

# Emerging Trends of Judicial Review in India

Harsharan Walia<sup>1</sup>, Trishna Neupane<sup>2</sup>

**Abstract:** *Judicial process means any judicial proceeding in connection with the dispensation of Justice by any court of competent jurisdiction. The judiciary is one of the pillars on which the edifice of the constitution is built. It is the guiding pillar of democracy. Everything done by judge in the process of delivery of justice is called judicial process.*

**Keywords:** Judicial Review

## 1. Introduction

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

- Chief Justice John Marshall [1]

Supremacy of law is essence of Judicial Review. It is power of the court to review the actions of legislative and executive and also review the actions of judiciary. It is the power of the court to scrutinize the validity of law or any action whether it is valid or not. It is a concept of *Rule of Law*. Judicial Review is the check and balance mechanism to maintain the separation of powers & separation of functions. Separation of power has rooted the scope of Judicial Review. It is the great weapon in the hands of the court to hold unconstitutional and unenforceable any law and order which is inconsistent or in conflict with the basic law of the land. The two principal basis of judicial review are "*Theory of Limited Government*" and "*Supremacy of constitution with the requirement that ordinary law must confirm to the Constitutional law.*" [2]

In its capacity as the guardian of the Constitution the Supreme Court of India possesses implied power to declare any Act of the Central or State Legislature or any decree of the Executive as ultra vires, if it does not conform to the provisions of the Constitution. The power of the Judiciary to review the Act of the Legislature or the Executive in order to determine its constitutional propriety is known as the "*Doctrine of Judicial Review*". [3]

America is the classic home of Judicial review. It was an extra constitutional growth in America. In the famous case of *Marbury v. Madison* (1803) [4] Chief Justice John Marshall of the United States emphatically pronounced the power of the Court to declare the act of the legislature as ultra vires. Marshall claimed this power of the Court from famous clause of "Due process of Law" of the American Constitution. One of the Bills of Rights in the American Constitution is that "No person shall be deprived of his life, liberty, and property without due process of law".

There is no Judicial review in England. England has an unwritten Constitution. There is absolute supremacy of the Parliament. The Chief Legislators and Chief Executives are combined and the Cabinet headed by the Prime Minister brings complete co-ordination between the legislation and administration. Hence Judicial review is not necessary. The power of Judicial review is explicit in the Constitution of

India. Further, the scope of Judicial review in India is not as wide as that of the United States of America. The scope of Judicial review is comparatively limited in India because of the fact that the Constitution of India is the longest written Constitution in the world. All provisions including the distribution of powers between the Union and the States have been elaborately enumerated. The enumeration of Fundamental Rights along with its limitations in detail has also restricted the scope of Judicial review in India. Further, there is a vital distinction between the two clauses contained in the respective Constitutions, namely, "Due Process of Law" of the American Constitution and "Procedure established by Law" of the Indian Constitution. Article 21 of the Constitution provides that "no person shall be deprived of his life or personal liberty except according to the procedure established by law". The word "law" in the clause "procedure established by law" does not mean natural law but it implies State made law. [5]

## 2. Meaning of Judicial Review

The power of the Judiciary to review the Act of the Legislature or the Executive in order to determine its constitutional propriety is known as the "*Doctrine of Judicial Review*". It means that the constitution is the Supreme law of the land and any law inconsistent with it is void. The term refers to "the power of a Court to inquire whether a law, executive order or other official action conflicts with the Indian Constitution and if the Court concludes that it does, to declare it unconstitutional and void". It is the power of the Court to declare a legislative Act void on the grounds of unconstitutionality.

Edward S. Corwin says that Judicial review is the power and duty of the courts to disallow all legislative or executive acts of governments, which in the Court's opinion transgresses the Constitution. [6]

Judicial Review is not an expression exclusively used in Constitutional law. It means the revision of the decree of an inferior court. It works through the remedies of appeal, revision and the like, as prescribed by the procedural laws of the land, irrespective of political system which prevail. Judicial Review has, however, a more technical significance in public law, particularly in countries having the written Constitutions, founded on the concept of 'limited government'. Judicial Review, in the constitutional law of such countries, means that courts of law have the power of testing the validity of legislative as well as other governmental actions. [7]

Judicial Review prevails in those countries which have written Constitution. It means that the Constitution is the Supreme law of land and any law inconsistent therewith is void. The power of the judiciary is not limited to enquiring about whether the power belongs to the particular legislature under the question it extends also as to whether the laws are made in conformity with and not in violation of other provisions of the Constitution. For example, in our Constitution, if the courts find that the law made by Union Legislature or State Legislature is violation of the various fundamental rights guaranteed in part III, the law shall be struck down by the courts an unconstitutional under Article 13(2).

