which it has been stretched by the American Supreme Court.

The power of constitutional amendment that the Indian Parliament possessed during the first decade in amending several provisions of the Constitution, including those which deal with right to property had made little difference whether the phrase 'due process of law' had been included in the Indian Constitution or not. The omission of the clause from the Indian constitution had led commentators[200] and the Supreme Court itself[201] to conclude that judicial review under Indian Constitution was a somewhat reduced and 'scale-down' version of the jurisdiction which the United Supreme Court possesses

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[199] Seervai, "The position of the Judiciary Under the Constitution of India", p. 57 University of Bombay, 1970

[200] H. M. Seervai, 'The Position of Judiciary Under the Constitution of India', p. 56-62, University of Bombay, 1970

[201] Collector of Customs v. Sdampathu Chetty, A.I.R 1962 SC 310

under the 'due process' cause of the United States Constitution. H. M. Seervai, in this regard said:

> "The framers of our Constitution did not create Courts which could act as 'super legislatures' or as permanent 'third chambers' revising the legislation enacted by the elected representatives of the people. The elimination of the 'due process' clause from our constitution, and the detailed specification of restrictions to which Fundamental Rights were subject were important safeguards against the abuse of judicial review."[202]

The example given by Seervai of reasonable doubt, reasonable care and reasonable notice are phrases occurring in statues or case laws. No question of the validity of such phrases arises for consideration. 'Reasonable restriction', unlike all the examples given by Seervai, will go to the root of particular statue's validity and this is a very great distinction. Seervai's point is that the Court will determine whether a doubt was reasonable, the care taken was reasonable. Etc. and that it can equally easily decide whether a statutory restriction is reasonable-but the cases are hardly in ***pari materia*** for the legislature is not a 'reasonable man'.[203]

The expression 'Procedure established by law' in Article 21 was interpreted by the Supreme Court for the first time in *Gopalan v.*

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[202] H. M. Seervai, 'The Position of Judiciary Under the Constitution of India', p. 58-59, University of Bombay, 1970

[203] H. M. Seervai, 'The Position of Judiciary Under the Constitution of India', p. 67 University of Bombay, 1970

State of Madras.[204] In this case Mr. Gopalan was detained under preventive detention Act, 195-. He challenged the action of detention. The government argued that the words "procedure established by law" meant nothing but such procedure as laid down by the act made by legislature. And Court could not under Article 21 go into reasonableness of the law or procedure thereof. The contention consists in three points, out of which, the last one is that the expression "procedure established by law has been imported from the Japanese Constitution. "Due process of law" which imposes burden upon court to watch out whether requisites of due process have been complied with by the State. The Supreme Court held that American concept has covered aspects, procedural and substantive and word "law" means 'a reasonable law'. The word "Due" implies 'just', 'proper' and 'fair'. But omission of the word 'due' in Indian constitution plays significant effect on non-import of what has been accepted and followed in U.S.A. The Supreme Court considered the fact that the Constituent Assembly introduced the word due process but later decisions as word 'due' is ambiguous cued in U.S.A.. Judicial decision reveal wide ambit of judiciary by variety of interpretation. Das J. expressed, "If a law provided that the Bishop of Rochester be killed in oil, it would be valid under Article 21."[205]

It is intriguing to see the contrast resting exclusively on the rights to property and occupation, trade, etc., while none of the other rights in Article 19 are mentioned. It is also ironical since it is these two rights that have been curbed most by various constitutional amendments in the last decade. On that basis,

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[204] AIR 1956 SC 108
[205] *ibid*

there would be very little judicial review in India, but the truth of matter is that five other rights guaranteed by Article 19 have received full judicial attention. Curbs on the rights to property and business do not mean the end of judicial review. Even with respect to the two rights there is yet further scope for judicial review.

