

JUDICIAL REVIEW: THE INTERPRETATION AND OBSERVER ROLE OF THE JUDICIARY

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INTRODUCTION

Legislature executive and Judiciary are three organs of government. Their main function is to legislate the law, to implement the laws and to decide the cases that come before it and to interpret the law as well respectively. Montesquieu in his book¹ gave the doctrine of separation of power which states that all three organs are separated from each other, one needs to remain within their premise and not step on another's jurisdictions. Lord Acton writes that "power tends to corrupt and absolute power" which indicates that the accumulation of uncontrollable power in any form of government ultimately leads to anarchy, tyranny and chaos thus curbing absolute and uncontrollable power. Judicial review has become an interposition of judicial restraint on the legislative as well as on the executive organ of the government². The doctrine of judicial review refers to the power of the judiciary to examine the constitutionality of any legislative act and executive order of the government whether Central or State. It is a judicial doctrine, propounded by John Marshall the then chief justice of the America Supreme Court, originated and developed by judicial pronouncement in the case of *Marbury v. Madison*³ by the American Supreme Court. Contemplating the literal meaning we find that judicial review is a combination of two terms i.e. judicial and review means the power of the judiciary to review. In India, the constitution itself bestows the power of judicial review upon the judiciary by virtue of which the Judiciary can examine the constitutionality of the Legislative act or executive order of government to maintain the Supremacy of the law of the land i.e. the Constitution. Moreover, the Supreme Court has held judicial review as a basic structure of the Constitution. Justice Khanna in the case of fundamental rights said that "Judicial review has become an integral part of our constitutional system and power has been vested in the High Court and the supreme court to decide about the constitutional validity of the provision of the statute and if the provisions of the Statue

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¹ The spirit of the laws, 1747

² J. N. Pandey, constitutional law of India 31 (2023)

³ 5 U.S. (1 Cranch) 137 (1803)

found to be violative of any of the articles of the constitution Supreme Court and the High Court are in power to strike such provision"⁴.

ORIGIN AND DEVELOPMENT OF THE DOCTRINE

The judicial review doctrine originated and developed in the United States of America. It was propounded by John Marshall the then Chief Justice of the American Supreme Court in the famous case of Marbury versus Madison (1803). In this case, the holding was that "*Section 13 of the Judiciary Act of 1789 is unconstitutional to the extent it purports to enlarge the original jurisdiction of the Supreme Court beyond that permitted by the Constitution. Congress cannot pass laws that are contrary to the Constitution, and it is the role of the judiciary to interpret what the Constitution permits*".

MARBURY V. MADISON CASE

Facts of the case:-

In 1800, the Federalists lost the election though they had created several new judicial posts before leaving office. William Marbury was issued a commission as justice of the peace, but the new Secretary of State, James Madison, refused to deliver it. Marbury then filed a writ of mandamus against the secretary of state to deliver the commission. He relied on section 13 of the Judiciary Act of 1789 which provided: "The supreme court shall have the power to issue the writ of mandamus in cases warranted by the principles and usage of law to the person holding office under the authority of the United States".

Issues:

Three issues raised are whether Marbury had the right to his commission. Secondly, whether mandamus would be a proper remedy from the Supreme Court. The last issue is if Marbury's right had been violated whether the law offers a remedy for the same.

Decision:

The court said that Marbury had a right to his commission as the law offered him a remedy. Marshall reasoned that "all appropriate procedures were followed: the commission had been properly signed and sealed and Marbury's commission was valid", Madison's withholding

⁴ 1973 4 SCC 225

"was violative of a vested legal right" on Marbury's part. Answering 2nd issue Marshall coating *ubi jus ibi remedium* wrote that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." Further, the court found mandamus a proper remedy for Madison. The third issue's answer completely relied on section 13 of the Judiciary Act of 1789. Marbari argued, "Section 13 of the said act gives the Judiciary authority to issue the writ of mandamus only under original jurisdiction not under appellate jurisdiction". Agreeing with Marbury's contention, the court held section 13 of the Judiciary Act of 1789 was unconstitutional, Justice Marshall observed that "it conflicted with Article 3 Section 2 of the Constitution". Marshall wrote, "*The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. ... Certainly all those who have framed 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*". Thus, in this case, Marshall established that the Supreme Court is the ultimate interpreter of the Constitution and the court can invalidate laws and acts that it finds do not confirm the Constitution; this principle fits well with the government system of check and balance.