The doctrine of Judicial Review is an integral part of the American judicial and constitutional process although the U.S. Constitution does not explicitly mention the same in any provision. The power of the Courts to interpret the Constitution and to secure its supremacy is inherent in any constitution which provides government by defined and limited powers. Madison explained, "A Constitution can be preserved in practice in no other way than through the medium of the courts of justice". Whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular freedoms or liberties or privilege amount to nothing.

Montesquieu's theory of separation of power put a curb on absolute and uncontrollable power in any one organ of the government. It is by balancing each of these against the other two that the efforts in human nature towards tyranny can alone be checked and restrained and any freedom preserved in the Constitution. To take recourse to Judicial Review is the evolution of the mature human thought. Law must be in conformity with the Constitution. If law exceeds in its limit, it is not law but a mere pretence of law. Law must be just, virtuous and capable of bringing human prosperity and not arbitrary, unjust and in violation of the Constitution. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked. Judicial review is the cornerstone of constitutionalism which implies Limited Government. [8]

In this connection Prof. K.V. Rao remarks- "In a democracy public opinion is passive, and in India it is still worse, and that is all the reason why it is imperative that judiciary should come to our rescue. Otherwise the Constitution becomes ill-balanced, and leaves heavily on executive supremacy, and tyranny of the majority; and that was not intention of the makers". [9]

### 3. Evolution of Judicial Review

The doctrine of Judicial Review of United States of America is really the pioneer of Judicial Review in other Constitutions of the world which evolved after the 18th century and in India also it has been a matter of great inspiration. In India the concept of Judicial Review is founded on the Rule of Law which is the swollen with pride heritage of the ancient Indian culture and society. Only in the methods of working of Judicial Review and in its form of application there have been characteristic changes, but the basic philosophy upon which the doctrine of Judicial Review

hinges is the same. In India, since Government of India Act, 1858 and Indian Council Act, 1861 imposed some restrictions on the powers of Governor General in Council in evading laws, but there was no provision of judicial review. The court had only power to implicate. But in 1877 *Emperor v. Burah* [10] was the first case which interpreted and originated the concept of judicial review in India. In this case court held that aggrieved party had right to challenge the constitutionality of a legislative Act enacted by the Governor General council in excess of the power given to him by the Imperial Parliament. In this case the High court and Privy Council adopted the view that Indian courts had power of judicial review with some limitations. Again in, *Secretary of State v. Moment*, [11] Lord Haldane observed that "the Government of India cannot by legislation take away the right of the Indian subject conferred by the Parliament Act i.e. Government of India Act of 1858". Then, in *Annie Besant v. Government of Madras*, [12] Though there is no specific provision of the Judicial Review in Government of India Act, 1935 and the constitutional problems arising before the court necessitated the adoption of Judicial Review in a wider perspective. Now, Constitution of India, 1950 explicitly establishes the Doctrine of Judicial Review under various Articles 13, 32, 131-136, 137, 143, 226, 227, 245, 246, 372. [13]

### 4. Judicial Review in India

Indian Constitution represents a synthesis of the ideals of several constitution of the world. The importance of present constitution was well explained by H.C.L. Merrilat [14] as it "shows the combination of a British parliamentary system where the executive is responsible to the legislature and a written constitution on the American model, including a Bill of Rights and separation of powers and federal principles by division of powers between center and federating units, resulting in a unique constitutional position regarding judicial review in India.

"Supremacy of the law is the spirit of the Indian Constitution. In India, the "DOCTRINE OF JUDICIAL REVIEW" "is the basic structure of the Constitution. It is the concept of Rule of Law and it is the touchstone of Constitution India. Though there is no word of judicial review in Indian Constitution but it is an integral part of our constitutional system. In India, Judicial Review is a power of court to set up an effective system of check and balance between legislature and executive. Various provisions in Indian constitution explicitly provides for the power of judicial review to the courts such as Articles 13, 32, 131-136, 137, 141, 143, 226, 227, 245, 246, 372. [15]

The most prominent object of judicial review to ensure that the authority does not abuse its power and the individual receives just and fair treatment. The ostensible purpose of judicial review is to vindicate some alleged right of one parties to litigation and thus grant relief to the aggrieved party by declaring an enactment void, if in law it is void, in the judgment of the court. But the real purpose is something higher i.e., no statute which is repugnant to the constitution should be enforced by courts of law. [16]

