

# JUDICIAL REVIEW

Judicial Review is the power of the Courts to determine the constitutionality of Legislative act in a case instituted by aggrieved person. It is the power of the Court to declare a legislative Act void on the grounds of unconstitutionality. It has been defined by Smith & Zucher, "The examination or review by the Courts, in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written Constitution or are in excess of powers granted by it, and if so, to declare them void and of no effect".<sup>1</sup> Edward S. Corwin also says that Judicial Review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the State governments, which in the Court's opinion transgresses the Constitution.<sup>2</sup>

The constitution of India, in this respect, is more a kin to the U.S. Constitution than the British. In Britain, the doctrine of parliamentary supremacy still holds goods. No court of law there can declare a parliamentary enactment invalid. On the contrary every court is constrained to enforce every provision" of the law of parliament.

Under the constitution of India parliament is not supreme. Its powers are limited in the two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment.

Being the guardian of Fundamental Rights and the arbiter of constitutional conflicts between the union and the states with respect to the division of powers between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures.

This is what makes the court a powerful instrument of judicial review under the constitution. As Dr. M.P. Jain has rightly observed: "The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution."

In the framework of a constitution which guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and delimits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review.

The power of judicial review of legislation is given to the judiciary both by the political theory and text of the constitution. There are several specific provisions in the Indian constitution, judicial review of legislation such as Act 13, 32, 131-136, 143, 226, 145, 246, and 372.

Article 372 (1) establishes the judicial review of the pre-constitutional legislation similarly. Article 13 specifically declares that any law which contravenes any of the provision of the part of Fundamental Rights shall be void. Even our Supreme Court has observed, even without the specific provisions in Article 13. The court would have the power to declare any enactment which transgresses a Fundamental Right as invalid. The Supreme and high courts are constituted the protector and guarantor of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that in case of in consistent if between union and state laws, the state law shall be void.

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Article 13(2) even goes to the extent of saying that "The state shall not make any law which takes away or abridges the rights conferred by this Part (Part III containing Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void." The courts in India are thus under a constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provision. The courts act as sentinel on the *qui vive* so far as the Constitution is concerned.

Underlining this aspect of the matter, the Supreme Court stated in State of *Madras v. Row*, that the Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution and that

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<sup>1</sup> Smith, Edward Conard and Zucher, Arnold Jhon, Dictionary of America Politics , Barnes and Noble, New York, 1959, p. 212.

<sup>2</sup> Corwin, Edward S., A Constitution of Powers in a Secular State , The Michie Company, USA, 1951, p. 3-4.

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the courts "face up to such important and none too easy task" not out of any desire "to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution." <sup>3</sup>The Court observed further: "While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."

As the Supreme Court emphasized in *Gopalan*: "In India it is the Constitution that is supreme" and that a "statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or, not" and if a legislature transgresses any constitutional limits, the Court has to declare the law unconstitutional "for the Court is bound by its oath to uphold the Constitution."<sup>4</sup>

The doctrines of supremacy of the constitution and judicial review has been expounded very lucidly but forcefully by BHAGWATI, J., as follows in *Rajasthan v., Union of India*:<sup>5</sup>

"It is necessary to assert in the clearest terms particularly in the context of recent history, that the constitution is *supreme* lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of government be it the executive or the legislature or the judiciary, derives its authority from the constitution and it has to act within the limits of its authority. No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of Such power laid down by the constitution. This Court is the ultimate interpreter of the constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are "the limits and whether any action of that branch transgresses such limits".

Therefore, the courts in India cannot be accused of usurping the function of constitutional adjudication; it is a function which has been imposed on them by the Constitution itself, 'It is a delicate task; the courts may even find it embarrassing at times to discharge it, but they cannot shirk their constitutional responsibility.

Justifying judicial review, RAMASWAMI, L, has observed in *S.S. Bola v, B.D. Sharma*.<sup>6</sup>

"The founding fathers very wisely, therefore, incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, avilment and enjoyment of equality, liberty and Fundamental freedoms and to help to create a healthy nationalism, The function of judicial review is a part of the constitutional interpretation it. self, It adjusts the constitution to meet new conditions and needs of the time."

In a number of cases, the Supreme Court has emphasized upon the importance of judicial review in India. KHANNA, J., emphasized in *Kesavananda*:

"As long as some Fundamental Rights exist and area part of the Constitution, the power of judicial review has also to be exercised "with a view to see that 'the guarantees afforded by these Rights are not contravened.....Judicial review has thusbecome an integral part of our Constitutional system...

