

**Judicial Review of Legislative Action: A Study with  
Special Reference to Landmark Judgments of Supreme  
Court of India (1950-1980)**

**A Dissertation Submitted to the Department of Political Science**

**In partial fulfillment of requirements for the degree of**

**MASTER OF PHILOSOPHY**



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### **DECLARATION**

I declare that the dissertation entitled, “**Judicial Review of Legislative Action: A Study with Special Reference to Landmark Judgments of Supreme Court of India (1950-1980)**” submitted by me for the partial fulfilment of the requirements for the award of the degree of **Masters of Philosophy (M. Phil)** in the **Department of Political Science, Central University of Haryana, Mahendergarh**. This dissertation is my own work and has not taken previously submitted for another degree of this or any other university.

**POONAM DEVI**

### **CERTIFICATE**

We recommend that this dissertation be placed before the examiners for evaluation.

**Dr. RAGHVENDRA PRATAP SINGH**

**Forwarded by:**

**Head of the Department**

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**POONAM**

## ABBREVIATIONS

- A or All. : Indian Law Report, Allahabad Series
- AC. : Appeal Cases
- ACJ : Accident Claims Journal
- A.H.C.R. Agra : Agra High Court Reports
- AI.Cr.R : All India Criminal Reports
- A.I.R. (A. or All.) : All India Reporter, Allahabad
- A.I.R. (B. or Bom.) : All India Reporter, Bombay
- A.I.R. (C. or Cal) : All India Reporter, Calcutta
- A.I.R. (L. or Lah) : All India Reporter, Lahore
- A.I.R. (M. or Mad.) : All India Reporter, Madras
- A.I.R. (N. or Nag.) : All India Reporter, Nagpur
- A.I.R. (O.) : All India Reporter, Oudh
- A.I.R. (P. or Pat.) : All India Reporter, Patna
- A.I.R. (P.C.) : All India Reporter, Privy Council
- A.I.R. (R. Rang.) : All India Reporter, Rangoon
- A.I.R. (S.) : All India Reporter, Sindh
- AL.J. : Allahabad Law Journal
- ALR : All Law Reporter
- Art. : Article
- A.W.N. : Allahabad Weekly Notes
- B.H.C. : Bombay High Court Reports
- B.L.R. : Bengal Law Reports
- Bom. : Indian Law Reports, Bombay Series
- Bom. L.J. : Bombay Law Journal
- Bom. L.R. : Bombay Law Reporter
- C. or Cal. : Calcutta Law Journal
- C.L.R. : Calcutta Law Reports
- C.W.N. : Calcutta Weekly Notes
- C.B. : Common Bench Reports
- C.B.N.S. : Common Bench Reports, New Series
- C.P. : Common Pleas

- C.D. : Chancery Division
- Cr. L.J. : Criminal Law Journal
- C.P.D. : Common Pleas Division, Law Reports
- East : East's Reports, King's Bench
- Exch. : Exchequer
- Ex. D. : Law Reports, Exchequer Division
- I.A. : Indian Advocate
- I.B.R. : Indian Bar Review
- I.C. : Indian Cases
- IJI : Indian Journal of International Law
- I.L.R. : Indian Law Reports
- I.P.J. : Indian Police Journal
- J.C.P.S. : Journal of Constitutional and Parliamentary Studies
- J.L.J. : Jaipur Law Journal
- K.B. : Law Reports, King's Bench Division
- L.R.C.P. : Law Reporter Common Pleas
- L.J. : Law Journal
- L.Q.R. : Law Quarterly Reporter
- L.R. : Law Reporter
- L.W. : Law Weekly
- L.R.H.L. : Law Reports, House of Lords
- L.T. : Law Times Reports
- M. L. J. : Madras Law Journal
- M.L.R. : Modern Law Review
- M.L.T. : Madras Law Times
- M.W.N. : Madras Weekly Notes
- M.I.A. : Moore's Indian Appeals
- Mys. L.J. : Mysore Law Journal
- N.L.J. : Nagpur Law Journal
- N.L.R. : Nagpur Law Reports
- N.W.P.H.C.R. : North Western Province High Court Reports
- O.C. : Oudh Cases

- O.L.J. : Oudh Law Journal
- O.W.N. : Oudh Weekly Notes
- P.C. : Privy Council
- P.L.J. : Patna Law Journal
- P.L.T. : Patna Law Times
- P.L.R. : Patna Law Reporter
- P.R. : Punjab Record
- Q.B. : Queen's Bench
- Q.B.D. : Law Reports, Queen's Bench Division
- Rat. Un. Cr.C : Rattan Lal's Un-reported Criminal Cases
- SA : Student Advocate
- SCC : Supreme Court Cases
- SCJ : Supreme Court Journal
- SCN : Supreme Court Notes
- SCR : Supreme Court Reporter
- SCWR : Supreme Court Weekly Reporter
- T.L.R. : Times Law Reports
- W.L.R. : Weekly Law Reporter

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- States of madras Vs V.G. Row. Dir 1952 SC 196, 200
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# **CHAPTER-1**

## **INTRODUCTION**

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Judicial Review basically is an aspect of judicial power of the state which is exercised by the courts to regulate the validity of a rule of law or an action of any agency of the state. In the legal system of modern democracies, it has very wide connotations, for example - the judiciary of India plays a very significant role as a protector of the constitutional values that the founding fathers have given to us. They try to undo the harm that is being done by the legislature and the executive. Judiciary also try to provide every citizen what has been promised by Constitution. All this is possible because of the power of judicial review.

Judicial review is a result of two fundamental features of Indian constitution. India is lucky enough to have a constitution in which the fundamental rights are preserved. This has arranged an independent judiciary as the guardian of the constitution and defender of the citizen's liberties against the forces of oppression.

