THE DIFFERENTIAL STATE OF THE INDIAN CONSTITUTION – A CONSTITUTIONAL ANOMALY

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Abstract

The Suprema Lex of the Indian nation-state, the Constitution of India, is a living organism that grows, changes, and adapts itself with the evolution of societal, economic and political norms of the Indian state of nature. What makes this document a living Constitution are its provisions of amendment which allow it to keep pace with the changing needs of the country. This power to amend the Supreme Law of the Land resides with the Parliament of India which is only permitted to exercise this power in consonance with the provisions of the Constitution and only to the extent that it does not abrogate 'the basic structure' of the Constitution. Even though this doctrine has been laid down by the Supreme Court of India in its authority as the final arbiter of law in the Indian domain, the respective High Courts of each State hold no less power in

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The authors would like to thank Mr. Ahmed Ali, Assistant Professor, Symbiosis International (Deemed University), for being their eternal friend, philosopher and guide.

interpreting the Constitutional provisions and evaluating the Constitutionality of the Parliament or State Legislature made laws.

However, a High Court's order is restricted by territoriality, thus being enforceable within the bounds of the State over which it presides, unlike the Supreme Court which is the Apex Court of the country and has jurisdiction over every inch of the Indian territory.

This article attempts to encapsulate the perplexing conundrums and confounding paradoxes that will arise after the declaration of a "Constitutional amendment" as violative of the Basic Structure by a "High Court" and attempts to reach a possible conclusion as to whether the conferment of such power to the High Courts is viable and if it is, what is the aftermath of such a declaration by a High Court.

I. INTRODUCTION

The Constituent Assembly ('**the assembly**') while debating on the aspects of our nascent Constitution intended to keep the separation of powers between the organs of the State.[1] The Assembly was inspired by the legal proposition put forward by Montesquieu who believed that tyranny pervades in the absence of separation of powers.[2] The Indian political system comes with a condition precedent of

[1]Constituent Assembly Debates, 10 December 1948, vol 7.
[2]Hazo, R., 'Montesquieu and the Separation of Power' (1968) 54(7) American Bar Association Journal 665, 668.

separation of powers[3] in a written federal Constitution and an inherent notion of judicial review[4] by a federal court. The post-Constitutional doctrines and the decisions of the Supreme Court have made it crystal clear that judicial review is indeed a *basic structure* of this Constitution.[5] The legal proposition of judicial review is necessary[6] to curb the havoc which can be thrusted by the executive or the legislative organs of the State.[7]

The assembly was well aware that absolute power corrupts[8] and hence, the layout of an independent judiciary was established.[9] A written Constitution is a worthless piece of paper if there is no supreme authority to enforce it.[10] Hence, the foundation of a polity with checks and balances[11] was created by our Constitutional forefathers, declaring the Hon'ble Supreme Court as the guardian of the Constitution.[12] The idea of fundamental rights was borrowed from the Bill of Rights of the American Constitution[13] with a specific provision which Dr. B.R Ambedkar addressed as the heart and soul[14] of the Constitution, thus granting Part III justifiability.

The Indian High Courts were also declared to be Constitutional courts and were granted with the writ jurisdiction under Article 226. Justice Bhagwati construed this power to be even wider than that of Article

[3]*S.P. Gupta v. Union of India*, AIR 1982 SC 149.
[4]*Minerva Mills Ltd. v. Union of India*, AIR 1789 SC 1980.
[5]*Kihoto Hollohan v. Zachillhu & Ors.*, 1992 SCR (1) 686.
[6]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (US).
[7]Orth, J., & Smith, T., 'Judicial Review' (2001) 80(3) Foreign Affairs 152,153.
[8]Harini Nagendra, 'Power Corrupts - Absolute Power Corrupts Absolutely' (1999) 3(2) Conservation Ecology.
[9]*Common Cause v. Union of India*, (1996) 2 SCC 752.
[10]Joseph Raz, 'Concept of Legal System' (1975) 20 American Journal of Jurisprudence 154, 163.
[11]*Sanjoy Narayan Editor in Chief Hindustan v. Hon. High Court of Allahabad*, (2011) 13 SCC 155.
[12]*Nar Singh v. State of UP*, AIR 1954 SC 457.
[13]D.G. Karve, 'The New Indian Constitution Principles and Prospects' (1940) 3(2) The University of Toronto Law Journal 281, 300.
[14]Constituent Assembly Debates, 9 February 1948, vol 6.

32.[15] This power was conferred to the High Courts keeping in view the diversity and area of the Indian sub-continent, and hence the High Courts were given equal importance to that of the Supreme Court in matters of independence and power. The High courts were also given the responsibility to maintain superintendence within their territorial contours and to uphold the Indian judicial system.[16]

However, the objective of this paper is not to analyze the concept of judicial review, but to bring forward the legal complexities that arise due to the quasi-federal structure of the Indian polity[17] and the unitary structure of the Indian judiciary.[18] Our Constitution propagates the notion of a Constitutionally limited democracy[19] and it imposes Constitutional limitations on the Legislative organs of our State – the Union Parliament and the State Assemblies. The Constitution expressly directs the Union and the state legislatures to not contravene Part III of the Indian Constitution by any "law" as defined under Article 13[20] except through the procedure given in Part III itself. A greater limitation is also imposed upon the Union Parliament which holds the power to amend the Constitution under Article 368 by the judicial innovation of the Supreme Court - *The Basic Structure.*[21] Hence any Constitutional amendment by the Parliament has to qualify the touchstone of the doctrine of basic structure. Even the paramount entity capable of amending the Constitution by its constituent power is limited in its powers to do so, for the protection of the basic ideas