The Indian constitution, like other written constitution, follows the concept of “separation of powers” between the three sovereign organs of the constitution. The doctrine of separation of powers stated in its rigid form means that each of the organ of the constitution, namely, executive, legislature and judiciary should operate in its own sphere and there should be no overlapping between their functioning. The Indian constitution has not recognized the doctrine of separation of powers in its absolute form but the function of the different organs have been clearly differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ of the functions that essentially belongs to another. [17]

Article 13 and 32 do not exhaust the power of judicial review and these two provisions signify and symbolize the great importance that the founding fathers attached to the fundamental rights guaranteed by Part III. Thus the Supreme Court of India and the High Courts are bestowed with power of judicial review in following aspects.

- 1) The judicial review means the power of the courts to review delegated or subordinate legislation and the acts of the executive in terms of their compatibility with the parent Acts. This is known as the ‘Ultra Vires’ doctrine and this power is exercised by the courts in England, U.S.A. and in India.
- 2) Under Federal Constitutions the courts have the power to enforce the scheme of distribution of legislative powers between the Central Government and the Provincial Governments. This judicial function is inherent in a written federal Constitution irrespective of whether such power is expressly conferred or necessarily conferred or necessarily inferred. Judicial review in this sense is peculiar to federal constitution, like that of the USA and India and hence is not found under the English Constitution which is unitary and unwritten.
- 3) Judicial Review in its third and most commonly used sense means the power of the courts to declare the Acts of the legislature as unconstitutional if such a legislation is repugnant to the constitution which is the fundamental law of the country. This was in essence what was propounded by Chief Justice Marshall and this power is also exercisable by the courts in the USA and India and not in the United Kingdom. [18]
- 4) The peculiar feature of Indian Constitution is that Supreme Court have asserted the power of judicial review over constituent actions i.e. amendments of the Constitution. In *Kesavananda Bharati v. State Kerala*, [19] the Supreme Court held that while the amending power under Article 368 is comprehensive enough to cover the amendment of any part of the Constitution including fundamental rights, the power could not be exercised so as to destroy those features of the Constitution which constitute the basic structure. In this case while different judges identified different feature as constituting the basic structure of the Constitution, it is remarkable that the doctrine of judicial review was not per se mentioned as one of the basic features of the Constitution. In fact the doctrine of judicial review has been added to the list of basic features in *Minerva Mills v. Union of India* [20] and subsequent to it wherein

constitutional amendments were tested on the ground of affecting the basic structure of the Constitution, the Supreme Court struck down certain provisions of those constitutional amendments only on the ground of ouster of judicial review of the Supreme Court or of the High Courts. [21]

The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balance between the legislature and executive on the one hand and the judiciary on the other hand provides means by which mistakes committed by one are corrected by the other and vice-versa. The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the policy of the Constitution. [22]

The exercise of the power of judicial review by the constitutional courts is not restricted, but subject to certain limitations. Even in the U.S.A., the judicial review power is exercised under certain limitations which are mostly self-imposed. In India, the limitations and restrictions cover much wider and mostly been especially incorporated into the Constitution itself. According to D.D. Basu, [23] these limitations may be placed in three categories - Constitutional Limitations, intrinsic limitation and Self-imposed Limitations. The Indian Constitution itself excludes many articles from judicial review. Powers of judicial review is expressly precluded by some of the Articles of the Constitution. They are - Article 31 A, 31-B read with Ninth Schedule, 31-C, 74(2), 77(2), 105(2), 194(2), 122, 232-A, 323-B, 239(a) 359, 361-A, 363, 368 (4) and Tenth Schedule.

## 5. Conclusion and Suggestions

The growth of the judicial review is the inevitable response of the judiciary to ensure proper check on the exercise of public power. Growing awareness of rights in the people; the trend of the judicial scrutiny of every significant governmental action and the readiness even of the executive to seek judicial determination of debatable or controversial issues, at times, may be, to avoid its accountability for the decision have all resulted in the increasing significance of the role of judiciary. There is a general perception that the judiciary in this country has been active in expansion of the field of judicial review into non-traditional areas, which earlier were considered beyond judicial purview.

It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation. These changed circumstances may also create a vacuum in a legal system, which has to be suitably filled up by the legislature. If the legislature fails to meet the need of the hour, the courts may interfere and fill in the vacuum by giving proper directions. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. Thus, directions given by the court will operate only till the law is made by the legislature and in that sense temporary in nature. Once legislation is made, the court has to make an independent assessment of it. The

courts may also rely upon International treaties and conventions for the effective enforcement of the municipal laws provided they are not in derogation with municipal laws.