Judicial Review is the power of judiciary, which is classified in two parts, as the first is the separation of powers between legislature, executive and Judiciary and the Second one is two level system of law with the constitution as the Supreme law and other legislation being the ordinary law. The exercise of each of these powers is a function of the Legislature, the executive and the Judiciary as a separate organ of the State. Deriving their powers from the Constitution, the legislatures in India enact statutes. There is the two-fold limitation on the validity of the statutes. The Legislatures must have the competence to enact them. Secondly, they must not conflict with the constitution. They would be invalid to the extent of their repugnancy with the constitution. 'Judicial Review' stands for something which is done by a court to examine the validity or correctness of the action of some other agency. Thus, Judicial Review indicates review of legislative actions to check its constitutional validity or its correctness. Under the constitution of India the Government is responsible to the parliament but the parliament, the president and the judiciaries are responsible to the constitution. All of them can exercise such powers as are given to them by the constitution. The court has to examine whether all the subordinate authorities of the constitution have exercised their powers within the

framework of the constitution. This is the way in which the constitution has enabled the courts to determine the state legislature by examining whether they are in accordance with the constitution.

### **Role of the Supreme Court of India and the supremacy of the constitution:**

In the constitution of India, the scope of judicial review has been widened. Unlike the U.S.A., in the constitution of India has made clear provision for judicial review. The scope of judicial review is shown in many articles of the constitution, like- 13, 32, 131-136, 143, 226 and 246 etc. That's why the concept of judicial review is directly rooted in Indian Constitution and in this shows that it is on a more solid than it is in U.S.A.

Judicial review in India is based on the assumption that the constitution is the supreme law of the land and all the governmental organs, which owe their origin to the constitution and derives their powers from its provisions, must function within the framework of the constitution. Under the Indian constitution there is a specific provision in Article 13(2) that "the state shall not make any law which takes away the rights conferred by Part III of the constitution that consist 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 provisions. It can be appreciated that the protection of the judicial review is crucially inter-connected with that of protection of Fundamental Rights, for depriving the court of its power of judicial review would be tantamount to making Fundamental Rights non-enforceable '*a mere paper provision*' as they will become rights without remedy. The following cases vividly demonstrate the nature, extent and importance of the role played by the Supreme Court of the Indian Union in protecting the supremacy of the constitution.

The Principle of Judicial Review in India for the first time highlighted in case of *Emperor Vs Burah* at the time of Privy Council. Supreme Court was established through the act of 1935, after Independence federal Court became the Supreme Court of India. Supreme Court of India is the guarantor and protector of the constitution. In the Indian constitution there is an express provision for judicial review, and in this sense, it is on a more solid footing then it is in America.

## **Judicial Review in India: Meaning and Constitutional Basis**

Judicial review is the power exerted by the courts of a country to examine the actions of legislative, executive and administrative arms of government and to ensure that such action conforms to the provisions of the constitution. *Khanna J* has observed that- in the fundamental Rights' case Judicial Review is 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 the statutes. If the provisions of the statutes are found to be violative of any of the articles of the constitution which is the touchstone for the validity of all laws the Supreme Court and High courts are empowered to strike down the said provisions.

*Edward S. Corwin* (2013) has said that- the judicial review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the state government, which in the courts opinion transgresses the constitution. *Zurcher* also has the similar view that- legislatures are prohibited by a written constitution or are in excess of powers granted by it and if so to declare them void and no effect.

### **Philosophy of Judicial Review-**

*Lord Acton* has said that – “*Power corrupts absolute and absolute power corrupts absolutely*” which ultimately resulted into tyranny. When *Montesquieu* gave his concept of separation of powers and it was about the check and balance on the power of the governmental organs on each other. He was intended to put a limit on absolute and uncontrolled power in any organ of the government. Indirectly Montesquieu has talked about the limitation on the use of absolute power by the governmental organs.

The concept of Judicial Review has the origin in the theory of limited government and in the theory of two laws by Locke, the father of liberalism. As he has talked about the constitutional democracy, which means that- all legislative authorities derive their power from the supreme law of the land, that is Constitution. It clarifies that Constitution as a supreme law which constitutes the source of all governmental organs. Any law which is made by legislative authorities' contravenes with the constitutional law has no validity.

## **Comparison between Indian and American Judiciary in Context of Judicial Review-**

In America Supreme Court or Judiciary assumed a power that grew more and more formidable in due course. The U.S. court has been called *third 'Chamber'* because it can upset decisions of the two chambers of congress. U.S. court has wide power of Judicial Review. In India there is an express provision for judicial review and in this sense it is on a more solid footing than it is in America. *Patanjali Shastri C.J.* in the *State of Madras Vs. V.G. Row*, (A.I.R. 1952 S.C. 196) observed, "Our constitution express provisions for judicial review of legislation so as to its conformity with the constitution unlike in America where the Supreme Court has assumed intensive powers of reviewing legislative acts under cover of the widely interpreted 'due process clause in the fifth and fourteenth amendments. If then, the courts in the country face up to such important and none too such important and none too easy task, it is not out of any desire tilt at legislative authority and a crusaders spirit, but in discharge of duty plainly laid upon them by the constitution. This is especially true as regards the fundamental rights as to which the court has been assigned the role of sentinel on the queue".

But while the basis of Judicial Review of legislative acts is far more secure under our constitution and its potentialities are much more limited as compared to that in U.S.A. This is due to the details provisions of the Indian constitution and the easy method of its amendment in contradistinction to the American's constitution's vague and general phraseology and the rigid method of its amendment. Thus under the power of Judicial Review the highest court of the Nation can test all pre constitution and post constitution or future laws and declares them unconstitutional in case they contravene any of the PART-III of the constitution.

### **Judicial Review under the Constitution of India:**

There are several specific provisions in the Indian constitution guaranteeing judicial review of legislation such as Article 13, 32, (131-136), 137, 143, 226, 145, 246, 251, 254 and 372.