[15]*Bandhua Mukti Morcha v. Union of India*, AIR 802 SC 1984.
[16]The Constitution of India 1950, art 227; *See also* A.G. Noorani, 'The Indian Judiciary Under the Constitution' (1976) 9(3) Law and Politics in Africa, Asia and Latin America 335, 341.
[17]*State of Karnataka v. Union of India*, (1977) 4 SCC 608.
[18]Bradford R. Clark, 'Unitary Judicial Review' (2003) 72(1) George Washington University Law School 319, 353.
[19]*I. C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.
[20]*Bhikaji Narain Dhakras v. State of Madhya Pradesh*, 1955 SCR (2) 589.
[21]*His Holiness Sripadagalvuru Kesavananda Bharti v. State of Kerala*, (1973) 4 SCC 225.

of the Constitution-makers, and this limitation is enforced by judicial review.[22]

The interesting part is that the power of legislation and governance is divided between the Union and the States under Schedule VII of the Indian Constitution,[23] but that is not true when the judicial model of the Indian Constitution is explored. Unlike the United States, we have High Courts for respective territories and the Supreme Court for the whole of India. A plethora of legal literature is available on the power and duty of the Supreme Court and High Courts to nullify a law in contradiction of the fundamental rights[24] or executive actions in abuse of power. This paper shall explore the powers of a High Court to review Constitutional amendments (and parliamentary legislations on exclusive Union subjects) leading to the situation of differential Constitutions which is a repercussion of two or more High Courts interpreting the Constitution in a dissimilar manner. Whereas the same is not strictly impermissible for a true Federation, but India's *"quasi-federal"* structure supplements the conundrum.

II. THE MISPLACED IDEALS OF FEDERALISM – THE INDIAN JUDICIARY

The Republic of India has twenty-five High Courts and one Supreme Court, which are termed as Constitutional courts for the reason that they have the power to interpret our Constitution.[25] However, this interpretation is much more plausible for a scenario where there are two separate Constitutions,[26] which is not so the case with Indian

[22]*State of Rajasthan v. Union of India*, 1978 (1) SCR 1.
[23]*Govt. of NCT of Delhi v. Union of India*, (2018) 8 SCC 501.
[24]*Basheshar Nath v. Commissioner of Income Tax*, AIR 1959 SC 149.
[25]DD Basu, *Commentary on the Constitution of India* (8th edn, LexisNexis 2008) vol 5.
[26]Mila Versteeg & Emily Zackin, 'American Constitutional Exceptionalism Revisited' (2014) 81(4) The University of Chicago Law Review 1641, 1707.

Constitution. This leads one to wonder why the power to interpret a single Constitution has been given to multiple legal entities.

An ideal federal system has a clear division of power between the states and the federal government,[27] which can be done by creating a state or a federal list and declaring either one to have residuary powers. The Indian Constituent Assembly chose to adopt a pseudo-federal model with a Union, State, and a Concurrent list, borrowed from the Government of India Act of 1935.[28] The issue arose when the Indian polity was given a uniform judicial system.[29] Yet, one might argue that India is never an absolutely federal nation, it is *"Quasi-Federal"*.[30] The fact that there is a division of powers between the Union and the states is a classic example of the Indian federal structure,[31] yet the High Courts of the states have the power to review parliamentary legislations, unbound by the three lists in order to enforce fundamental and legal rights under Article 226 which portrays more of a unitary structure. The fact that the Union has the power to legislate on state subjects if the Rajya Sabha passes a resolution by a two-third majority in the national interest is another unitary feature in Indian federalism.[32] One fact that cannot be denied is that the Union is the concentration of all sovereign powers.[33] It supervises the States by means of the Governor who holds his office at the pleasure of the President, who is bound by the advice of the

[27]Abbe R. Gluck, 'Our [National] Federalism' (2014) 123(6) Yale Law Journal 1996, 2043.
[28]HM Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing, 2013) vol 2.
[29]K.H. Cheluva Raju, 'Dr. B. R. Ambedkar and Making of The Constitution: A Case Study of Indian Federalism' (1991) 52(2) Indian Journal of Political Science 153, 164.
[30]C.H. Alexandrowicz, 'Is India a Federation?' (1954) 3(3) International and Comparative Law Quarterly 393, 403.
[31]V. Jagannadham, 'Division of Powers In The Indian Constitution' (1947) 8(3) Indian Journal of Political Science 742, 751.
[32]Mahendra P. Singh, & Douglas V. Verney, 'Challenges to India's Centralized Parliamentary Federalism' (2003) 33(4) Publius 1, 20.
[33]Constitution of India 1950, art 249.

Union, by virtue of the Supreme Court's reading in *Ram Jawaya Kapur*.[34] The Union Parliament also holds the power to alter the territory of the states by means of an ordinary legislation. States can be turned into Union Territories by mere legislations by virtue of Articles 3 and 4 of the Indian Constitution, even if the state has an objection towards the reorganization of its territory.[35]

This design of a quasi-federal nation with a unitary judiciary creates an anomaly which the paper refers to as the *State of Differential Constitutions,* but it is important to delve into the powers of High Courts to judicially review legislations. The Constitutional spirit of the Indian federal structure rests in the very first Article of our Constitution declaring India to be a – "union of states".[36] That being said, what one needs to wonder is the type of federalism that we propagate. The debate of Indian Constitutionalism has always resulted in our national political structure to be read as quasi-federal in nature.[37] The main architects of our Constitution wanted the Indian states to be backed by a strong and powerful center. There were exclusive State subjects, and exclusive Union subjects as a show of Indian federal spirit but there was no State court with exclusive State jurisdiction. The Indian judicial system is straightforward, it is absolutely unitary in nature unlike the United States.[38] The matter goes from the district to the State High Court and then eventually to the Hon'ble Supreme Court. The judicial system of the Indian State is also an argument presented to counter the argument declaring India to be a federal nation, because if it is and if federalism is a *basic feature* of the Indian Constitution, then its absence in our judiciary is