The decision in *A. K. Gopalan*[206] is often construed to mean that 'due process' could not be invoked in India and therefore, the power of judicial review of the Supreme Court of India is limited. Perhaps limited with reference to due process. The judicial review powers as understood in the U.S.A. with its own history, traditions and notions are different from the Indian Courts' powers, given the Indian experiences and expectations. It is not to be supposed to that guarantee of 'due process' in the two Amendments of the American Constitution is confined to the rights to life, personal liberty or property. By the liberal interpretation of the word 'liberty' in these two amendments, the American Supreme Court has extended to guarantee to all the fundamental rights, which are comprehended by Article 19 of our constitution, Such as the freedom of expression, assembly, association, profession, or movement. Hence, whenever any restriction is imposed on any of these fundamental rights, Courts have the jurisdiction to test their validity by the objective standard of fairness and reasonableness.[207]

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[206] AIR 1950 SC 27

[207] Joint Anti-Fascist Refugee Committee v. McGrath, (1951) 341 U.S. 123

In *Maneka Gandhi v. Union of India*, The Supreme Court held that

> " In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in republic while the other, to the whim and caprice of an absolute monarch, where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violated Article 14."

A notable surmise as to the 'similarity' between the American and Indian clauses comes from Justice Douglas of the United States Supreme Court.[208]

> "Suffice it to say here that the concepts embodied in due process are also embodied in Indian Constitutional Law, where other clauses do service for due process."[209]

Justice Douglas has opined:

> "The power of 'due process' is a potent one, because it is undefined except by the judiciary itself. The judiciary today, is the first recognize that the Due Process clause should not be used to substitute its judgment on policy for that of the other two branches of Government."[210]

He also remarked:

> "The Indian Courts have powers narrower than ours in some respects and as broad as ours in others. There is no

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[208] Justice Douglas, "From Marshall to Mukherjee, Studies in American and Indian Constitutional Law" Tagore Law Lectures, Calcutta, 1956

[209] *ibid*

[210] *ibid*

Due Process clause in the Indian Constitution. But Article 19 (1) (f) and (g) guarantee important rights-the right to acquire hold and dispose of property, and the right to practice a profession and carry on an occupation, trade or business; and it appears that the Supreme Court of India is the ultimate interpreter of what is reasonable in a given case."

3.3.4 Due Process of Law and Judicial Review

Briefly, due process means that any law which the Legislature chooses to enact will not be upheld as valid by the Court, if it affects the fundamental rights of an individual with respect to his life, liberty or property, but will be tested by a standard of 'justness', 'fairness' or 'reasonableness' which the Courts draw from universal or immutable principles of justice in a democratic society, in order "to strike balance between individual liberty and social control" so that a restriction imposed even by a representative legislature may not be arbitrary.[211]

The concept of 'due process' introduces 'judicial review' of legislation. If we peep into the past, the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law as enacted by the peoples' representatives, and Americans went further and asserted that since absolutism was ingrained in human nature itself, even the elected representative of the people could not be trusted with absolute power and were therefore to be restrained by limitation imposed by paramount law i.e. the Constitution of

[211] D. D. Basu, "Limited Government and Judicial Review" p. 216, S. C. Sarkar & Sons (Pvt.) Ltd.

the land, and if any law was repugnant to the Constitution it was the duty of the Court to declare it to be void. One of such limitations imposed by the Legislature to impose a restriction upon the right of life, liberty or property of an individual to secure some collective interest or general welfare, it must itself conform the test of 'due process'.

The Fifth Amendment to the constitution of U.S.A. (1791) declares, "No person shall be deprived of his life, liberty and property without due process of law." The Fourteenth amendment holds the same. American judiciary empowered to declare any law the bad one, if it is not accord with 'due process'. In *Murray's Lesse v. Hoboken Land & improvement Co.*, (1938) Court held that

> "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative and executive and judicial power of the government, and cannot be construed as to leave congress free to make any process' due process of law' by its more will."