**Article 13:** Article 13 specifically declares that any law which contravenes any of the provisions of the PART-III of fundamental right shall be void. But even in the absence of

the provision for the judicial review, the courts would have been able to invalidate a law which contravened any constitutional provision, for such power of judicial review follows from the very nature of constitutional law. In *A.K. Gopalan V. state of Madras*, Kania C.J. pointed out then it was only by way of abundant action that the framers of our constitution inserted the specific provision in Article 13. He observed: “In India it is the constitution that is supreme and that a statute law to be valid, must be in all its conformity with the constitutional, requirement and it is for the judiciary to decide whether any enactment is constitutional or not & High Court are”

### **Supreme Court and High Courts are the guarantor and protector of the constitution, under Article 32 and 226:**

“If I asked to name any particular article in the constitution as the most important article without which this constitution would be a nullity. I could not refer to any other article except this one. As It is the very soul of the constitution and the very heart of it” (Dr. Ambedkar).

**Art. 32 and 226 Judicial Review:** Basic features of constitution cannot be curtailed by act of parliament and constitutional provision- In landmark Judgment in “*State of W.B.V. Committee*” for protection of Democratic Rights west Bengal”.

**Art 32 (1)** consist the right to move to the Supreme Court for the enforcement of the fundamental rights conferred by part-III of the constitution clause (2) of the Article 32 confers power on the Supreme Court to issue appropriate directions or orders or writs as - habeas corpus, mandamus, prohibition quo- warranto of any of the rights conferred by PART-III. These same powers are exercisable by the High Court in the States.

**Article 257 and 254** says that in the case of contradiction between union and states laws, the state Laws shall be void. Article 245 is about the powers of both Parliament and State Legislature’s relations.

The constitutional validity of a law can be challenged on the ground that the Subject matter of the legislation.

- (a) Is not within the competence of the legislature which has passed it,
- (b) Is repugnant to the provisions of the constitution, or

(c) It infringes one of the fundamental rights.

**The basic function of the court is to adjudicate (Articles 131-136) disputes:**

(1) Among the states and the Union,

(2) While so adjudicating, the courts may require to interpret the provision of the constitution and the laws, and the interpretation given by the Supreme Court becomes the law privileged by all courts of the land.

**Writ Jurisdiction of the Courts:**

In the case of violation of the fundamental rights in Part III of the Indian Constitution special remedies have been provided. According to Article 32 (2) of the Constitution the Supreme Court has the power to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, which ever may be appropriate, for the enforcement of any of the fundamental right. As well, according to Article 226 every High Court shall have the similar jurisdiction for the enforcement of the fundamental rights and also for the enforcement of any other purpose throughout the territory in relating to which it exercises its jurisdiction.

There are two main differences between writ jurisdiction under Articles 32 and 226. Firstly, the right to move the Supreme Court under Article 32 is itself a fundamental right and thus, in such condition ordinarily the Supreme Court cannot refuse to grant this remedy.<sup>1</sup> However, the right to move the High Court under Article 226 is not itself a fundamental right. The remedy provided in Article 226 is a discretionary remedy and cannot be claimed as a matter of right. Secondly, the remedy provided under Article 32 is available only for the enforcement of the fundamental right guaranteed by part III of the Constitution while the remedy provided under Article 226 is available for the enforcement of the fundamental rights and also for the enforcement of any other purpose. Thus, the writ jurisdiction of the High Court is wider than of the Supreme Court.<sup>2</sup> Article 226 (4) makes it clear that the power inferred on the High Court by Article 226 shall not be in contravention of the power inferred on the Supreme Court by Article 32 (2).<sup>3</sup>

In a landmark decision of *L. Chandra Kumar v. Union of India*,<sup>4</sup> the Supreme Court held that the power of judiciary over legislative action vested in the High Courts under Article

226 of the Constitution is basic feature of the Constitution and therefore it cannot be ousted or excluded even by way of a Constitutional Amendment. Accordingly, the Supreme Court declared Clause (2)(d) of Article 323-A and Clause(3)(d) of Article 323-B<sup>5</sup> as unconstitutional to the extent that they excluded the jurisdiction of the High Courts over the Service Tribunals established under the *Administrative Tribunal Act, 1988*. The Court made it clear that while the jurisdiction of the High Courts cannot be ousted these tribunals will continue to function and perform a supplemental role in discharging the powers conferred by Articles 226, 227 and 32 of the Constitution. The tribunals are competent to test the validity of statutory provisions and rules. The result of the decision is that now it will not be possible for a person to move the Supreme Court directly from a decision of a tribunal, without first going to the concerned High Court. In this respect, the aggrieved person has got another remedy by way of a writ-petition before the concerned High Court. Thus, what was earlier two-tier litigation has now become three-tier litigation.<sup>6</sup>

The remedies of violation of fundamental rights should be sought within a reasonable time. Laches or unreasonable or unexplained delay in instituting writ petition entail refusal to issue a writ.<sup>7</sup> Nevertheless, delay is no bar to writ of quo warranto.<sup>8</sup> In *D.R.L.R.C. v. Dt. Board*,<sup>9</sup> refusal for delay was described as a rule of practice. Writs in the Indian legal system are as follows:

### **Habeas Corpus-**

Habeas Corpus is a prerogative writ by which a person, who is confined or detained by any authority or person, can apply to the Court and the Court may issue an order to produce the person, so confined and detained, before the Court. However, it is the duty of the Court to set free an individual when once the Court comes to the conclusion that there has been violation of the constitutional provisions.

In view of Article 21 of the Indian Constitution, the constitutionality of the very statute under which the person has been arrested or detained can be challenged in the proceedings of habeas corpus.<sup>10</sup> Thus the question for a Court, deciding a habeas corpus case, is whether the person is lawfully detained. If the Court holds that he is illegally detained, it will have to issue the writ of habeas corpus as it is a fundamental right guaranteed to a citizen of India under the Constitution.