[34]*Ram Jawaya Kapur v The State of Punjab*, AIR 1955 SC 549.
[35]H. Rajashekara, 'The Nature of Indian Federalism: A Critique' (1997) 37(3) Asian Survey 245, 253.
[36]Constitution of India 1950, art 1.
[37]Douglas V. Verney, 'From Quasi-Federation to Quasi-Confederacy? The Transformation of India's Party System' (2003) 33(4) Publius 153, 171.
[38]Douglas V. Verney, 'Federalism, Federative Systems, and Federations: The United States, Canada, and India' (1995) 25(2) Publius 81, 97.

unjustified. The differential treatment of this State's political structure amongst the executive & legislature vis-a-vis the judiciary creates the Constitutional anomaly of differential legislations and differential Constitutions. To holistically understand the notion of a singular judiciary, it is imperative to explore the judicial structure that has been laid down by the Constitution.

A. An idiosyncratic judicial model of a federal polity

The Constitutional law in India propagates two self-contradictory concepts, - firstly, the enunciation of a federal structure with the division of powers between the Union and the states, and secondly, a judicial system which is uniform in all aspects. One should wonder whether this political system which we follow is too unique to declare it different from that of the rest of the world. We have survived without any failure of Constitutional machinery since the 1950s, so to criticize the Indian polity is arguably without much basis. However, one may enquire about the conundrums that may arise theoretically due to the functions of the organs of the State.

The fact that we got independence as a single unitary polity consisting of British India[39] unlike the federation of the United States, makes one curious as to why there was a need for a federal Constitution for the Indian State. A unitary structure with the decentralization of power would do just fine, however, we ultimately did adopt a federal Constitution which was not formed because we came together as a State but rather the Constituent Assembly believed that, such a great nation with diversity and culture could be better protected with State Governments. When our constituent assembly decided to do so, it should have made State Courts an adjudicatory body within the state and they did – the High Courts were established with wide jurisdiction and great powers. In the authors' opinion, federal polities require the supremacy of the member states. However, as argued by

[39] Alexandrowicz (n 30).

Indian Constitutional law scholars,[40] it is actually quite the opposite of a federal polity if it propagates union supremacy. Another argument in support of the unitary structure is that every decision of a High Court is subject to appeal to the Supreme Court, under Article 136. The United States is clear that the matters not in the Federal List or unrelated to the Constitution are up to the jurisdiction of State Courts and ultimately the Supreme court of the State. The Supreme Court of the United States shall not look into the matter of the states, so one can say that the United States Supreme Court is not so Supreme after all. The state courts in the United States have exclusive jurisdictions, however, in India there is no distinction as such.[41]

So, our federalism is more like a decentralization of judicial power.[42] We have the Supreme Court and the lower courts and to unify it all, we have a special appeal to the apex court as well, however the biggest argument to counter a federal separation of power[43] in the Indian judiciary is the writ jurisdiction of the High Court and the High Courts' power of judicial review. This is, again, a product of the quasi-federal model of our polity which has given authority to the independent judiciary through the medium of High Courts and the Supreme Court to enforce Constitutional law by reviewing legislations from across the country.[44] Logically, as we are quasi-federal in nature, the power of judicial review could be separated in a simpler manner, which is to review state legislations made by the

[40]P.B. Mehta, 'Our misshapen Federalism is not about Centre vs states, but co-produced by political culture in both' *The Indian Express* (10 December 2020) <https://indianexpress.com/article/opinion/columns/who-wants-federalism-7098577/> accessed 5 January 2021.

[41]Shree Ram Chandra Dash, 'The Constitution and Constitutionalism in India' (1973) 34(1) Indian Journal of Political Science 7, 40.

[42]Sukumar Dam, 'Judiciary in India' (1964) 25(3) Indian Journal of Political Science 276, 281.

[43]Bruce Ackerman, 'The New Separation of Powers' (2000) 113(3) Harvard Law Review 633, 729.

[44]K.P. Singh, 'The Jurisdiction of the Supreme Court of India (Evolution of provisions relating to it in the Constituent Assembly of India' (1964) 25(3) Indian Journal of Political Science 192, 199.

state legislature by the High Courts and the union legislations by the Supreme Court, and to add a unitary touch the decision of the High Courts could be subject to appeal in the Supreme Court. However, our Constitution gave powers to the Supreme Court to review everything in the legal sphere, similar to the High Courts. As far as it is the Supreme Court, it does not create a conundrum, but the power of judicial review with the High Courts, especially to review parliamentary legislations and by extension, Constitutional amendments, gives birth to the state of differential Constitutions. This legal conundrum arises with the powers of judicial review vested with the High Court provided under Article 226. Therefore, an evaluation of the Constitutional history of Article 226 from an originalistic frame in light of the 15th Constitutional Amendment Act, 1963 is a requisite to proceed further.