In *Minerva Mills* CHANDRACHUD, C.J.' speaking on behalf of the majority, observed;

"It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the Fundamental 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."

In his minority judgement in *Minerva* BHAGWATI, J., observed:

"It is for the judiciary to uphold the constitutional values and to enforce the constitutional values and to enforce the constitutional limitations, that is the essence of the rule of law, which *inter alia* requires that 'the exercise of

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<sup>3</sup> AIR 1952 SC 196, 199 : 1952 SCR 597; Ch. XXIV

<sup>4</sup> AIR 1950 SC 27

<sup>5</sup> AIR 1977 SC 1361: (1977) 3 SCC 592.

<sup>6</sup> AIR 1997 SC 3127, 3170

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powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law.' The power of judicial review as an integral part of our 'constitutional system... the power of judicial review... is unquestionably... part of the basic structure of the Constitution.

AHMADI, C.J..... speaking on behalf of a bench of seven judges in *L. Chandra Kumar v. Union of India*<sup>7</sup> has observed:

“The judges of the Supreme Courts have been entrusted with the task of upholding the constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the

Judicial review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land. In fact, the study of constitutional law may be described as a study of the doctrine of judicial review in action. The courts have power to strike down any law, if they believe it to be unconstitutional.

The judgment in *I.R. Coelho v. the State of Tamil Nadu*<sup>8</sup> has answered this question by establishing the pre-eminence of judicial review of each and every part of the Constitution. The Court has laid down a two-fold test: (a) whether an amendment or a law is violative of any of the Fundamental Rights in Part III (b) if so, whether the violation found is destructive of the basic structure of the Constitution. If the court finds that the impugned enactment damages the basic structure of the Constitution, it shall be declared void, notwithstanding the fictional immunity given to it by Article 31B. Thus, the basic structure doctrine requires the State to justify the degree of invasion of Fundamental Rights in every given case; and this is where the court's power of judicial review comes in.

Under our Constitution, judicial review can conveniently be classified under three heads:<sup>9</sup>

1. **Judicial review of Constitutional amendments.**-This has been the subject-matter of consideration in various cases by the Supreme Court; of them worth mentioning are: *Shankari Prasad case*<sup>10</sup>, *Sajjan Singh case*<sup>11</sup>, *Golak Nath case*<sup>12</sup>, *Kesavananda Bharati case*<sup>13</sup>, *Minerva Mills case*<sup>14</sup>, *Sanjeev Coke case*<sup>15</sup> and *Indira Gandhi case*<sup>16</sup>. The test of validity of Constitutional amendments is conforming to the basic features of the Constitution.
2. **Judicial review of legislation of Parliament, State Legislatures as well as subordinate legislation.**- Judicial review in this category is in respect of legislative competence and violation of fundamental rights or any other Constitutional or legislative limitations;
3. **Judicial review of administrative action of the Union of India as well as the State Governments and authorities falling within the meaning of State.**

It is necessary to distinguish between 'judicial review' and 'judicial control'. The term judicial review has a restrictive connotation as compared to the term judicial control. Judicial review is 'supervisory', rather than 'corrective', in nature. Judicial review is denoted by the writ system which functions in India under Arts. 32 and 226 of the Constitution. Judicial control, on the other hand, is a broader term. It denotes a much broader concept and includes judicial review within itself. Judicial control comprises of all methods through which a person can

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<sup>7</sup> AIR 1997 SC 1125, 1150 : (1997) 3 SCC 261

<sup>8</sup> (1999) 7 SCC 580

<sup>9</sup> Justice Syed Shah Mohammed Quadri, *Judicial Review of Administrative Action*, (2001) 6 SCC (Jour) 1.

<sup>10</sup> *Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458.

<sup>11</sup> *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

<sup>12</sup> *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

<sup>13</sup> *Kesavananda Bharati v. Union of India*, AIR 1973 SC 1461

<sup>14</sup> *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

<sup>15</sup> *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*, (1983) 1 SCC 147.