It should also be noted that the Constitution of India has narrowed down the scope for the issue of the writ of habeas corpus by empowering the Legislatures to enact laws under Schedule VI,<sup>11</sup> like the *Preventive Detention Act*, etc.

### **Quo Warranto -**

Quo warranto is a prerogative writ to prevent a person who has wrongfully usurped an office from continuing in that office. This writ calls upon the holder of the office to show the court under what authority he holds that office. In India the writ of *quo warranto* has been used for two purposes, namely in cases of (a) usurpations of a public office, which is filled by appointment (b) election to a public office, including office in a public corporation. In *G.D. Karkare v. T.L. Shevde*<sup>12</sup>, it was held that this writ will lie regarding a public office of a substantial nature. However, in *Jamalpur Arya Samaj v. Dr. D. Ram*,<sup>13</sup> it was held that the writ will not be issued against offices of private nature.

Ordinarily the power under Article 226 is exercisable for the enforcement of a right or performance of a duty at the instance of the person who has been personally affected. However, an application for the writ of quo warranto challenging the legality of an appointment to an office of a public nature is maintainable at the instance of any private person, although he is not personally interested or aggrieved in the matter. In *G.D. Karkare v. T.L. Shevde*,<sup>14</sup> the *Nagpur High Court* has reiterated this principle.

### **Mandamus-**

The prerogative writ of mandamus can be issued for the enforcement of fundamental rights and for the redress of any injury of a substantial nature arisen due to some illegality or due to contravention of any other provision of the Constitution when an applicant whose rights are infringed applies for it. The object of the writ of mandamus is only to compel any public authority, including administrative and local bodies to act. This writ will not be issued to correct an error or irregularity in the judgment of a court, which could be corrected by appeal or revision,<sup>15</sup> where effective and convenient remedy is provided by the statute that created the right which is infringed;<sup>16</sup> where the aggrieved party would get an adequate remedy by an ordinary action<sup>17</sup> in the civil court. The writ of mandamus will not be granted against some persons as follows: (a) The President or the Governor of a State for the exercise and performance of the powers and duties of his



office, (b) Against the Legislature,<sup>18</sup> (c) Against persons who are not holders of public offices,<sup>19</sup> (d) Against an inferior or ministerial officer who is obeying the orders of his higher authority.<sup>20</sup>

## **Prohibition**

Prohibition is a prerogative writ, issued by a superior court to an inferior court, directing the inferior court not to exceed from the limits of its jurisdiction in the performance of its judicial duties.<sup>21</sup>

Prohibition is a prerogative writ, issued by a superior court to an inferior court, directing the inferior court not to exceed from the limits of its jurisdiction in the performance of its judicial duties.<sup>22</sup> Under the Constitution of India, the Supreme Court and all High Courts are given powers to issue the writ of prohibition. This writ issues out of the High Court to prevent an inferior court or tribunal, judicial or quasi-judicial, from exceeding its jurisdiction or acting contrary to the rules of natural justice, e.g., to prevent a judge from hearing a case in which he is personally interested.<sup>23</sup> Writ of prohibition will issue to prevent the tribunal from proceeding further when the inferior court or tribunal proceeds to act- (a) without<sup>24</sup> or in excess of jurisdiction,<sup>25</sup> (b) in violation of the rules of natural justice,<sup>26</sup> (c) under a law which is itself ultra vires or unconstitutional,<sup>27</sup> and (d) in contravention of fundamental rights.<sup>28</sup>

## **Certiorari-**

Certiorari is a prerogative writ whereby the superior courts restrict the lower courts and courts of special jurisdiction from exceeding their function as prescribed by law. Under the constitutional provisions the writ of *certiorari* can be issued by the Supreme Court and all High Courts for mainly two purposes: in the first instance for the enforcement of fundamental rights and in the second instance for the redress of any injury of a substantial nature.

In *T.C. Basappa v. Nagappa*,<sup>29</sup> Justice *Mukherjee* said, that this is one of the fundamental principles in context of the issuing of a writ of certiorari is that the writ can be take only to remove or adjudicate on the validity of judicial acts.” In *Praboth Verma v. Uttar Pradesh*,<sup>30</sup> the Supreme Court has emphasized that a writ in the nature of certiorari is a wholly inappropriate relief to ask for when the constitutional validity of a

legislative measure is being challenged. In such a case, the proper relief to ask for would be a declaration that a particular law is unconstitutional and void. If a consequential relief is thought necessary, a writ of mandamus may be issued restraining the state from enforcing or giving effect to the provisions of the law in question.

Both the writ of prohibition and certiorari are available against the same class of persons, namely authorities exercising judicial or quasi-judicial powers. They are issued practically on the similar grounds of “*defect of jurisdiction*” and violation of fundamental rights or unconstitutionality. The main difference between the two is that certiorari is issued to quash a decision after the decision is taken by a lower tribunal while prohibition is issuable before the proceedings are completed. The object of prohibition is prevention rather than cure. For example, the High Court can issue prohibition to restrain a tribunal from acting under an unconstitutional law. However, if the tribunal has already given its decision then certiorari is the proper remedy in such a situation. It may be that in a proceeding before an inferior body, the High Court may have to issue both prohibition and certiorari, prohibition to prohibit the body from proceeding further, and certiorari to quash what has already been done by it.<sup>31</sup>

### **Statement of Problem-**

The Glorious Revolution of 1688 ushered in the era of legislative supremacy according to which the laws enacted by parliament shall have supremacy and no individual or institution shall have the authority to review the laws of Parliament. From this time onwards the scope of judicial Review was abandoned in respect of legislative actions and its scope was restricted to the review of administrative actions only. In respect of judicial action however the review power in English legal system is confined to such of the matters which are covered by due process and call for the issue of a prerogative Writ or order from the Court. But in India this is not the case. The Courts continue to review every form of State action, be it legislative, administrative or judicial action. Further in the sphere of legislative action, the courts put their shackles of review whether the rule is a constitutional amendment, a statute, order, ordinance, regulation or anything else.