III. THE CONTOURS OF ARTICLE 226 – A JURISPRUDENTIAL ANALYSIS

The positivist vision of law which Austin defines as a *"command of the sovereign"*[45] indicates that any direction issued by the sovereign will be law[46] and every person under the authority of that sovereign has to obey the law, otherwise, it will invite legal sanction.[47] This definition of what law is, has changed after the First World War due to the American adoption of Constitutional law as a democratic limited government.[48] All modern revolutionary Constitutions such as

[45]John Austin, *Lectures on Jurisprudence on the Philosophy of Positive Law* (Robert Campbell ed, 5th edn, 1885).
[46]Elijah Weber, 'Rebels with a Cause: Self-Preservation and Absolute Sovereignty in Hobbes's 'Leviathan'' (2012) 29(3) History of Philosophy Quarterly 227, 246.
[47]H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harvard Law Review 593, 629.
[48]Joseph Raz, *Ethics in the Public domain* (Oxford: Clarendon Press, 1994).

ours[49] follow the Lockean notion[50] of social contract,[51] and a contract is useless unless there is an authority to enforce it. The main question however is: which is the power above the sovereign to enforce it? The modern notion of legal Constitutionalism refers to it as - *judicial review*.[52] Judicial review is a doctrine in Indian Constitutionalism which is an abstract concept and it does not come from any specific provision of our Constitution. Judicial review exists by the very fact that this Constitution was written; it derives its existence from the fact that we are indeed a Constitutionally limited democracy, and to balance the scale of power, judicial review emerges as a shield against the atrocities of the sovereign parliament. The most celebrated doctrine of Indian Constitutional law is *basic structure,* which is nothing but a radical facet to judicial review, a product of Chief Justice Marshall in *Marbury v. Madison*[53] which is the most effective limitation on the legislative organ of the Government. The notion of Judicial review has been affirmed by the Indian Supreme Court and its eclecticism has extended it to even review the constituent power of the parliament under Article 368.[54] However, judicial review itself has its own problems and one of them in the Indian scenario is the state of differential Constitutions arising out of the extended notion of judicial review which will be discussed in the latter portion of this paper.

[49]Jack M. Balkin & Sanford Levinson, 'Articles Understanding the Constitutional Revolution' (2001) 87(6) Virginia Law Review.
[50]David Resnick, 'Locke and the Rejection of the Ancient Constitution' (1984) 12(1) Political Theory 97, 114.
[51]E. Clinton Gardner, 'John Locke: Justice and the Social Compact' (1992) 9(2) Journal of Law and Religion 347, 371.
[52]Saikrishna B. Prakash & John C. Yoo, 'The Origins of Judicial Review' (2003) 70(3) University of Chicago Law Review 887, 982.
[53]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (US).
[54]Mohammad Moin Uddin & Rakiba Nabi, 'Judicial Review of Constitutional Amendments in Light of the 'Political Question' doctrine: A Comparative Study of the Jurisprudence of Supreme Courts of Bangladesh, India and The United States' (2016) 58(3) Journal of the Indian Law Institute 313, 336.

B. Constitutional history of Article 226

The power to issue writs arose from the English Common Law[55] which gave the power to the King to issue writs. The King was said to be the

"Supreme repository of executive power and the fountainhead of justice, had inherent power to see that the courts, tribunals and other authorities within his dominion did not act without jurisdiction or in violation of the law."[56]

Later this power flowed from the King to his Lord Chancellor and then to the High Court of Justice[57] and hence the power of the issuance of writs derives its jurisprudence from English law. However, an important part which needs to be understood is that the Indian Constitutional law confers judicial review under Article 32 and Article 226, however, the English law based on the model of parliamentary supremacy does not allow judicial review of legislations, therefore, a law made by the British Parliament is supreme.[58]

Article 226 as it stands today has the jurisdiction to cover almost everything under the sun in its ambit.[59] It is a special power conferred by the Constitution upon the High Courts for the enforcement of legal as well as fundamental rights.[60] What needs to be understood as of today is the that the High Court has powers equivalent to that of the

[55]Turk McCleskey & James C. Squire, 'Knowing When to Fold: Litigation on a Writ of Debt in Mid-Eighteenth-Century Virginia' (2019) 76(3) The William and Mary Quarterly 509, 544.
[56]*Aidal Singh v. Karan Singh*, AIR 1957 All 414.
[57]Supreme Court of Judicature Consolidating Act 1925.
[58]Christopher Forsyth & Nitish Upadhyaya, 'The Development of the Prerogative Remedies in England and India: The Student Becomes the Master?' (2011) 23(1) National Law School of India Review 77, 85.
[59]M.M. Semwal& Sunil Khosla, 'Judicial Activism' (2008) 69(1) Indian Journal of Political Science 113, 126.
[60]S.M. Sikri, 'Does Article 226 Of the Constitution need any amendment?' (1958) 1(1) Journal of the Indian Law Institute 77.

Supreme Court in every aspect of writ jurisdiction of these Constitutional courts and by extension, both the courts have the jurisdiction to entertain a Constitutional challenge to any sort of legislation either parliamentary or promulgated by the state legislature. When the Constitution was enacted, the High Courts had exclusive jurisdiction within their territories. This was limited to the first clause of 226 back then which created conundrums because it barred an invite for an action, if the authority against which the writ was to be issued was beyond the High Court's territory. Hence, clause (2) which we read today was added by the fifteenth Constitutional amendment to provide extraterritorial jurisdiction to the High Courts and that is where the anomaly began.

C. Hohfeldian analysis of Article 226 vis-a-vis Constitutional amendment

Article 226 of our Constitution is nothing but an extension to the legal proposition, or rather the differentials of the Indian legal system which Hohfeld divided into eight atomic parameters and termed as right, duty, privilege, no-right, power, disability, immunity, and liability.[61] The entire temporal-legal system of our country is capable of being fragmented into the Hohfeldian legal relations.[62] In Hohfeldian terms, Article 226 is a prerogative 'power' of the Indian High Courts. A power, as per Hohfeld, is the ability to change the legal incidence of a person.[63] The jural correlative of power is liability, and after examination of what actually 226 is, a conclusion can be drawn that it is actually the power which can change the legal trajectory of the person for whom this power is exercised by the High Courts. According to Hohfeld, 'power' has the ability to alter "first-

[61]Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) Yale Law Journal 710, 770.
[62]Curtis Nyquist, 'Teaching Wesley Hohfeld's Theory of Legal Relation' (2002) 52(1) Journal of Legal Education 238, 257.
[63]Hohfeld (n 61).