<sup>16</sup> *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

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seek relief against the Administration through the medium of the courts, such as, appeal, writs, declaration, injunction, damages statutory remedies against the Administration.<sup>17</sup>

Therefore judicial review is a fundamental principle of law that every power must be exercised within the four corners of law and within the legal limits. Exercise of administrative power is not an exception to that basic rule. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. Unfettered discretion cannot exist where the rule of law reigns. Again, all power is capable of abuse, and that the power to prevent the abuse is the acid test of effective judicial review.<sup>18</sup>

Under the traditional theory, courts of law used to control existence and extend of prerogative power but not the manner of exercise thereof. That position was, however, considerably modified after the decision in *Council of Civil Service Unions v. Minister for Civil Service*<sup>19</sup>, wherein it was emphasized that the reviewability of discretionary power must depend upon the subject-matter and not upon its source. The extent and degree of judicial review and justifiable area may vary from case to case.<sup>20</sup>

At the same time, however, the power of judicial review is not unqualified or unlimited. If the courts were to assume jurisdiction to review administrative acts which are 'unfair' in their opinion (on merits), the courts would assume jurisdiction to do the very thing which is to be done by administration. If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk.

It is submitted that the following observations of Frankfurter, I. in *Trop v. Dulles*<sup>21</sup>, lay down correct legal position:

"All power is, in Madison's Phrase 'of an encroaching nature'. Judicial Power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint."

## **Cases On Judicial Review In India**

The basic function of the courts is to adjudicate disputed between individuals and the state, between the states and the union and while so adjudicating, the courts may be required to interpret the provisions of the constitution and the laws, and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land. There is no appeal against the judgement of the Supreme Court.

In *Shankari Prasad vs. Union of India*<sup>22</sup> the first Amendment Act of 1951 was challenged before the Supreme Court on the ground that the said Act abridged the right to property and that it could not be done as there was a restriction on the amendment of Fundamental Rights under Article 13 (2).

The Supreme Court rejected the contention and unanimously held. "The terms of Article 368 are perfectly general and empower parliament to amend the constitution without any exception whatever.

In the context of Article 13 law must be taken to mean rules or regulations made in exercise of ordinary legislative power and amendments to the constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368.

" In *Sajjan Singh's case*<sup>23</sup>, the competence of parliament to enact 17th amendment was challenged before the constitution. Bench comprising of five judges on the ground that it violated the Fundamental Rights under Article 31 (A).

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<sup>17</sup> M.P. Jain and S.N. Jain, Principles of Administrative Law: An Exhaustive Commentary on the Subject containing case-law reference (Indian & Foreign), 6th Ed., Wadhwa and Company Nagpur, New Delhi, 2007, p. 1779.

<sup>18</sup> Wade, Administrative Law, (1994), pp. 39-41.

<sup>19</sup> (1984) 3 All ER 935; (1984) 3 WLR 1174; (1985) AC 374.

<sup>20</sup> Craig, Administrative Law, (1993), p. 291.

<sup>21</sup> (1985) 35 US 86.

<sup>22</sup> AIR 1951 SC 458

<sup>23</sup> 1960 A.C. 167

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Supreme court reiterated its earlier stand taken in Shankari sad's case and held, "when article 368 confers on parliament the right to amend the constitution the power in question can be exercised over all the provisions of the constitution, it would be unreason about to hold that the word 'law' in article 13 (2) takes in amendment Acts passed under article 368.

Thus, until 1967 the Supreme Court held that the Amendment Acts were not ordinary laws, and could not be struck down by the application of article 13 (2).

The historic case of *Golak Nath vs. The state of Punjab*<sup>24</sup> was heard by a special bench of 11 judges as the validity of three constitutional amendments (1st, 4th and 17th) was challenged.

The Supreme Court by a majority of 6 to 5 reversed its earlier decision and declared that parliament under article 368 has no power to take away or abridge the Fundamental Rights contained in chapter II of the constitution the court observed.

- (1) Article 368 only provides a procedure to be followed regarding amendment of the constitution.
- (2) Article 368 does not contain the actual power to amend the constitution.
- (3) The power to amend the constitution is derived from Article 245, 246 and 248 and entry 97 of the union list.
- (4) The expression 'law' as defined in Article 13 (3) includes not only the law made by the parliament in exercise of its ordinary legislative power but also an amendment of the constitution made in exercise of its constitution power. ,
- (5) The amendment of the constitution being a law within the meaning of Article 13 (3) would be void under Article 13 (2) if it takes away or abridges the rights conferred by part III of the constitution.
- (6) The First Amendment Act 1951, the fourth Amendment Act 1955 and the seventeenth Amendment Act. 1964 abridge the scope of Fundamental Rights and, therefore, void under Article 13 (2) of the constitution.
- (7) Parliament will have no power from the days of the decision to amend any of the provisions of part III of the constitution so as to take away or abridge the Fundamental Rights enshrined there in.