These are the some kinds of problems which will be try to solve by researcher related to their research work:

- Whether the power of judicial review of Courts are consistent with the idea of constitutional democracy established in India.
- Whether the exercise of power of judicial review by courts in India has been within the permissible limit under the constitution of India.
- Whether the exercise of power of judicial review by courts resulted in to nourishment of parliamentary democracy in India

In short, the courts have to exercise their power of judicial review for the purpose of upholding the rule of law, the sovereignty of the Republic and the principles of socialism, human rights and good governance.

### **Literature Review-**

1. **J. B. Thapar (1893)** has said that- “the great task of Judicial Review is not, and cannot, indeed, be confined to the ‘annulment of legislative direction, or to fixing the outside border of reasonable legislative action’”.
2. **J Frankfurter (1940)** defined “Judicial Review, itself a limitation on popular government, is a fundamental part of our constitutional system”.
3. **S. N. Mukherjee (1951)** recommended that- “reasonable be removed as a qualification for restrictions on the other freedoms, apparently believing that if none of the freedoms were so protected, consistency in the article would preclude Judicial Review of restrictions on speech”.
4. **Patanjali Shastri C.J. (1952)** observed, “Our constitution express provisions for judicial review of legislation so as to its conformity with the constitution unlike in America where the Supreme Court has assumed intensive powers of reviewing legislative acts under cover of the widely interpreted ‘due process clause in the fifth and fourteenth amendments. If then, the courts in the country face up to such important and none too such important and none too easy task, it is not out of any desire tilt at legislative authority and a crusaders spirit, but in discharge of duty plainly laid upon them by the constitution. This is especially true as regards the fundamental rights as to which the court has been assigned the role of sentinel on the queue”.
5. **M. P. Jain (1963)** has said that- “the validity of legislation is not determined by the degree of invasion into the fields assigned to the other legislature, once it is found,

that a law falls within a permitted field, any incidental encroachment by it on a forbidden field does not affect the competence of the legislative to enact the law”.

6. **A. T. Thomas (1966)** defines that- “Judicial Review affirms as well as negates; it is both a power- releasing and power- breaking function”.
7. **Gurram Ramchandra Rao (1968)** has quoted that- “Judicial Review is the concept of accountability in any republican democracy, and this basic theme has to be recommended by everybody exercising public power irrespective of the extra expressed expositions in India”.
8. **V.S. Deshpande (1975)** considered that- India has a written constitution and Supreme Court of India’s Act as the guardian of the constitution. That’s why, judicial review of legislation acquired great importance. A legislation can be nullified by the court if it is inconsistent with the constitution and according to him, judicial review of legislation has two aspects that one is foundational course of study and its objective in nature and concerned with the exercise of the judicial function and its connection with the legislative function and other aspects of the philosophy of constitution as different point of view.
9. **V. S. Shekhawat (1994)** has defined that -“Judicial Review is an important component of the Indian constitutional system, meant to protect the ramparts of various freedoms. It also performs the cardinal function of preventing encroachments into each other’s sphere of authority in the case of institutions”.
10. **Justice J.N. Bhagwati (1994)** has defined that- “the judges in India have fortunately most potent judicial power in their hands namely-the power of Judicial Review. The Judiciary has to play vital and important role not only in perceiving the remedying abuse and misuse of power but also eliminating, exploiting and injustice”.
11. **Dawn (2009)** reveals that –“the Judicial Review is the process whereby an apex court interprets a law and determines its’ Constitutional status. If the judiciary finds that a given piece of legislation is in conflict with any provision of the constitution, it may strike down the same”.
12. **Amartya Sen (2009)** says, the justification for protecting fundamental is not on the assumption that they are higher rights, but the protection is the best way to promote a just and tolerant society.

13. **Sunny Jindal (2010)** has defined that- “for ensuring social justice and for safeguarding the fundamental rights of citizens and arbitrary power of legislative and administrative power of judicial review is must”.
14. **Sameer Sharma (2011)** has concluded that- “apex court referred that no doubt legislature cannot over rule a decision of the court or render at ineffective. It can only change the law or alter the law according to the limitations of the constitution. However the judiciary as the guardian of the constitution and it is the duty of the court to review the competence of law enacting power of the judiciary”.
15. **Sanjay S. Bang (2012)** said that- “Constitution is the supreme law of the land and this is the big responsibility of Judiciary to maintain the spirit of the constitution by the use of power of Judicial Review”.
16. **Edward S. Corwin (2013)** has said that- the judicial review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the state government, which in the courts opinion transgresses the constitution<sup>6</sup>.

### **Hypothesis-**

1. Judicial Review power of the court is essential for functional constitutional democracy. There is no inconsistency between the judicial review power and the constitutional democracy. The judicial review makes the elected government accountable to the constitution and the rights of the people.
2. The court’s power of judicial review is based on the constitutional provisions however the court’s exercise of the power of judicial review has not always been same. In the post emergency period, the court became more assertive in defending the fundamental rights of the peoples by exercising this inherent power of the judicial review.
3. The Court’s intervention through the judicial review power has increased the credibility of the independent judiciary in India, that is the *sine qua non for the constitutional democracy*.

### **Objectives of the Study:**

1. To study the nature and constitutional basis of judicial review in India.
2. To study the effect of judicial review on the implementation and enforcement of fundamental rights in India.
3. To study the changing contour of judicial review in India.