order" claims as well as privileges, which according to Hart were primary rules.[64]

To understand the nature of a Constitutional amendment in the Hohfeldian sense,[65] the Constitution under Article 368 declares the power to amend the Constitution to be a *"constituent power"* and this power under all circumstances can change the provisions of this Constitution.[66] However, even this constituent power cannot amend the power of the High Courts to exercise judicial review. The challenge was posed before the Hon'ble Supreme Court of India for the first time, in the case of *Sampath Kumar*[67] when the Parliament amended the Constitution and inserted Articles 32A and 323B. Through this, it established the central administrative tribunals and excluded the jurisdiction of the High Courts in service matters. The Supreme Court held this amendment to be Constitutionally valid, however, it reconsidered this judgement in *L. Chandrakumar*[68] and held that the power of judicial review contained in the legal proposition of Article 32 as well Article 226 of the Indian Constitution forms the basic structure of this Indian Constitution. Hence, it is immune even to the constituent power of the Parliament. Therefore, the power of judicial review is a larger legal proposition than a Constitutional amendment as it is immune in Hohfeldian terms from the parliamentary exercise of constituent power, as the Parliament lacks the ability to alter the power of judicial review with the High Courts. The power of the High Court to review a Constitutional amendment, as well as the power of the State to amend the Constitution are both classified into active rights however, the

[64]HLA Hart, *Concept of Law* (6th edn., Clarendon Press 1961).
[65]Pierre Schlag, 'How to do Things with Hohfeld' (2015) 78(1) Law and Contemporary Problems 185, 234.
[66]The Constitution of India 1950, art 368, *"Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article."*
[67]*SP Sampath Kumar v. Union of India*, 1987 (3) SCR 233.
[68]*L. Chandrakumar v. Union of India*, 1995 AIR 1151.

immunity against the power of disruption of the basic structure of judicial review is a passive right. Article 226 is a power given to the High Courts unlike Article 32 of the Indian Constitution which is by virtue of the Constitution, a Constitutional right[69] and therefore, a Hohfeldian duty[70] upon the Apex Court.[71] A right as per Hohfeld[72] is the ability to do one action and with a right, comes its jural correlative duty which in the present case is upon the Supreme Court under Article 32 of this Constitution to enforce fundamental rights against the state, and therefore it is a fact that 226 is indeed a power given to the High Courts and there is no corresponding claim, or a corresponding duty upon them to act. However, when a high court exercises its power to strike down Constitutional law or a parliamentary legislation it creates a legal nexus which creates a Constitutional anomaly, which is discussed in the paper in the subsequent section.

IV. THE BIRTH OF THE ANOMALY - THE HIGH COURT'S DECLARATION OF UNCONSTITUTIONALITY

A. The High court's power to review a Constitutional amendment

In the case of *His Holiness Kesavananda Bharti v. State of Kerala*[73] the Supreme Court held that it can review a Constitutional amendment and strike it down if it alters the basic structure of the

[69]Nirmalendu Bikash Rakshit, 'Right to Constitutional Remedy: Significance of Article 32' (1999) 34 Economic and Political Weekly 2379, 2381.
[70]Sarla Kalla, 'In Defence of Hohfeld's Analysis of Fundamental Legal Conceptions' (1985) 27(1) Journal of the Indian Law Institute 110, 116.
[71]Hohfeld (n 61).
[72]'Rights', (*The Stanford Encyclopedia of Philosophy*, 2005) <https://plato.stanford.edu/entries/rights/> accessed 5 January 2021.
[73]*His Holiness Sripadagalvuru Kesavananda Bharti v. State of Kerala*, (1973) 4 SCC 225.

Constitution.[74] A Constitutional amendment is no ordinary law, it does not flow from Article 245 and it is not a legislative power. The power to amend the Constitution is a constituent power; a power of a higher degree which only vests with the Supreme law-making body of our country.

In an ordinary sense, a federal court reviewing a Constitutional amendment is something which for Austin[75] or Hart[76] would have been absurd. However, to maintain a Constitutional balance and to protect the Constitution from being destroyed, the Supreme Court gave birth to another aspect of Constitutional jurisprudence which is to restrain the state from rewriting the Indian Constitution and get away with the principles which make the Constitution what it is.[77] However, the question is that do High Courts have the jurisdiction to review a Constitutional amendment? Constitutional amendments have been reviewed by the Supreme Court, but what prevents the High Court from adjudging a Constitutional amendment when the law is clear that the High Courts have equivalent powers to that of the Supreme Court? The fact that the Supreme Court itself handles a challenge to the basic structure under Article 32 and if Supreme Court is the appropriate forum, then it is logical to interpret that High Courts are indeed capable enough to entertain a challenge to the basic structure.

[74]Virendra Kumar, 'Basic Structure of The Indian Constitution: Doctrine of Constitutionally controlled governance [from Kesavananda Bharati to I.R. Coelho]' (2007) 49(3) Journal of the Indian Law Institute 365, 398.
[75]G. Maher, 'Analytical Philosophy and Austin's Philosophy of Law' (1978) 64(3) Archives for Philosophy of Law and Social Philosophy 401, 416.
[76]N. Duxbury, 'English Jurisprudence between Austin and Hart' (2005) 91(1) Virginia Law Review 1, 91.
[77]David Deener, 'Judicial Review in Modern Constitutional Systems' (1952) 46(4) American Political Science Review 1079, 1099.