The constitutional validity of the 14th, 25th, and 29th Amendments was challenged in the Fundamental Rights case. The Govt. of India claimed that it had the right as a matter of law to change or destroy the entire fabric of the constitution through the instrumentality of parliament's amending power.

In *Minerva Mills case*<sup>25</sup> the Supreme Court by a majority decision has struck down section 4 of the 42nd Amendment Act which gave preponderance to the Directive Principles over Articles 24, 19 and 31 of part III of the constitution, on the ground that part III and part IV of the constitution are equally important and absolute primacy of one over the other is not permissible as that would disturb the harmony of the constitution.

The Supreme Court was convinced that anything that destroys the balance between the two part will *Ipsa Tacto* destroy an essential element of the basic structure of our constitution.

In *Danial Latifi v. Union of India* the Supreme Court upheld the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and held that a Muslim divorced woman has right to maintenance even after iddat period.

In *John Vallamattan v. Union of India*, S.118 of Indian succession Act was challenged as violative of Art 14. S.118 imposed restriction on Christian having nephew or niece or near relative as regards his power to bequeath his property for religious or charitable purposes. 'Near relative' did not include wife but included an adopted son .The Court held S.118 as unconstitutional as it violated Art 14.

In *Githa Hariharan v. Reserve Bank of India* S.6(a) of the Hindu Minority and Guardianship Act,1956 was challenged under Art 14 and 15 on the ground of gender discrimination as this section provided that the father of a Hindu minor is the only guardian and mother is relegated to an inferior position .She could become the guardian only after the father. However, the court did not strike down this provision even though it violated the right of equality. The court read down the section and interpreted S. 6(a) to mean that when the father is not in

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<sup>24</sup> AIR 1967 SC 1643

<sup>25</sup> (1980) 3 SCC 625

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actual charge of the affairs of the minor, the mother could act as natural guardian during the father's lifetime. Courts evolved a technique of reading down a statute in order to retain it within constitutional limits. Gender inequality is also found in personal laws such as in law of succession, marriage laws. In Muslim personal law a Muslim male can have four wives at a time or they can terminate a marriage by triple talaq. These 'so called privileges' are not available to women.

The Bombay High Court in *State of Bombay v. Narasu Appa Mali*, held that the word 'law in force' does not intend to cover personal laws as such laws are derived from higher sources of law and therefore they should not be tested under constitutional morality.

This has been reiterated by Supreme Court in *Ahmedabad Women Action Group v. Union of India*, where Muslim personal law which allows polygamy was challenged on the ground of violating Art 14 and 15. The Court did not take cognizance and observed that the issues raised involve questions of state policy with which the Judiciary does not have any concern. The remedy lies with the Legislature and not the courts.

In *P.E. Mathew v. Union of India*, S.17 of India Divorce Act was challenged. The Kerala High Court held that personal laws do not fall under that purview of Fundamental Rights as they are outside scope of Art 13(1) as they are not laws as defined in Art 13(3)(b).

In fact Courts have not interfered because of sensitiveness of the people and delicate nature of issues involved, 'Laws in force' include laws passed or made by a Legislature

or competitive authority before the commencement of Constitution does not exclude any pre-Constitutional legislative enactments.

The Fundamental Rights are available only against the state. They cannot be enforced against private individuals. This has been elucidated in the case of *Vidya Verma v Shiv Narain* in which case the Supreme Court had held that violation of personal liberty by private individual was not within the purview of Art 21. Thus, the government recognized only the vertical application of Fundamental Rights. This decision seems to be anomalous as there are certain provisions in the Constitution itself which uphold the horizontal application of Fundamental Rights i.e. available against people inter se. (Also in *P.D. Shamdasani v. Central Bank of India.*)

Art 15(2) prohibits the state as well as private individual from discriminating against a person on grounds of religion, race, caste, sex or place of birth or any of them with regard to access to shops, hotels etc and all places of public entertainment, of public resorts, wells, tanks, roads etc. (Also Art 17)

In *Vishakha v. State of Rajasthan*, the Supreme Court laid down exhaustive guidelines for all employers or persons in charge of work place in the public and private sector in order to prevent sexual harassment of working women in places of their work until a legislation is enacted for this purpose. Thus, the employers were under the obligation to protect the fundamental rights of women under Art 14, 19 and 21.

The Supreme Court's decision in *Suresh Kumar Kaushal & Another v. Naz Foundation & Others* was an unprecedented ruling, deciding to turn the clock back to pre-July 2009, when LGBT persons were criminalized by section 377 of the Indian Penal Code