### **Research Methodology:**

This research work is a qualitative, analytical and descriptive work. The researcher will undertake doctrinal analytical study of the judicial review in India by examining various landmark judgements. It will be supported by Secondary sources such as official government and other Judicial documents, reports, Judicial cases, books, articles, journals and newspapers, readings, seminars, lectures, documents and reports released by different national or international organizational bodies relevant to the research on the related issue.

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- <sup>3</sup> D.,D. Basu, Article 32 supra note 414, pp. 121-24.
- <sup>4</sup> AIR 1997 SC 1125.
- <sup>5</sup> Ins. By the Constitution (42nd Amendment Act), 1976, sec. 46 ( w.e.f. 3-1-1977).
- <sup>6</sup> Pandey, supra note 416, pp. 528.
- <sup>7</sup> Trilok Chand v. Munshi, AIR 1970 SC 898; Ramachandra v. State, AIR 1974 SC 259, 265; Bhaskar v. State Andhra Pradesh, (1993) 24 ATC 842.
- <sup>8</sup> Kashinath v. Speaker, (1993) 2 SCC 703, paragraphs 34-36.
- <sup>9</sup> (1992) 2 SCC 598.
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- <sup>11</sup> The Constitution of India, Schedule VII, list I, Entry 9; List III, Entry 3.
- <sup>12</sup> AIR 1952 Nag 330; see also Hamid Hassan v. Banwari Lal Ray, AIR 1947 PC 90.
- <sup>13</sup> AIR 1954 Pat 297.
- <sup>14</sup> AIR 1952 Nag 330; also see Biman Chandra v. Governor of West Bengal, AIR 1952 Cal 799.
- <sup>15</sup> Vishwanath v. Second Additional District Judge, AIR 1951 Nag 6.
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- <sup>17</sup> Moti Lal v. State of U.P., AIR 1951 All 257, 265 FB.
- <sup>18</sup> Chotey Lal v. State of U.P., AIR 1951 All 228.
- <sup>19</sup> Laxman v. Rajpramukh , AIR 1953 MB 54.
- <sup>20</sup> Babul Chandra, Re, AIR 1952 Pat 309, 311.
- <sup>21</sup> Babul Chandra, Re, AIR 1952 Pat 309, 311.
- <sup>22</sup> Shrirur Mutt v. Commissioner, AIR Mad 613, 617.
- <sup>23</sup> Shantaram D. Salri v. M.M. Chudama, AIR 1954 Bom 361.
- <sup>24</sup> East India Commercial Co. v. Collector of Customs, AIR 1962 SC 1893.
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- <sup>26</sup> Manak Lal v. DrPrem Chand Singhvi, AIR 1957 SC 425, 431.
- <sup>27</sup> Sales Tax Officer v. BudhPrakash, AIR 1954 SC 459: (1955) 1 SCR 243.
- <sup>28</sup> Bidi Supply Co. v. Union of India, 1956 SCR 267, 277-B.
- <sup>29</sup> AIR 1954 SC 440.
- <sup>30</sup> AIR 1985 SC 167: (1984) 4 SCC 251.
- <sup>31</sup> Pandey, Jai Narayan, (1997), Constitution of India, Allahabad Central Law agency p.397, pp. 427.

## **CHAPTER-2**

### **JUDICIAL REVIEW OF LEGISLATIVE ACTION IN INDIA**

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Judicial review defined as protector and guarantor of the Indian constitution. Judicial review is the symbol of rule of law. Judicial review can be found in every constitution of the world whether it is written or not. In Indian constitution but Indian constitution follows the rule of law separation of power and supremacy of the constitution judicial review of basically concerned with the scrutiny of legislature acts as well as administration action in such as country like India, the importance of judicial review of legislation is manifested in Indian constitution. A legislation can be declared null and void by apex court, if it is not according to the constitution. It is the duty of the court to decide the validating of legislation acts.

The constitution gives power to the legislature to enact legislation. V.S. Deshpande observed that- in so far as the legislation is without such competence, it would be unconstitutional for the some reason that executive action is illegal for want of jurisdiction. "The concept evolved by many factors like supremacy of the constitution and socio economic conditions of the country and the idea and concept of party forming the government and the particular fact giving rise to the need for legislation".<sup>1</sup>

Extreme deference to legislative actions or weak form of Judicial review appears to be problematic to *Rosalind Dixon*. She opines that pure legislative supremacy might often produce consequences that fall short of inclusive and responsive constitutional power. According to Dixon, the power should be rest with the court to preserve the right of common people that the thereby justifying the strong form of judicial review.<sup>2</sup>

Judicial review of legislative action is the result of the most important tendencies of the Indian constitution which is directly talked about supremacy of the constitution and Supreme Court is final arbiter and protector of the fundamental right of the citizens and other legislation being the ordinary law which is valid only in so far as consistent with the constitution. The second is the separation of the legislative the executive and judicial powers of the state. And legislature also derived powers from the constitution itself an a federal constitution, constitution is supreme and legislature is bound to enact laws and



statutes according to the spirit of the constitution and judiciary has power to declared nullify laws and statues to the constitution.<sup>3</sup>

### **Relation between Legislative Action and Administration Action:**

Today the state acquired the character of welfarist that is why tremendous increase in the state activities and has become necessary to confer discretionary power on the administrative authorities so that they may be able to meet the emergent situations in the public interest promptly and efficiently. The discretionary power, if not controlled properly, may be misused and may affect the right of the people adversely. Responsibilities of legislature borne by the administrative authorities' due to the lackness of time and border. The Supreme Court has made it learn that there has to be room for discretionary authority within the operation of the law ever though it has to be reduce to the minimum extent necessary for proper governance.<sup>4</sup>

### **Judicial Review of Administrative Action:**

The system of judicial review Administrative action has been inherited from Britain. It is on this foundation that the Indian courts have built the superstructure of control mechanism. The whole law a judicial review of administrative action has been developed by judges on case-to-case basis.