B. Kelsen's basic norm vis-a-vis power to review a Constitutional amendment

Kelsen's pure theory of law[78] is a legal proposition which says that every legal action derives its legitimacy or authority from the power of a higher degree, and every action can trace back its legitimacy to a supreme legal entity.[79] An exercise of legitimate power can happen if it is authorized by a higher notion of law, meaning that a district magistrate has the power to issue an order imposing curfew under a law made by the Union Parliament. The Union Parliament is empowered to make laws on that subject under the Indian Constitution, but where does the Indian Constitution derive its authority from? The Indian Constitution is the supreme law of the land and in Kelsen's terms, we presuppose the validity of the Constitution, meaning that every law, direction, order given by any authority can be traced back to the Constitution and this is what we call the basic norm or the *Grundnorm.*[80] Kelsen's theory serves our purpose as it firstly explains legal validity, secondly, normativity of law and thirdly, systematic nature of legal norms.

As Kelsen submitted, legal norms cannot exist independently. They come in systems, and in the Indian legal system, the High Courts and the Supreme Court have the power to review a *'law'*[81] if it is in violation of fundamental rights. That power is exercised by reading together the 'duty' of the Supreme Court under Article 32 and 'power' of the High Court under Article 226 with Article 13, which means that according to Kelsen, the notion of judicially reviewing state and parliamentary legislations can be traced back to the Constitution. But what about the challenge to Constitutional amendments? They are no ordinary law and are hence, formed due to the exercise of the constituent power of the Parliament. They do not

[78]Hans Kelsen, *Pure Theory of Law* (University of California Press 1934).
[79]N. Duxbury, 'Kelsen's Endgame' (2008) 67(1) Cambridge Law Journal 51, 61.
[80]Kelsen (n 78).
[81]The Constitution of India 1950, art 13(3)(a).

fall within the meaning of Article 13 of the Indian Constitution, and are hence, not outside the ambit of Articles 32 and 226 because a Constitutional amendment cannot violate fundamental rights. However, the question which emerges here is, whether the High Courts are empowered to evaluate a challenge to Constitutional law? To answer this from Kelsen's point of view, the power of judicial review is not exclusive to the Supreme Court. The grundnorm which authorizes the Supreme court to review laws, is the same grundnorm which also authorizes the High Courts to exercise judicial review. The fact that a challenge to the basic structure is filed under Article 32, grants legitimacy to the power of a High Court to review a Constitutional amendment under Article 226. But is Supreme Court under Article 32 itself empowered to review a Constitutional amendment? Article 32 is a justiciable provision for the enforcement of fundamental rights. Constitutional law cannot itself violate the Constitution which is an argument to say that a challenge to Constitutional law under Article 32 is not the ideal provision to challenge a Constitutional amendment as fundamental rights per se are not basic structure, rather notions of life, liberty, equality, etc. are basic structures. However, to draw the original jurisdiction of the Supreme Court, which lies with Article 32, a petition under the said provision is filed because it is the nearest possible jurisdiction which the Supreme Court can entertain.

Article 226 empowers the High Court to evaluate the Constitutionality of laws on the touchstone of Part III, similar to that of Article 32. However, Article 226 also encapsulates within itself powers wider than what Article 32 postulates. It would thus, be erroneous to conclude that the Supreme Court shall have the jurisdiction to entertain a challenge to a Constitutional amendment whereas the High Courts would not.

The anomaly occurs when a High Court declares a Constitutional amendment invalid. To understand this hypothesis, let us assume that

the thirty-ninth Constitutional Amendment Act, 1975 abridging the power of judicial review with the Courts to invalidate the election of the Prime Minister, were brought before the Kerala High Court in a 226 petition and it declared the Constitutional amendment to be invalid. On the same day, the validity of the said amendment is challenged before the Delhi High Court which upholds it. The result would be that the Constitutional amendment would not be applicable within the territorial limits of Kerala High Court. However, it would be valid in the territorial limits of the Delhi High Court. What about the rest of the country?

One might argue that the declaration of unconstitutionality by virtue of 226(2) and the reading of *Kusum ingots*[82] applies throughout the territory of India but what stops another High Court from reviewing it? The declaration of law by the Supreme Court is binding upon all the Courts within the territory of India by virtue of Article 141, however, the decision of one High Court does not bind another. Then the question arises–what if there are conflicting judgments of two High Courts? This power of judicial review of the High Courts through which they review a Constitutional amendment might actually, in theory, design differential Constitutions. One High court has struck down a Constitutional amendment while another has upheld it. Therefore, there are actually two different Constitutions in force within Indian territory.

It can be said that, like always, a conflict of opinion between two High Courts would be resolved by the Supreme Court. However, if no one ever appeals the decision in the Apex Court or even if an appeal is indeed preferred; till the time the Supreme Court renders a decision, there will be two distinct Indian Constitutions in force at the same time.

[82] *Kusum Ingots and Alloys Ltd. v. Union of India*, (2004) 6 SCC 254.

C. Extra-territorial applicability of the declaration of unconstitutionality

It is a fact that the power of the High Court under Article 226 was territorially restrained and Constitutionally limited and had never been debated since the inception of our Constitution and that the power of the High Courts shall be exercised within its Constitutional realm and cannot, under any circumstance, run beyond its respective jurisdiction. The issue which arose out of this legal proposition was the issuance of writs against the Government of India because of its residence in New Delhi, however, it worked throughout the Indian territory. The fact that the High Courts could not issue writs beyond its jurisdiction granted an immunity to the Government of India and the Union agencies having their head offices in Delhi as a writ filed against the Union, which came up before the High Courts, except the High Court of Punjab, (as the Delhi High Court was established in 1966) was beyond their jurisdiction.