JUDICIAL REVIEW IN THE BIGGEST DEMOCRACY (INDIA)

India follows the Rule of law and Separation of power though not in its strict sense to make the constitution flexible, maintain harmony between the organs of government and refrain from leveraged power in tyrannical ways. The Indian constitution is considered as law of the land or supreme lex, the permanent law of the land which is in all periphery supreme, every organ of government whether legislature, executive or judiciary derives its power from the constitution and has to perform within the ambit of constitution. Moreover, it's on the judiciary to ensure that no enactment or implications contravene the provisions of the Indian Constitution. Although the term Judicial review is nowhere mentioned in the Indian Constitution, the various provisions of the system of Judicial review have been granted in various articles such as articles 13, 32, 226, 245, 372, 251 and 254 etc. Indian constitution makers have adopted the concept of judicial review from the United States. In *State of Madras v. V.G. Row* chief justice, Patanjali Shastri observed "Our constitution contains express provisions for judicial review of legislation as to its conformity with the constitution unlike in America". C.J Kania observed: "In India, it is the Constitution that is Supreme and

that a statute to be valid must be in all conformity with the constitutional requirements and it is for the Judiciary to decide whether any enactment is Constitutional or not⁵". A recent example of using the doctrine of judicial review can be seen when the supreme court of India declared the 99th Constitutional Amendment Act, 2014 and the National Judicial Appointment Commission, 2014 as unconstitutional and null and void.

In the landmark case *Kesavananda Bharati*, it has been held that the "Judicial review is the basic feature of the Indian constitution and therefore it cannot be damaged or destroyed by amending the constitution under Article 368 of the constitution". "The power of Judicial review of Legislative action as vested in the high court under article 226 and in the Supreme Court under article 32 is part of the basic structure of the constitution and cannot be excluded even by the constitutional amendment⁶".

CONSTITUTIONAL PROVISIONS FOR JUDICIAL REVIEW:

1. As per Article 13, any law, order, or ordinance that infringes or is inconsistent with fundamental rights is null and void.
2. Through the mechanism of Article 32, the apex court can issue a writ, order to provide a remedy for the infringement of fundamental rights.
3. According to Article 131, in case of any tussle between center and state or state and state the apex court has original jurisdiction.
4. Article 132 gives an appellate jurisdiction to the Supreme Court in constitutional matters.
5. Article 133 authorizes appellate jurisdiction to the apex court in civil matters.
6. The Supreme Court has appellate jurisdiction in criminal cases.
7. Certificate for appeal from the high court to Supreme Court comes under Article 134.
8. The apex court is permitted to exercise the federal court's jurisdiction, on any pre-constitutional statute, as per Article 135.

⁵ J. N. Pandey, constitutional law of India 32 (2023)

⁶ L. Chandra Kumar v. Union of India AIR 1997 Sc 1125

9. According to Article 143, the President of India can seek the opinion of the Supreme Court on any legal constitutional matters.
10. Article 226 empowers the high court to issue a writ or other order to secure fundamental and legal rights.
11. Territorial limits of laws made by Parliament and by the Legislature of the state are dealt with under Article 245.
12. Article 251 and 254 provides that in case of a conflict between the central law and State Law, the central would prevail over State law.

SCOPE OF JUDICIAL REVIEW IN THE INDIAN CONTEXT

Although in several cases the Supreme Court has declared the doctrine of Judicial review as a basic structure of the Constitution, its application is subject to 3 grounds:

- There must be an infringement of fundamental rights.
- Authority enacted or implicated the questioned law ultra vires.
- Repugnant to the constitutional provision.

Comparatively, the scope of judicial review in India is narrower than what exists in the USA. “the dew process of law gives the American Supreme Court wide scope to Grand protection to the rights of its citizens it can declare loss violative of these right void not only on the substantive ground of being unlawful but also on the procedural ground of being unreasonable on other hands the Indian Supreme Court wild determining the constitutionality of law examine only the substantial question because Indian Constitution provides procedure established by law”⁷.

IMPORTANCE OF JUDICIAL REVIEW

The judiciary has been acting as a guardian of the Constitution and the power of judicial review has enhanced the scope of judiciary. The importance of Judicial review can be seen in one of the supreme court's statements "It is the function of the judges to pronounce on the validity of laws if courts are totally deprived of the power of judicial review the fundamental

⁷ Subhash C. Kashyap, Our constitution, National book trust, Third edition, 2001. P. 232

rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled"⁸. The importance of judicial review can be summarized as it is important:

- To uphold the principle of Supremacy of the constitution as the constitution is supreme law of land.
- To protect the fundamental rights guaranteed by the Constitution.
- To maintain fundamentals of democracy; rule of law and Federal equilibrium.
- To ensure democracy.
- "To afford a useful weapon for availability avilment and enjoyment of equality Liberty and fundamental freedom and to have to create a healthy nestles nationalism healthy nationalism"⁹

Hence, the power of judicial review is inherent in the constitution and the Judiciary vigilantly follows it and adjusts the constituent to meet new conditions and needs of the time. "The function of the judicial review is a part of the constitutional interpretation itself"¹⁰.

TYPES OF JUDICIAL REVIEW

According to Justice Syed Shah Mohamed Quadri, there are three kinds of judicial review:

1. Constitutional amendments' judicial review.
2. Legislation enacted by Parliament or state legislature.
3. Administrative actions of the union and state are subject to judicial review.