### **The Grounds and extent of Judicial Review of Administration and Legislative action:**

- (i) Abuse of power conferred by legislature and administrative authorities:-In present scenario, the legislative and administrative authorities are conferred wide discretionary powers. There is a great need of their control, so that they may not be misused. The power of legislature and administrative authorities should be followed by the constitutional norms and frame work. That is why, it is necessary for controlling the power of legislature and administrative authorities.<sup>5</sup>

If legislative authorities and administrative authorities are not to act accordingly constitutional framework. It is duty of the Supreme Court as an guardian of constitution to safeguard the constitutional power conferred on legislature and delegated legislation and administrative authorities to follow the just and fair procedure and it is not so, it will amount to abuse of power. If the power is used for another purpose other than one which

it has been given it will be taken as abuse of power and court will declare it invalid even if it has been done in good faith or in the public interest.

### **Mala Fide or bad Faith:**

If the legislature and administrative authorities are doing or making some law with the intention for harming the nature of constitutional framework and against the spirit of the rule of law court can quashed the act or order.

In *State of Punjab V. Gurdialsingh* (A.I.R. 1980 SC 319) the petitioner challenged the land acquisition proceedings for acquiring his land for Mahdi on the ground that the proceedings were started at the behest of a minister to satisfy his personal vendetta against the petitioner. The court accepted his contention and quashed the proceedings on the ground of mala-fide.<sup>6</sup>

In other case '*express newspapers Ltd. V. Union of Indian*', the central government's notice of re-entry upon forfeiture lease under *Delhi Municipal corporation Act, 1957* was held to be invalid on the ground of mala-fide as it was issued to silence the newspaper and was politically motivated. The burden to prove mala fide is on the person who wants the order to be quashed on the ground of mala fide.

### **Unreasonable use of Power-**

The discretionary power is required to be exercised by the authority reasonably. If it is exercised unreasonably, it will be declared invalid by the court every authority is required to exercise its power with reasonability. In a case lord wrenbury has observed that a person in whom invested a discretion must exercise his discretion upon reasonable grounds. Where a person is conferred discretionary power, it should not be taken to mean that he has been empowered to do what he likes merely because he is minded to do so.<sup>7</sup>

In another case, *Lord Denning* has observed that "although the planning authorities are given wide powers to impose such conditions as they think fit, nevertheless law says that those conditions to be valid, must be fairly and reasonably related to the permitted development."

In Indian case like *Sant Raj v. O.P. Singh* (A.I.R 1985 SC 677) the court has made it clear that when it is said that the authority has discretion to do something, it should be

taken to mean that the authority must do it according to the rules of reason and justice and not according to private opinion.<sup>8</sup>

In *C.I.T.v. RadhaKishan* it has been held that the court will interfere only if the decision is so increasable that no reasonable man could have even come to it.

### **Concept of Rule of Law and Article 14 of the Indian constitution-**

Rule of law plays very important role in modern democratic institutions without this, we cannot imagine the rights of the citizens. As a judiciary is guarantor and protector of constitutional right under the written constitution. The expression 'Rule of Law' has been derived from the French phrase 'la principle de legality' i.e. a government based on the principles of law.

It was expounded for the first time by *Edward Coke*, and was developed by *Prof. A.V. Dicey* in his '*The Law of the constitution*' (1885) rule of Law can be direct translated to rule according to law. It requires the government to exercise its powers in accordance with established and clearly written rules, regulations and legal principles. Constitution is a rule of law however not all constitution follows the theory of rule of law. It shall be define as the balance of government power with the protection of human rights. *Aristotle* once said that "*The rule of Law is better than that of any individual.*"<sup>9</sup> British jurist A.V. Dicey popularized the rule of Law and emphasized there aspects as following-

#### **First is that:**

- (1) No one can be punished or made to suffer in body or goods except for a clear breach ranch of law proved in an ordinary court.
- (2) Nobody also should be given too wide on arbitrary power or discretionary power.
- (3) No one is above the law and everyone is equal before the law regardless of social economics or political status and they are subjected to the same court of the land and the results of judicial decisions are better protectors of the rights of private persons.
- (4) Indian constitution also follows the rule of law by incorporating article 14 article envisages that no person shall be discriminated on the basis of sex, religion, race, place of birth.

**Article 14** of the constitution guarantees equality before law and equal protection of law. However, & reasonable ground of distinction. The action will be taken as arbitrary and against Article 14. Actually Article 14 prevents arbitrary discretion being vested in the executive.

The Supreme Court of India has further strengthened this mechanism through its various judgments the foremost of them being, *ADM Jabalpur v. Shivkanth Shukla*, the question before the court was whether there was any rule of Law in India apart from article 21. This was enforcement of article 14, 21 and 22 during the proclamation emergency. The answer of majority of the bench was in negative for the question of law. However *Justice H.R. Khanna* dissented from the majority opinion and observed that:-

"Even in absence of Article 21 in the constitution, the state has got no power to deprive a person of his life and liberty without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning ..... rule of Law is now accepted of all civilized societies."

If the statute confers discretionary powers, the exercise of the discretion powers, it must contain clear legislative policy or guidelines, it will be against Article 14 and the way in which it is applied will be immaterial.

### **Separation of Powers and Judicial Review:**

The Separation of Powers means the power distribution between Legislature Executive and Judiciary by constitution itself. It plays very important role in federation. The principle propounded by the French political thinker Montesquieu. In the judgment of elaborately discussed in the Judgment of "Divisional Manager, *Aravali Golf Case V. Chander Haas* (2000)1 Sec."