It also conveys that if like liberty is taken away by judicial proceeding but without complying with the requirements of due process, such proceedings are held as invalid. In U.K., any law enacted by Parliament is the law of the land and does remain within purview of judicial review as parliamentary sovereignty is supreme and therefore, "one who makes an error must correct it."

The U.S. Constitution has not elaborated the exact definition of due process of law. On account of this, U.S. Courts turned it to advantage of liberal interpretation of the doctrine to declare law as invalid if it seems to offend the Constitution.

In *Wolf v. Colorado*, Frank Furter J. observed:

> "It is the compendious expression for all these rights which the courts must enforce because they are basic to our society. It is of the very nature of a free society to advance in its standard of what is deemed reasonable and right. The real problem confronting the judiciary in the application of due process clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the court to draw it by the gradual and the empiric process of inclusion and exclusion."

Thus, 'due process' is not affixed term beyond change, once contents are considered.

Procedural 'due process means that in dealing with individuals, the government must proceed with settled usage and modes of procedure for example, no conviction without hearing. Due process is the process of law, which hears before it condemns which proceeds upon enquiry and renders judgment only after trial. The clause therefore means that there can be no proceedings against life, liberty and property, which may result in deprivation of either, without observance of those general

rules established in our system of jurisprudence for the security of private rights.

In *subodh Gopal case*,[212] the validity of the West Bengal Land Revenue Sales (Amendment) Act, 1950 was challenged on the ground inter alia, that it constituted an unreasonable restriction upon the fundamental right to property guaranteed by Art. 19(1)(f) of the Constitution to an auction purchaser of an estate at a revenue sale. The Court held that Art. 19(1)(f) had no application to the enjoyment of 'concrete rights', but referred to natural rights of private property. Hence, complain under Art. 19(1)(f) was harsh in its consequences.[213]

The above-mentioned discussion demonstrates that, subject to whatever exceptions may be drawn from the various provisions of the constitution, the principle of reasonableness, as those of 'due process', are both founded on universal sense of fairness and justice. However one can find that there must be some limits that should be borne in mind by our Courts in wielding the mighty engine of 'reasonableness of restrictions, which has now been infused, by judicial interpretation, into the entire legislative field in India.

Once it is held that the concept of 'reasonableness' in clause 2 to 6 of Art. 19 of our Constitution have imported, through the backdoor, the doctrine of 'due process' from the United States. It will be seen that the scope of judicial review of our Courts under these clauses is, in a sense, wider than that of the American Supreme Court, as it exists today.

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[212] State of West Bengal v. Subodh Gopal (1954) S.C.R. 587
[213] ibid

In the U.S.A. though the doctrine of 'due process' contains both procedural and substantive elements, the Supreme Court has, of late, been sparingly using the substantive arm of due process to strike down economic legislation.[214]

However it is not possible for the Indian courts to make any distinctions between economic and other legislation in the application of the concept of 'reasonableness' under clause 2-6 of Article 19. If the restriction is excessive or arbitrary, that is to say, disproportionate to the mischief to be averted, the Court has to strike down the legislation as substantively unreasonable, even though it may serve an economic or social purpose.

Thus, our Supreme Court has annulled a statute, which empowered the administrative authority to prohibit the manufacturer of bidis in the village during the agricultural season.[215] Similarly, the Court has annulled a statute which imposed obligation upon an employer to pay gratuity to an employee even when the voluntarily resigned from the service.[216]

But wider the power of judicial review, greater caution is to be observed by our Courts. In this regard, our Courts may take following lessons from American constitutional history[217]:

1. That the Constitutional function of judicial review does not mean that the Judiciary should exercise 'the powers of a

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[214] Lincon Fed. Union v. Northwestern Iron Co., (1949) 348 U.S.
[215] Chintamani rao v. state of M. P. (1950) S.C.R. 759
[216] Express Newspapers v. Union of India, A.I.R. 1958, SC 578
[217] Vide D. D. Basu, "Limited Government and Judicial Review", p. 266, S. C. Sarkar & Sons Pvt. Ltd. Calcutta, 1972

super-legislature' or 'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass the laws.

