

Synchronizing Concepts of Judicial Review in Indian Legal Scenario

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Abstract: “Certainly, all those who have framed the Written Constitutions contemplate them as forming the fundamental and paramount law of the nation and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void.” The rule of law should not be modified by excessive Parliamentary powers. All those exercising public power, have to be accountable for their actions. They are bound to work within the democratic provision of the Constitution. The guiding light for such actions is the system of judicial review. Keeping in the light of the given statement we attempt to trace the origin and development of the concept of Judicial Review; by critically examining the need and significance of Judicial Review in a legal system with a Written Constitution emphasizing the Indian scenario.

Keywords: Rule of Law, Judiciary, Constitutional Amendments, Judicial Activism, Violation of Power, Emergency, Supreme Court, Fundamental Rights and Duties

1. Introduction

India has adopted the Parliamentary form of democracy where people from every section are involved in the process of decision and policy-making.

There are broadly three organs of the government i.e. executive, legislative and judiciary, and each organ reflects fair representation of each and every section of the society. This is considered to be the consciousness of responsibility in every Republican type of democracy.

The preliminary duty of application of rule of law lies in the hands of the judiciary. Rule of law is considered as the foundation stone of social equality and equity. Judicial review implies that legal validity of acts of the legislature may be challenged before and adjudicated upon by a judicial body. The Constitution of India explicitly provides for judicial review through:

- Article 13 (Laws inconsistent with or in derogation of the fundamental rights),
- Article 32 (Remedies for enforcement of rights conferred by this Part),
- Article 131 through 136 (Jurisdiction and appellate powers of the Supreme Court),
- Article 143 (Power of the President to consult the Supreme Court),
- Article 226 (Power of High Courts to issue certain writs) and
- Article 246 (Subject-matter of laws made by Parliament and by the Legislatures of States).

B. R. Ambedkar, The Chairman of the Drafting Committee, while addressing the Constituent Assembly Debate of 1948 [1] has specifically and repeatably said that, “If I was asked

to name any particular article in this Constitution as the most important—an article without which this Constitution would be a nullity—I could not refer to any other article except these ones. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance”.

Origin England:

England 1610, Sir Edward Coke’s statement in *Thomas Bonham v/s College of physics* [2] “when the act of parliament is against common right and reason or impossible to be performed, the common law will control it, and Adjudge such act to be void”

Main difference between British and American judges is that American judges speak the language of constitutional authority, whereas the British judge has to represent himself as carrying out the true intention of Parliament. Constitution is the supreme law of the land and no actions, even of judiciary will be acceptable, if it is inconsistent with the Constitution.

Origin US:

Doctrine of judicial review was originally propounded by the court of US. Originally, the Constitution of the US did not have any provision regarding judicial review but it was assumed by the Supreme Court in the case of *Marbury V/S Maddison* [3]; J. Marshall shall that “Certainly all those who have framed the Written Constitutions contemplate them as forming the fundamental and paramount law of the nation and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void.”

It is insistently the duty of the judicial department to say what the law is in the Supreme Court original the

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jurisdiction. The case arose when a writ of mandamus was filed by Marbury which we see which required the secretary of state Maddison to deliver to Marbury, a commission appointing him as the Justice of peace.

The question was whether there was original jurisdiction to hear the case. The Constitution describes the case where Supreme Court can have original jurisdiction but this excludes the case involves involving writ of mandamus, judiciary act 1789 gives Supreme Court original jurisdiction to hear cases involving mandamus The judiciary act was in inconsistent with the Constitution and attempted to provide the Supreme Court a jurisdiction which was not “warranted by the Constitution.”

Marshall, referred to the article 3 and article 6 which suggests that ‘federal judicial power is extended to all cases arising under the Constitution and judges are to take an oath to support this constitution, and make laws in pursuance of the Constitution.

It was held that a law repugnant to the Constitution is void and the courts and the other departments are bound by the instrument.

This was the first decision to expressly strike down the act of Congress as unconstitutional.

Origin India:

The federal system was introduced in India by the British parliament by enacting the government of India act of 1935. The power of judicial review was exercised by the court prior to the commencement of the Constitution. Federal courts were entrusted in functioning and interpreting the constitution and determining the constitutionality of legislative and executive acts.

In the present democratic set up, courts are empowered by constitution to play active role and to declare void any legislation if it violates the constitution. Judicial review is expressly provided in the Article 13 of the Constitution it includes in its purview all the legislation in India, including the past and future ones, and brings them all under the scrutiny of judicial review.

Such power is conferred to all high courts and Supreme Court, to declare any law as unconstitutional, if they are inconsistent with any provision of the part-III of Constitution.

Some of the fundamental subjects of judicial review in Indian constitution are–

- Violation of fundamental rights.
- Violation of other constitutional restrictions embroidered in the Constitution.
- Delegation of essential legislative power to executive and other bodies.
- Violation of implied limitations and restrictions.

Judicial review in India is broadly covered in three aspects,

- judicial review of legislature act,
- judicial review of administrative act,

- judicial review of judicial decision.

Judicial trend with respect to judicial review in India

Shankari Prasad V/S UOI [4]

First Judicial Amendment was challenged which aimed at abrogation of fundamental right. Article 13(3) shall include Constitutional amendments. The Supreme Court rejected the content and held that text of article 13 should imply rules and regulation made in exercise of Constitution power hence article 13 (3)

did not affect amendment, so the amendment is valid even when it takes away fundamental right.

