

Doctrine of Judicial Review in India

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Abstract

The supreme court of India is the guardian of Constitution of India which is the supreme law of the land. All other laws should be compatible with the constitutional scheme. In case there is conflict, the apex court has the power to strike down that law and to declare it invalid. This is known as the power of judicial review.

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Introduction

The doctrine of judicial review was for the first time propounded by the supreme court of America in the famous case of **Marbury Vs Madison**. The US Supreme Court asserted the power of the Supreme Court to declare a statute invalid if it comes into conflict with the constitution.

Like US, India also has a written constitution. Indian constitution promulgates 'rule of law', establishes a limited democracy and has accepted the system of 'check and balances' in contrast to the rigid doctrine of separation of power. Each organ of the State i.e. legislature, executive and judiciary draws its powers from the constitution and are thus subjected to the constitutional limits. Uncontrolled and unbridled power would lead to tyranny, anarchy and chaos. Judiciary has been vested with the power to protect

the constitution of India. Thus, the power of judicial review is inherent in the character of Indian judiciary.

Meaning of 'Judicial Review'

'Judicial Review' is the power of courts to pronounce upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void'. Judicial review is a judicial weapon to strike down the power exercised in excess or exercised arbitrarily or exercised in contravention to what is mandated in the constitution, by the legislative and executive organs of the state. 'Thus, the concept has the origin in the theory of limited government and in the theory of two laws — an ordinary and supreme. If the ordinary law as made by the legislature contravenes the provisions of the supreme law then there must be some organ which is to possess the power or authority to pronounce those legislative acts as void, such power in the present system is vested in the institution of judiciary.

Foundations of judicial Review

Unlike the USA, the constitution of India expressly and explicitly establishes the doctrine of judicial review under Articles 13, 32, 226 and thus, has the explicit sanction of the constitution. However, the scope of judicial review in India is limited as compared to America, which has a rigid method of amendment. Fundamental rights are the basic rights cherished rights which are required for the overall development of the human being. The fundamental rights help in establishing the rule of law. So they have to be safeguarded against state action. Thus, in India the power of judicial review thus remain limited to the provisions of part III of the constitution.

Article 13 provides for the “judicial review” of all the legislations in India, past as well as future. This power has been conferred on the High courts and the Supreme court of India (Article 226, Article 32) which can declare a law unconstitutional if it is inconsistent with any of the provisions of part iii of the constitution.

Article 13 (1) provides that the laws which were in force before the commencement of the constitution shall be void to the extent to which they are inconsistent with the fundamental rights from the date of the commencement of the constitution. Art, 130) has prospective operation. The inconsistent laws are not void ab initio. They are declared void only after the commencement of the constitution. For the acts committed before the commencement of the constitution, the pie-existing laws would have their application’.

Similarly, Article 13 (2) provides that any law made after the commencement of the constitution shall be void to extent it contravenes, takes away or abridges any of the provisions of part III of the constitution of India, which is the gateway of rights and liberties of the people of India. The expression “the State” in Article 13 is to be construed in conformity with article 122. The article 13 under 13 (3) (a) itself defines the ambit of the expression “law” for the purpose of the provisions of part III. Thus, under article 13(3) (a) law means and includes:

- (a) temporary laws such as Ordinances, acts as well as permanent laws
- (b) statutory instruments in the nature of subordinate legislation, specifically described as “order, bye law, rule, regulation, notification” having in the territory of India the force of law
- (c) non-legislative sources of law, that is to say custom or usage having in the territory of India the force of law³.

However, at the clause (4) of Article 13 seeks to ensure that a constitutional amendment does not fall within the definition of law in Art 13 and its validity cannot be challenged on the ground that it violates a fundamental right.

The amending power of the parliament under Art 368 does not extend to the 'basic structure of the constitution'. In that sense, the parliament cannot amend by the way of abrogation or modification the basic features on which the constitution is founded. Though fundamental rights are not immune from constitutional amendment but at the same time, there are some fundamental rights which are form the part of the 'Basic structure' of the constitution and hence they fall outside the preview of the amending power of the parliament. In **Keshavnanda Bharti Vs State of Kerala (1973)**, the apex court while upholding the validity of the constitution (24h Amendment) by which article 13(4) was inserted, (aid down (by majority) the theory that there were certain basic features which could not be amended under the amending power.

In Indira Nehru Gandhi Vs Raj Narain, the apex court declared that judicial review, free and fair elections, rule of law and right to equality arc the features constituting the basic structure of the constitution. The court unanimously struck down clause (4) of article 329 —A added by the constitutional 391 Amendment Act, 1975 which withdrew the jurisdiction of all courts including the Supreme Court, over disputes relating to elections involving the Speaker and the Prime Minister. In the Fundamental Rights Case "the court said that judicial review has become an integral part of our Constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the Constitutional validity of the provisions of statutes. If the provisions of the statutes are found to be violative of any of the Article of

Constitution which is the touchstone for the validity of all laws the Supreme Court and the High Court are empowered to strike down the said provision.

In L Chandra Kumar v. Union of India, the Supreme Court reiterated the view held in Keshavnanda's case and stated that the power of judicial review of legislative actions as vested in the High Court under Art.226 and in the Supreme Court under Art. 32 is part of the basic structure of the Constitution and cannot be ousted or excluded even by the Constitutional Amendment.