2. That the Court should not import any particular economic theory into the constitution, which was made "people of fundamentally deferring views.
3. That in interpreting the constitution, Judges should not be guided by any consideration as to what was 'novel' or even 'shocking' in their opinion.

3.4 Judiciary v. Parliament- Present Instances: Inter-conflict between Rule of Law and Separation of Powers

Indian federalism faces the risk of a constitutional impasse between the Supreme Court and the constituent power of Parliament. In the past, such conflicts could be resolved by referring to the Constitution. But this may not always be possible in future in view of a challenge the Supreme Court has posted to the Constitution itself.

It is ironical that the biggest challenge to the Indian Constitution has come in January, the month in which the country introduced it as back as 1950 to become a Republic. Unfortunately, the challenge is developing into some sort of a confrontation between the legislature (Parliament) and the judiciary (the Supreme Court).

Both are creatures of the Constitution, which has delineated their respective territory. Yet, both look like transcending the limits and going relentlessly towards a point where both can

burn their fingers, one probably more than the other. The following instances are sufficient to throw light on such vital issue.

- It all began over the expulsion of 11 Lok Sabha members from Parliament because they had accepted money for raising questions in the House. Through a sting operation, a TV network had shown them taking the bribe.

  The Lok Sabha Speaker, Mr. Somnath Chatterjee, constituted an all-party inquiry committee, which recommended their expulsion. The Speaker implemented the decision to the public applause. For the first time, the prestige of Parliament went up in the eyes of people. The members, however, knocked at the court's door. The conflict with Parliament began when the Supreme Court referred the matter to a Constitution bench to examine whether the Parliament had the powers to expel its members.

  The Supreme Court took all the care not to disturb the Speaker's sensitivity by observing that it was not concerned about "the merit of the case". Nor did the court give a stay, which would have resulted in restoring the members' right to sit in the Lok Sabha. Still, the Speaker took umbrage to the Supreme Court's admission of the members' petition. The Speaker has said that his stand "remains the same". That is, "I cannot help anyone from going to court. But, according to me, the courts have no jurisdiction at all in the matter. Any order is not binding on me." Indeed, Parliament, elected by people, is supreme. But a judicial review is the basic structure of the Constitution.

The case of expelled members does not relate to the question who has the last word — whether the Parliament or the Supreme Court. The point at issue is if the Supreme Court is correct in examining the extent to which the Parliament can go in punishing a member. It is apparent that the Supreme Court has been quite circumspect in its brief order: "The notices to the respondents are to assist the court in adjudication of the matter." The words used are "to assist." There is not even a whiff of suggestion that the Speaker has been put in the dock. The order merely seeks his help to interpret the constitutional provision on the disqualification of a member. The Supreme Court is at pains to explain that ``we are not on the merits of the case, we are only on the constitutional provision whether Article 105, setting out the privileges of Members of Parliament, encompassed the power (in Parliament) to expel a member."

Article 105, which defines powers and privileges of the members, does not say much. Nothing has been "defined." Until it takes place, Parliament follows the House of Commons in the UK. Not a compliment to the Indian Parliament, which has not codified its privileges and powers for more than five decades. It is obvious that it does not want to do so because the undefined territory is any day better and larger than the defined one. But the big difference between the UK and India is that former does not have a written Constitution while the latter has. One depends on vague precedents and the other on cold provisions. Mr. Chatterjee's stand, however democratic and laudable, cannot be above the Constitution, which is supreme. The question is not about the expelled members but that of the Constitution's interpretation. This is the court's job. As far back as 1803, the US Supreme Court upheld in the *Marbury vs. Madison* case that

a judicial review is in order even after what the US Congress had decided. In India itself, there is one judgment by the Madhya Pradesh High Court, which is in favour of the Speaker's stand, and another by the Punjab and Haryana High Court that is against it. In 1957, the Allahabad High Court punished a UP journalist and all the 29 judges on the bench endorsed it. The right to appeal was also extinguished. However, the Supreme Court said that it was the final authority and let the journalist free. In the days of Jawaharlal Nehru, there was a similar case in the Lok Sabha. A member was caught taking the bribe for asking question in the house. Before the resolution to expel him was adopted, he resigned. At that time, the question had taken the shape of morality, whether such a thing behaved a member and the Parliament.