DOCTRINE EVOLVED BY USING JUDICIAL REVIEW

The Supreme Court and High Court while using the power of Judicial review have pronounced other doctrines as well which assist the Judiciary while interpreting the constitution and deciding the cases; these are:

⁸ Minerva mills v. Union of India AIR 1980 SC 1789

⁹ Justice Ramaswami in S.S. Bola v. B. D. Sharma, 1997

¹⁰ M. Laxmikant, indian polity 27.2 (2017)

- Doctrine of Eclipse
- Doctrine of Waiver (not applied in India)
- The doctrine of Colourable legislation.
- The doctrine of Severability.

FEATURE OF JUDICIAL REVIEW

The foremost feature of the doctrine is that this can be exercised by both the Supreme Court and high court under Articles 13 and 226 respectively. All the laws, orders, bye-laws, or ordinances made by the Central or State are subject to judicial review. The concept of Judicial review is not applied automatically it needs to be attracted which means this power can be used only when a question of law is challenged before the Hon'ble Court.

JUDICIAL REVIEW OF ORDINANCES AND MONEY BILLS

Article 123¹¹ and 213¹² of the Indian constitution empowers the president and governor to promulgate ordinances. This power is used in exceptional conditions thus the power of making ordinances should be used bonafide. Constant conflict is seen among the judges to decide whether ordinances are subject to judicial review or not. "The president's power to pass an ordinance is not a subject of Judicial Review"¹³. "Just like legislative power cannot be questioned, the ordinance made on the ground of motive or non-application of mind, or necessity cannot be questioned"¹⁴. However, recently Justice D.Y. Chandrachud wrote in a common judgment with Justices S.A. Bobde, A.K. Goel, U.U. Lalit and L. Nageshwara Rao "the satisfaction of the President under Article 123 and of the Governor under Article 213 is not immune from judicial review"¹⁵.

Article 110 provides provisions regarding money bills. In the present scenario, the money bill is beyond judicial review.

¹¹ The indian constitution

¹² Ibid

¹³ AK Roy v. Union of India (1982) 1 SCC 271

¹⁴ T. Venkata Reddy v. State of Andhra Pradesh (1985) 3 SCC 198

¹⁵ The Hindu <https://www.thehindu.com/news/national/SC-widens-boundaries-of-judicial-review-of-ordinance/article16980378.ece> (last visited 18 June, 2023 at 11:47 AM)

CASES OF JUDICIAL REVIEW IN INDIA

*Sankari Prasad versus Union of India*¹⁶

In 1951 Indian Parliament made the 1st amendment to the constitution which challenged 1951 on the ground of infringing fundamental rights. However, the apex court held the Act valid, contending that Parliament can amend fundamental rights and Amendments made under Article 368 do not fall under the law of Article 13(3).

*Sajjan Singh versus State of Rajasthan*¹⁷

The 17th Amendment Act and the 9th schedule inserted by the 1st CAA were challenged. The Supreme Court with a ratio of 3:2 upheld the Sankari Prasad case judgment.

*Golaknath vs State of Punjab*¹⁸

This was the largest bench till then. The constitutionality of the 1st, 4th and 17th CAA was challenged. In this case, the apex court enhanced the scope of judicial review by overruling the previous judgment held that Parliament's amending power is not absolute, they are subject to Article 13.

*Kesavananda Bharati v. State of Kerala*¹⁹

The constitutionality of the 24th and 25th CAA, 1971 was challenged. The apex court gave the doctrine of basic structure and held that Parliament has the power to amend any part of the constitution including fundamental rights but cannot amend the basic structure of the constitution.

*Minerva mills*²⁰

In this case, the constitutionality of the 42nd amendment act which inserted subsections 4 and 5 in Article 368 of the Indian Constitution struck down and upheld Judicial review as part of the basic structure.

¹⁶ 1951 AIR 458, 1952 SCR 89

¹⁷ 1965 AIR 845, 1965 SCR (1) 933),

¹⁸ 1967 AIR 1643, 1967 SCR (2) 762

¹⁹ 1973 4 SCC 225

²⁰ AIR 1980 SC 1789

I.R. Coelho case²¹

In this case, the apex court reiterated judicial review as a basic structure of the constitution and held that the 9th schedule is a part of the Indian constitution and any insertion on this schedule that infringes part 3 of the Constitution is subject to judicial review.

CONCLUSION

Ensuring supremacy of the Constitution is the foremost object of the judiciary and to accomplish it the judiciary evolved the concept of judicial review. In India, the constitution makers vigilantly incorporated the concept of judicial review in the constitution though not expressly mentioned. The power of judicial review has enlarged the scope of the judiciary to protect fundamental rights and the basic structure of the Constitution.



²¹ (1999) 7 SCC 580]