Sajan Singh V/S space state of Rajasthan [5]

The 17th amendment act 1964 was challenged.

The position laid down in Shankari Prasad was struck down and it was held that amendment made under article 368 falls outside the ambit of judicial review of both the quotes.

Golak Nath V/S State of Punjab [6]

The position laid down in Sajjan Singh case was challenged.

- J. Subba rao held that – amendment is a legislative process
- 1) Parliament’s power to amend the Constitution is derived from article 245 (read with entry 97 of list 1)
 - 2) Article 13(3) includes all laws including statutory constitutional and amendments so amendments which are in contravention of article 13 (3) will be void.
 - 3) Fundamental rights are beyond the reach of amendment.

The 24th amendment of 1971 was brought by the Parliament to erase difficulties created in Golaknath’s case and following were added to article 13 and 368:

- 1) Article 13 (4) -Nothing of this article shall apply to amendment made under article 368.
- 2) Article 368-Procedure to amend the Constitution was changed to power of Parliament to amend the constitution and the procedure there of.
- 3) Article 368(3) nothing of article 13 shall apply to any amendment made under this article.

The amending power of Parliament was restored and its scope was extended by adding the words “to amend by way of addition or variation or repeal” Any provision of the Constitution in accordance with the procedure laid down in article 368.

The constitutional validity of 24th, 25th and 29th amendment was called upon to be considered in the case of *Kesavananda Bharati* [7] in 1972.

The basic feature doctrine was adopted and since became the bedrock of constitutional interpretation in India.

State of UP V/S Raj Narayan [8]

In 1975, Allahabad High Court decision of staying Mrs Gandhi’s election as a member of Parliament, an appeal was filed in the Supreme Court by Ms Gandhi against the decision of the High Court of Allahabad in which it was held that appellant had committed certain malpractices in the election.

Before the appeal could be heard by the Supreme Court, Parliament passed a constitutional bill of 1975 in which it inserted clause 329A in the constitution and placed election of Prime Minister and speaker beyond the purview of judicial review and judicial scrutiny.

It was held by the Supreme Court that democracy is a basic feature of the Constitution if by insertion of any clause, article 329 A in this case, the democracy, and therefore basic structure of the Constitution is being destroyed, the said amendment will be considered ultra virus to the Constitution.

Minerva Mills Ltd v/s UOI [9]

Limited amending powers are considered to be a basic structure of the Constitution of India. Clause (4) and (5) of article 368 inserted by 42nd amendment was struck down because they destroyed the basic feature of the Constitution. This clause removed all the limitations on the amending powers of the Parliament and therefore unlimited amending powers were given to the Parliament.

S.P. Sampat Kumar V/S UOI [10] & L. Chandra Kumar V/S UOI [11]

The constitutional validity of provision of administrative Tribunal act 1905 (which excluded jurisdiction of High Court under article 226 and 227) along with article 323A of Constitution where under question. It was held that the power of judicial review in the High Court under article 226 and in Supreme Court under article 32 are essential and integral part of the basic structure of the Constitution.

Supreme Court advocates on record Association V/S UOI [12]

NJAC was violating judicial independence by creating a system where political influence of executive and Parliament where dominant, judiciary will not have majority control over NJAC and the chief Justice would not have primacy in judicial appointments.

It also granted power to Parliament to alter/change judicial selection criteria and procedures.

All these were in clear violation of judicial independence, separation of power and the rule of law. The impugned amendments and acts were struck down by the Supreme Court on being unconstitutional.

Shayara Bano V/S UOI [13]

Triple t is considered to be a unilateral power which is given to a husband to divorce his wife. This was arbitrary in nature and violative of article 14 of the Constitution and therefore was held unconstitutional.

Anuradha Bhasin V/S UOI [14]

Supreme Court directed the union territory of Jammu and Kashmir to review all orders forth with which suspended the internet services article 19 (1)(A) and (G) ensures constitutional protection for freedom of speech and expression and the freedom to practice any profession or

carry on any trade, business or occupation even the medium of internet.

The restriction upon such fundamental rights should be in consonance with the mandates under article 19 (2) and 19 (6) inclusive to the test of proportionality.

It was held by the Supreme Court that through the government was empowered to impose complete shut down on internet services, any orders intending to impose the restriction should be made public and was subject to judicial review.

2. Conclusion

The Supreme Court of India has been time and again called the final interpreter and the supreme protector of the Indian Constitution. This power of the Supreme Court to judicially review the legislative and the executive and keep their broad and extensive powers in check gives it a very significant role in the Indian political scenario. The power of judicial review vested with the Supreme Court allows it to safeguard the fundamental rights and strike down acts which are violative of the Constitutional values. The Supreme Court exercising its power under Article 13, 32, 131-136, 143, 226 and 246 can review any law.

Various factors attached with the power of Judicial review:

- Protection of Constitutional values
- Protection of fundamental rights
- Check on tyrannical and arbitrary tendencies
- Reviewing own decisions: Article 137 of the constitution of India empower the Supreme Court to review its own order or judgment.

The Indian judiciary, therefore, has a remarkable job of protecting the constitutional mandate by the way of judicial review and it therefore safeguards democratic values and ensures the maintenance of peace and justice in the society.

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