This time the constitutional aspect has come to the fore. None has mentioned the word, "moral." However the Supreme Court has to carry out its job, though controversial and onerous. This is an issue, which is bound to be raised in the years to come. It is better it is out of the way now. In no way should the prestige of the Supreme Court lessen.

- In another case of Jharkhand, Mr. Somnath Chatterjee, the seasoned lawyer opted for a sagacious course of a Presidential reference because he, as Speaker of the ultimate legislature — the Lok Sabha — did not want the March 9 order of the Supreme Court to remain as a precedent. He would surely know that it was plainly inconsistent with the privileges of the legislature.

- The Governor of Jharkhand committed an obvious fraud on the Constitution by appointing a person belonging to the minority

group as Chief Minister and giving him unduly long time to purchase MLAs to muster the majority. However, what the Supreme Court did on March 9 would only support the old saying, "Hard cases make bad law".

From the newspaper reports, it appears that the court gave several directions to the Speaker — that he should administer the oath of office to the newly elected members, that on the next day the floor test should be conducted, that this should be the only agenda of the Assembly for the day, that proceedings of the House on March 11 should be peaceful and disturbance-free, that the Speaker should report to the court the outcome of the proceedings, that the proceedings be video graphed.

It may be noted that the constitutional authority to summon the House, the Governor, had not asked the Assembly to meet on March 11, but the court dispensed with the requirement of a notice of summoning of the Assembly and the court's order was a substitute. The video-record was to be placed before the court. By all accounts, the court took over the functions of the Governor and the Speaker — in fact the whole legislative process. Describing this an invasion into the precincts of the House may not be an unpardonable exaggeration. A law-knowing Speaker like Mr. Somnath Chatterjee cannot but be perturbed.

It has always been understood that the court could interpret the constitutional provisions, even those relating to the legislative wing. The Constitution is what the court says it is. The court can declare any action of the Governor or that of the Speaker as being unconstitutional. But can it direct the Speaker to act in a

particular manner — say video-record the proceedings and to report to the court? And what if the Speaker refuses to obey?

Throughout the long history of the evolution of parliamentary democracy, the issue of that institution's honour and its privilege was constantly guarded with the zeal that would put the religious fundamentalists to shame. Our Constitution adopted all of it. A classic example of our legislatures' fervour for privilege was provided by the conflict between the legislature and the High Court in Lucknow.

In March 1964, one Keshav Singh was imprisoned by the order of the UP Assembly Speaker for committing contempt of the House. An advocate, B. Solomon, presented a petition on his behalf to the Lucknow Bench of the High Court praying for his release. A two-judge Bench of the High Court, after hearing the government advocate, passed an order that Keshav Singh be released on bail. The Legislative Assembly considered the action of the judges a breach of the privilege of the House and proceeded to resolve that the judges and the lawyer had committed contempt of the House.

The Speaker ordered the arrest of all three — the two judges of the High Court and the lawyer — and wanted them to be produced before the House. The two lordships that heard the news over the radio rushed to the Allahabad High Court and filed petitions questioning the resolution of the House. A Full Court consisting of all 28 judges of the High Court entertained the petition and passed an interim order prohibiting the implementation of the resolution of the House.

The mounting confrontation between the legislature and the judiciary impelled the President of India to make a reference to the Supreme Court under Article 143 of the Constitution. The questions referred for opinion were mainly centred round the facts of the case.