It is considered that the judicial review in India is absolutely essential and not undemocratic because, the judiciary while interpreting the constitution or other statutes is expressing the will of the people of India as a whole who have reposed absolute faith and confidence in the Indian judiciary. If the judiciary interprets the Constitution in its true spirit and the same goes against the ideology and notions of the ruling political party, then we must not forget that the Constitution of India reflects the will of the people of India at large as against the will of the people who are represented for the time being by the ruling party. If we can appreciate this reality, then all arguments against the democratic nature, of the judicial review would vanish. The judicial review would be undemocratic only if the judiciary ignores the concepts of separation of powers and indulges in “unnecessary and undeserving judicial activism”. The judiciary must not forget its role of being an interpreter and should not undertake and venture into the task of lawmaking, unless the situation demands so. The judiciary must also not ignore the self-imposed restrictions, which have now acquired a status of “prudent judicial norm and behavior”. If the Indian judiciary takes these two “precautions”, then it has the privilege of being the “most democratic judicial institution of the world, representing the biggest democracy of the world.”

## References

- [1] Available at <http://streetlaw.org/en/case/1%22> (last visited on 10<sup>th</sup> December, 2017).
- [2] Prashant Gupta, “Doctrine of Judicial Review: A Comparative Analysis Between India, U.K. and U.S.A” *IJLDAI* 49
- [3] Available at [www.quora.com/what-is-meant-by-the-doctrine-of-the-judicial-review](http://www.quora.com/what-is-meant-by-the-doctrine-of-the-judicial-review) (last visited on 11th December, 2017).
- [4] Available at [www.history.com/this-day-in-history/marbury-medison-establishes-judicial-review](http://www.history.com/this-day-in-history/marbury-medison-establishes-judicial-review) (last visited on 11th December, 2017).
- [5] Chander Kirti Negi, “*JUDICIAL REVIEW IN INDIA & ITS EMERGING TRENDS*” LL.M, KURUKSHERTA UNIVERSITY (DDE REF NO. 3380)
- [6] Corwin Edward S., *A Constitution of Powers in a Secular State* 3-4 (The Michie Company, USA 1951)
- [7] Basu D.D., *Limited Government and Judicial Review* 275 (LexisNexis, Calcutta 1972)
- [8] Dash, S.C., *The Constitution of India: A Comparative Study*, Chaitanya Publishing House, Allahabad, 334 (1960)
- [9] Rao, *Parliamentary Democracy of India*, The World Press Pvt. Calcutta, 213 (1961)
- [10] [1877] 3. ILR 63 ( Cal)
- [11] [1913 ]40. ILR 391 (Cal)
- [12] [ 1918 ] . AIR 1210 ( Mad)
- [13] M.Laxmikanth, *Indian Polity* (Tata McGraw Hill Education Private Limited, New Delhi, 2010)
- [14] H.C.L. Meillat, *University of Toronto Law Journal*, Vol. 15, 1963-64, pp. 489-492, quoted by P. Ravi Jashuva,

- “The necessity of accountability in Judicial Review Power,” *Indian Bar Review*, Vol. 29, 2002, p. 206.
- [15] Ibid.
- [16] Justice CK Thakkar and Justice Arijit Pasayat, *Dr. CD Jha Judicial Review of Legislative Acts 116* (2nd, Lexis Nexis Butterworths Wadhwa, Nagpur 2009)
- [17] *Ram Jawaya Kapoor v. State of Punjab*, AIR 1955 SC 549 at 556.
- [18] *Encyclopedia of the American Constitution* 1054 (1986), quoted by V. Nageswara Rao and G.B.Reddy, *Doctrine of Judicial Review and Tribunals: Speed Breakers Ahead*,”(1997) 39 JILI. 415.
- [19] (1973) 4 SCC 225
- [20] AIR 1980 SC 1789
- [21] *P. Sambhamurthy v. State of A.P.* AIR 1987 SC 663; *Kihota v. Zachillu* (1992) Supp. (2) SCC 651; *L. Chandra Kumar v. U.O.I.* AIR 1997 SC 1125.
- [22] Dr. A.S. Anand, “Judicial Review - its content its reach”, AIR 2000 J&A 163
- [23] D.D. Basu, *Commentary on the constitution of India*, 5th Ed., Vol. 1, p. 170.