The Supreme Court in the case of *Lt. Col. Khajoor Singh v. Union of India*[83] affirmed the judgment in *Venkata Rao*[84] and declared that indeed the High Courts are territorially bound to their jurisdiction and imposed a limitation that writs which are issued under the writ jurisdiction of 226 cannot run beyond the jurisdiction of the respective High Court. The second limitation was that, the authority against whom the writ was issued must be located within the limits of the High Court. The legal proposition which emerged was obvious: if one has to file a 226 petition against the Union, it can be filed only under the Punjab High Court as Delhi High Court did not existed then, which technically put the High Court of Punjab at a higher footing as it was the only High Court which had the power to issue writs against the Union Government. Still, the problem was the same, if the High Court of Punjab declared a law as unconstitutional, it had

[83] *Lt. Col. Khajoor Singh v. Union of India*, (1961) 2 SCR 828.
[84] *Election Commission of India v. Saka Venkata Rao*, (1953) SCR 114.

its effect even within the territorial jurisdiction of Punjab only and not across the country, hence giving birth to two different legal scenarios throughout the country.

The result of the judgment of the Supreme Court in *Khajoor Singh*[85] and the legal proposition propagated was that the High Courts could not issue a writ under 226 of the Constitution against the authorities which lie beyond the territory of the High Courts and hence they were helpless against the Union Government whose seat was Delhi. The result was that every enforcement of a legal right against the government had to come through the Punjab High Court, and actions related to the fundamental rights came from either the Punjab High Court or the Supreme Court, which created problems for litigants who lived far from Delhi. To overcome this phenomenon the Constitutional fifteenth amendment[86] was set into motion which inserted clause (2) of Article 226 which reads as

"The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories"

As a consequence of this amendment, the High Courts are now empowered to exercise their writ jurisdiction on entities like the Central authorities outside their respective territorial limits provided the cause of action wholly, or in part, arises within said limits. Subsequently, the High Courts now possessed the jurisdiction to declare parliamentary legislations as constitutionally invalid. The crux of the conundrum lies henceforth:

[85]ibid.
[86]The Constitution of India 1950, art 226(2).

That whereas it is not only acceptable under the Constitutional scheme but is also rather common to have different Statutes in force in different states (as a result of state reservations and/or amendments to the statutes made on subjects under the concurrent list), but since theoretically, the cause of action of a Constitutional Amendment also arises in all of India; any High Court could resort to review its Constitutionality vis-à-vis the Basic Structure {or procedural norms of Article 368(2)}. Would this judgement of the High Court now be enforceable in all of India, outside the territorial bounds of its precedential powers?

The ordinary notion of Constitutional law will disagree with this contention however, the Supreme Court in the case of *Kusum Ingots and Alloys Ltd. v. Union of India*,[87] said,

"The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the Constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act."

This obiter of the Supreme Court has faced heavy criticism because this selective interpretation of 226(2) will result in another Constitutional conundrum. If today the Delhi High Court declares a parliamentary statute unconstitutional, will it be binding all across India? If yes, will it bar another High Court to evaluate the same? If no, and another High Court passes a different order, will there be differential reading of the same parliamentary law in two different states? The answer is that the position of law because of different reading of different High Courts will be a state of constant flux. In practice, the Supreme court will have to step in when there are conflicting decisions of different High Courts to clarify the law. The

[87] *Lt. Col. Khajoor Singh* (n 83).

High Courts were given the power to issue writs because of the fact that India is a huge country, and it is not possible for everyone to come to Delhi to file writs before the Supreme Court, but extending that power and allowing them to judicially review parliamentary legislation does nothing but create conundrums. The fifteenth amendment was intended to make the Union Government amenable to the writ jurisdiction before the High Courts, however, it paved a way for different High Courts to read the law made by the parliament differently, giving multiple meaning to the same law and the if the High Court's reading of the same law stands different in different states, which defeats the purpose of the parliament legislating for the entirety of India.

D. The paradox created by the declaration of Constitutionality by the High Courts.

The declaration of parliamentary law has been done by the High Court several times. In the most celebrated case of the *Naz Foundation*[88] when the High Court of Delhi partially struck down section 377 of the Indian Penal Code, the biggest question was whether that declaration of unconstitutionality would be applicable beyond the jurisdiction of the Delhi High Court? Professor Shivprasad Swaminathan in his paper *Schrödinger's Constitutional Cat: Limits of the High Court's Declaration of Unconstitutionality*[89] has argued that the declaration of law by the High Court cannot run beyond the territory of Delhi because of the territorial restraints. The reading of *Kusum ingots* based upon 226(2) is unsatisfactory and bad in law,[90] however the courts have applied this principle like the High

[88] *Naz Foundation v. Govt. of NCT of Delhi* 160 DLT 277.
[89] Shivprasad Swaminathan, 'Schrödinger's Constitutional Cat: Limits of the High Court's Declaration of Unconstitutionality' (2013) 25(1) National Law School of India Review 100, 118.
[90] ibid.

Court of Judicature at Madras in the case of *Textile Technical Tradesmen v. Union of India.*[91]

The conflict between the High Courts on parliamentary legislations is not new. In 1983 Justice Chaudhary of the High Court of Andhra Pradesh while adjudicating upon the Constitutional validity of section 9 regarding the restitution of conjugal rights of the Hindu Marriage Act in the case of *T. Sareetha v. T. Venkata Subbaiah,*[92] declared it to be in contravention of the fundamental rights and hence struck it down. However, a year later the High Court of Delhi in the case of *Harvinder Kaur v. Harmander Singh Choudhry*[93] took a contrary view and held section 9 of the Hindu Marriage Act to be constitutionally valid. Now if we are to apply the principle laid down by the Supreme Court in *Kusum Ingots*, both the judgments are valid throughout the territory of India, by the virtue of Article 226(2) of the Indian Constitution. Now what the law is in territorial limits of Delhi as well as the territorial limits of Andhra Pradesh is a paradox since there are two judgments in which neither one is superior as neither one has the power to overrule the other and at the same time, neither of the judgments is binding on the other High Court because all the High Courts are of the same contour. So, if there are actually two different laws running at the same time which is nothing but a paradox, then what is the point of granting High Courts the power of declaration of law beyond their territory? The criticism of *Kusum Ingots* is fair enough because the Constitutional law laid down by the judgment gives birth to another conundrum that the Supreme Court could not possibly foresee. The above situation of differential legislations was ultimately restored by the Supreme Court in the case of *Saroj Rani v. Sudarshan Kumar Chadha*[94] but the judgment came a year later in 1984, which in essence means for a period of twelve