A seven-judge Bench of the Supreme Court, after hearing arguments from a galaxy of legal luminaries, held that while the courts could not interfere with the legislature's sphere, they had the power to determine what were the privileges of the British House of Commons at the commencement of the Constitution that were preserved by our Constitution and whether any of them had become inconsistent with the Constitution of India.

The court complimented the legislature in the following words: "During the fourteen years that the Constitution has been in operation, the legislatures have not done anything to justify the view that they do not deserve to be trusted with power. In a modern State it is often necessary for the good of the country that parallel powers should exist in different authorities. It is not inevitable that such powers will clash."

That showed the reverence that the legislature commanded.

- In another case, Mr. Shibu Soren and his three other JMM colleagues had in 1992 voted opposing the no-confidence motion against Prime Minister Narasimha Rao allegedly for monetary consideration. On this count a criminal case was launched against them. Eventually, a Constitution Bench of the Supreme Court by a majority verdict held that to enable members to participate fearlessly in parliamentary

debates, they must have the protection of immunity against all civil and criminal proceedings that bear a nexus to their speech or vote, and Article 105(2) of the Constitution provides such a protection. Accordingly, criminal proceedings against them for taking bribe to vote inside the House in a particular manner were quashed.

In the words of the court, "By reason of the lucre that they received, they enabled a government to survive. Even so they are entitled to protection that the Constitution plainly affords them. The court's sense of indignation should not lead it to construe the Constitution narrowly, impairing the guarantee to effective parliamentary participation and debate". The court's respect for parliamentary privileges went so far.

After the anti-defection law — Tenth Schedule to the Constitution — came into force on March 1, 1985, questions arose whether the decision of the Speaker on the issue of disqualification of a member of a House could be interfered by the High Courts or the Supreme Court. Notwithstanding the clear provision that no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member, the Supreme Court in 1992 held that the Speaker while deciding the question of disqualification acts only as a statutory authority, and, therefore, his decision shall be subject to judicial review. While holding so, it was reiterated that a Speaker, acting as such, is beyond the court's jurisdiction.

- Notwithstanding the Supreme Court's decision, Dr H. Borobabu Singh, who was the Speaker of the Manipur

> Legislative Assembly, continued to hold the view that a Speaker's decision was final. When the Supreme Court reversed some of his decisions, the Manipur Speaker not only refused to implement them but also punished the Secretary of the Assembly who took steps to implement the Supreme Court's orders.

The Speaker was hauled up for contempt of the Supreme Court. But Mr. Borobabu Singh refused to appear before the court. Even the Central Government pleaded helplessness in the matter of procuring his presence. Finally, the contempt proceedings were dropped on March 23, 1993, as soon as he showed his face before the court — no apology and no punishment. The Jharkhand Speaker could rely upon the unfortunate precedent.

With Jharkhand and Goa experiences too fresh to be ignored, in a possible Presidential reference, it is reasonable to expect an opinion more clearly defining the court's powers to give directions to all other Constitutional authorities to act strictly in accordance with the Constitution, particularly to remedy a fraudulent exercise of power; the protection afforded by Article 361 to the Governor would be available in respect of bonafide exercise of power — not to shield malafide actions. Whether an act is bonafide or malafide is undoubtedly a matter to be decided by courts on the basis of evidence.

To conclude with, the doctrine of rule of law. Doctrine of separation of power and the doctrine of due process of law will can survive and establish its objectives, when the doctrine of judicial review is present in any country. And for effective exercise of judicial review power enables to preserve the

instrument of constitutionalism balance, which can be extended to three principal areas.

- It maintains the constitutional balance of authority between the central and state governments in a federal system;
- It maintains and preserves the balance between executive power and legislative power on the same governmental level;
- It defends the fundamental human freedoms and thus acts as 'great sentinel' of the cherished values of life.