Article 32 which provides for the enforcement machinery of fundamental rights is itself a fundamental right. This makes the availability of fundamental rights a reality. Under Art, 32 any person can move to the 'Supreme Court of India whenever there is violation of fundamental rights for an appropriate remedy. A similar power is granted to High Courts under Art. 226. However, the power of the High Court under Art. 226 are wider than that of Supreme Court. It is not confined to fundamental rights, but extends to all cases where the breach of a legal right is alleged. Both under article 32 and 226 broad discretion is vested in the Courts for giving proper relief if warranted by the circumstances of the case before them. The Courts are empowered not only to issue a writ but also to make any order, or give any direction, to the petitioner'

In M.C. Mehta v. Union of India, [he Supreme Court held that the scope of Art. 32 is wide enough to include the power to grant compensation for violation of fundamental rights. The power of the court under Art 32 is not merely preventive that is preventing the infringement of fundamental rights, but also remedial in nature i.e. power to grant compensation.

In a significant judgment in **Gaurav Jain v. Union of India**, the Supreme Court issued directions to the Government for the improvement of the plight of the prostitutes, fallen women and their children.

In S.R. Bommai v. Union of India, the decision in this case is a great landmark in the history of executive satisfaction and judicial review. The Court held that the proclamation issued under Art. 356 is not wholly outside the part of judicial scrutiny and the Court can examine whether the reasons disclosed for issuing proclamation have rational nexus with the satisfaction reached under Art. 356. The satisfaction of the President can be challenged on two grounds:

- (i) It has been exercised malafide.
- (ii) Based on wholly extraneous and irrelevant grounds.

The Court thus held that it has Constitutional duty and responsibility to review the acts done by the coordinating branches, the executive and the legislature under the constitution, or under law. It is the province and duty of the Supreme Court, as ultimate interpreter of the Constitution by exercising its power of judicial review to declare what the law is. The action of the President under Article 356 is a Constitutional function and the same is subject to judicial review.

Thus, administrative actions also fall within the ambit of judicial review. If the rule of law and conformity to the provisions of the Constitution is to be maintained it is necessary that the administrative authorities are also brought under the control of Courts of Law. 'Judicial Review' helps in proper administration of Justice. The activist Supreme Court in order to make justice available to the poor and weaker sections of the society, has done away with the traditional rule of locus standi i.e. the party whose right is infringed can only apply under Art. 32. Today, a progressive approach is

followed. The Court now permits Public interest Litigation (**PIL**) or Social Action Litigation at the instance of 'public spirited citizens' for the enforcement of Constitutional and other legal rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief'.

In **A.B,S.K. Sangh ('Rly.) v. Union of India**, the Court held that the Akhil Bhartiya Soshit Karamchari Sangh (Railway), though an unregistered association could maintain a writ petition under Art.32 for the redressal of a common grievance. Access to justice through 'class action', 'public interest litigation and 'representative proceedings' is the present constitutional jurisprudence.

Hence, the power of Judicial Review has enabled the judiciary to control the powers of legislative and executive organs of the State. Just think of a situation when a law enacted by the legislature is challenged and if legislature is made to decide upon its validity. The decision is obvious, it would never let its law succumb to the challenges made against it. Therefore, if unlimited powers are given to the legislative and executive organs of the State then there will be rule of men and not of law. Democracy will give way to dictatorship and justice will be delivered according to the whims and fancies of the rulers. That it why, the Indian Constitution makes broad division of powers and specifically provides under Art.50 that judiciary should be independent and separate from the executive³.

Consequences of Judicial Review

In exercise of the power of Judicial review, the Court either upholds the Constitutionality of an act or declares such act as unconstitutional, invalid or ultra vires. In ease of a legislative enactment, when it is declared unconstitutional the effects are far

reaching. In an American case; **Norton v. Shalby County**, the Court held “An unconstitutional Act is not a law, it confers no right, it imposes no duties it affords no protection, it creates no offices, it is, in the legal contemplation as inoperative as though it has never been passed. In **Keshav Madhav Menon v.. State of Bombay**, Justice Mahajan stated on the similar lines as to what was quoted in the American case that “unconstitutional statute is void since its inception and anything done under it is void and illegal: even convictions made under it are set aside: and the person affected is entitled to relief.”

The effect of judicial review in administrative action is that it affects directly the concerned government department or agency. Judicial review has an impact on public bodies and has the capacity to perform an educative role to provide public authorities with principles and standards to guide their future decision making. The normal proposition is that the Court declares law of decides what law is and the view that Court makes law is not acceptable because the law making power is vested in the legislative organs of the state. On this premise when the Supreme Court declares a law unconstitutional, the decision is binding on all Courts in India Art. 14, and possesses law quality as a precedent.

Conclusion

According to the Chairman of Drafting Committee, Dr. BR. Ambedkar, it is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. Justice Bhagwati relying on the views expressed by Dr. BR. Ambedkar stated:—

“The power of judicial review is an integral part of our constitutional system and without it there will be no government of law and the rule of law would become a teasing illusion and a promise of unreality.”

However, while declaring as to 'what law is' the Court has to perform a very delicate and responsible function. The legislature which is elected by the people of the nation is presumed to be fully conversant with the needs and aspirations of the people. The Court has to strike a fine balance between the constitutional fundamentals and the 'felt necessities' of the time. Therefore, it has to cautiously weigh all the circumstances and has to impose on them a good deal of self restraint in performing this delicate and responsible task. Thus, it should only as a last resort that the Courts would hold a statute unconstitutional.

In **P.S. T Bar Association v. State of U.P.**, the Court held that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional provisions.

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