[91] *Textile Technical Tradesmen v. Union of India,* (2011) I LLJ Mad 297.
[92] *T. Sareetha v. T. Venkata Subbaiah,* AIR 1983 AP 356.
[93] *Harvinder Kaur v. Harmander Singh Choudhry,* AIR 1984 Del 66.
[94] *Saroj Rani v. Sudarshan Kumar Chadha,* (1985) 1 SCR 303.

whole months, there was a different reading of same union legislation, which was intended to be same across India, yet was different because one High Court struck the provision down and the other high court chose not no. Therefore, now the paper will try to provide a possible solution to end this Constitutional anomaly which arises due to the power of the High courts to review Constitutional amendments and parliamentary legislations.

V. THE WAY FORWARD

The anomaly of differential Constitutions is something which our Constitution-makers never intended for. It happened with the fifteenth amendment because before this amendment all High Courts could not review parliamentary legislations. The Gujarat High court in 2013, struck down a part of the Constitution 97th Amendment Act[95] on procedural grounds, which was upheld by the Supreme Court in 2021.[96] The Constitutional validity of the 42nd Constitutional Amendment Act has also been recently challenged in the Madras High Court. The question which flows out of these propositions correlate to the legal conundrum, that the decision of the High Court being territorially bound will create a legal flux which the law should tend to avoid. If a Constitutional amendment is indeed struck down, will there be two Constitutions running within the Indian state? What is the true applicability of the declaration of Constitutional law by the High Courts? These are a few Constitutional questions which are *res integra*.

The power to exercise judicial review must be protected at all costs.[97] Whereas, the parliament has attempted to curb this power multiple times such as by the insertion of article 31B, through the 1st

[95] *Rajendra N. Shah v. Union of India*, (2013) 54(2) GLR 1698.
[96] *Union of India v. Rajendra N. Shah & Anr.*, 2021 SCC OnLine SC 474.
[97] Wojciech Sadurski, 'Judicial review and the protection of Constitutional rights' (2002) 22(2) Oxford Journal of Legal Studies 275, 299.

amendment to the Indian Constitution which barred legislations to be reviewed on grounds of violation of Part III of the Indian Constitution; the Apex Court has diligently protected the basic structure of the Indian Constitution and especially the power to exercise judicial review.[98] This power which becomes the cause of all causes has allowed the Indian Constitutional courts to even evaluate the Constitutionality of statutes inserted in the 9th schedule, if they violate the basic structure.[99]

A. Constitutional recognition of the judicial review of constituent power

The authors are of the opinion that the notion of judicial review of the constituent power of the Parliament was never intended by the Constitution-makers. The origin of the state of a differential Constitutions can be traced from the power of Constitutional courts to review the constituent power of the Parliament. The solution to this Constitutional conundrum is the recognition of the basic structure doctrine laid down in *Kesavananda* within the Indian Constitution. An amendment was made to the Constitution which formally recognized the doctrine of basic structure by adding a clause 4 to Article 368, substituting the following with the previous clause 4 imposing a limitation on the Parliament that it shall not, in the exercise of its constituent power, abrogate the basic structure of the Constitution.

The amendment so suggested is similar to what Article 13 provides, which imposes a Constitutional check on the legislative power by way of a Constitutional directive that the Parliament shall not make a law in contradiction with Part III of the Indian Constitution. The

[98]Upendra Baxi, 'Judicial Discourse: Dialectics of the Face and the Mask' (1993) 35(1) Journal of the Indian Law Institute 1, 12.

[99]*IR Coelho v. State of Tamil Nadu,* (1973) 4 SCC 225. *See also* Pathik Gandhi, 'Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)' (2010) 4 Indian Journal of Constitutional Law 47.

suggested amendment will serve as a Constitutional check on the constituent power of the Parliament. Thus, it ended the forever debate of the power of the Parliament under Article 368, subject to Article 13, which led to a series of cases from *Shankari Prasad* to *Kesavananda.*

B. Exclusive jurisdiction of the Supreme Court for the review of the constituent power of the Parliament

This paper draws inference on the legal proposition that nothing in this Constitution stops a High Court to review a Constitutional amendment insofar as its powers under Article 226 are concerned, and that is only possible as the Constitution, during its inception, did not segregate the constituent and the legislative power of the Parliament which was effectively held in *I.C. Golaknath.*[100] The segregation of the judicial review of the constituent power is incorporated and the Hon'ble Supreme Court is given an exclusive jurisdiction by way of another Constitutional amendment to Article 368 clause 5 (repealing the previous clause 5) as - *Notwithstanding anything in the Constitution, only the Supreme Court shall have the power, to strike down a Constitutional amendment, if the amendment aims to abrogate the Constitution of its basic features.*

The power of the High Courts should be limited to evaluate Constitutional challenges concerning the Concurrent and State lists because these are the only two legislative domains where differential laws within different states are permitted. A uniform legal framework is required for a parliamentary law made under the List I, and most importantly Constitutional law. The constituent power of the Parliament is not an ordinary power. It is the supreme exercise of sovereign power hence; its judicial review should exclusively vest with the Supreme Court to put an end to - *The State of Differential Constitutions.*

[100] *Golaknath v. State of Punjab*, AIR (1967) SC 1643.