Indian Judiciary and U.S. Judiciary borrowed this idea from the British Legal system. India and the United States of America are both no exceptions to this rule. As a result, the written constitutions of both countries, though differing greatly in length the Indian constitution is the longest one in the world, whereas the American constitution is the shortest constitution, but both countries here federal constitutions so that there is always need checks and balances Both have a set of constitutional rights based on the natural rights propounded by John Locke that gave birth bill of rights in American constitution

and Indian constitutional makers were much concerned about the inclusion of fundamental rights in constitution. Furthermore, both constitution's guarantee equality, freedom of speech and religion and life and liberty through their respective chapters on inalienable rights.<sup>10</sup>

It is important to both that both societies are also fundamentally similar. India and the United States of America have immense diversity of every kind. In India there are so many caste's, religions, languages etc. For securing their rights judiciary should be strong and Independent. Without the power of judicial review, freedom of citizens and rights cannot secure from the encroachment by legislature and Administration.

### **Due process of Law and procedure established bylaw: Changing approach of the Court-**

#### **Due process of Law-**

Due process of law followed by the American constitution. This feature enabled the American Judiciary so strong that is why it considered as the most powerful judiciary of the world. It means procedure should be just, fair and according to the Natural justice. State cannot use the arbitrary action against the freedom and liberty of the common man. Judicial review is a tool in the hands of the Supreme Court to check the validity of the law enacted by the legislature. It should be fair and justiciable.

In this the court or judiciary would assess that whether there is, law or not, whether the legislature is competent to form the law and it followed the procedure laid down to legislate and would not assess the said law.

If Supreme Court or apex court finds that any law made by legislature is not fair and not according to the natural justice, it will declare null and void. The principle is protected by the power of Supreme Court to check the validity of the power used by legislature or competent authority.

Under this principle it is the legal requirement that the state must respect all of the fundamental rights like personal liberty and liberty owed to a person by the constitution itself. It recognized Supreme Court as the guarantor and protector of the rights of citizen. It is duty of the judiciary to protect the constitution from the arbitrary power of the state

and also maintained the supremacy of the constitution. The feature supports of the power of judicial review.<sup>11</sup>

### **Procedure established by Law:**

Procedure established by law term used in Article 21 of the constitution. According to this article nobody should be deprive his/her life and personal liberty except according to the procedure established by law. The expression 'procedures established by law article 21 of the Indian constitution means that a person shall be deprived of his life or liberties by competent legislation'.

The expression "procedure established by Law" means procedure laid down by statute or procedure prescribed by the law of the state. Article 21 was confined to life and personal liberty and did not recognize property. Constitutional makers of the Indian constitution were much concerned about the extensive use of judicial review because Indian constitution follows the rule of law and separation of powers: while doing so, they unknowingly made the valuable fundamental right to life and liberty entirely dependent on the goodwill of the legislature. Intervening in this debate **Dr. B.R. Ambedkar** emphasized that-

“The question of due process raises in my judgment the question of the relationship between the legislature and the judiciary to decide. Whether any particular law passed by the legislature is ultra-virus in reference to the power of legislation which are granted by the constitution to the particular legislature..... the due process clause in my judgment, would give the judiciary the power to question the law is in keeping with certain fundamental principles relating to the right of the individual. In other words, the judiciary would be endowed, with the authority to question the law not merely on the found whether the law not merely on the ground whether the law was good law, apart from the question of the powers of the legislative making the law the question now raised by the introduction of the phrase due process is whether the judiciary should be given the additional power to question the laws made by the state on the ground that they violate certain fundamental mental principles”.<sup>12</sup>

The procedure established by law phrase in now acquiring the character of due process of law. After the decision of Supreme Court of India in '**Maneka Gandhi case**' and in this

case Judiciary held that procedure established by law meant procedure should be fair and just . This decision reversed the meaning of procedure established by law and introduced for the first time the grand can of due process of law.

But before Maneka Gandhi, Supreme Court strictly followed the principle of procedure established by law in A.K. Gopalan case and *A.D.M. Jabalpur vs Shiv Kant Shukla Case*, but through judicial activism, it supports the due process of a law and law should be fair and justiciable.

As detailed earlier in this work that power to ensure that a law passed by legislature is valid or not, vested in the Supreme Court and High Court and for this reason of Judicial Review of legislation is very important in federal country like India and it is relevant to maintain the working of the constitution.<sup>13</sup>

The legal implications of judicial review of legislation by the apex court in "*L.G. Row V/s Union of India* (A.I.R. 952 SC 1965)". In this case, It was declared by Supreme Court that "Our for Judicial Review of legislation as to like as America, where the Supreme Court has assumed extension under court of the widely interpreted Due process" clause in fifth and fourteenth amendment. As rightly observed in this case that the provision for Judicial Review of Legislative Action in the constitution of India, it is for safeguarding the fundamental Right of the citizen and challenged an impugned statute which is not according to the scheme of the construction.

And in another case, Judicial pronounced the relevancy and validity of their principles and power of the judiciary to declare the validity of laws made by the Legislature. In famous case *Minerva Milles V/s Union of India*, A.I.R. 1981 SC 1787 held that "Our constitution is founded on a nice balance of power amongst the three organs of the state namely legislature, executive and judiciary. It is the function of the judges and their duty to declare the validity constitution. If the court have legislation, there is no relevance of fundamental rights of the citizens because judiciary can't control the arbitrary power of legislature.

And cannot maintain the supremacy of the constitution. The legal position of Judicial Review in reference of Supreme Court and High Court to the Judicial Review the legislation action as decided in *L. Chendra Kumar V/s Union of India*, A.I.R. 1997 SC 1925. In this case the question confronted with Supreme Court that constitutional Validity of the Art. 323 (2) (d) and Art. 323(b)(d) of the constitution, which exclude the

jurisdiction of all courts except that of the Supreme Court under Art. 136 of the constitution, in respect of disputes and complaints referred in Arts 323A (1) or 323(B) 323 B (2) of the constitution.

Decisions made in different cases by Apex court, in landmark judgments manifested have been dealt with the power to test the validity of the legislation and this power is a part of the basic structure of the constitution. In this powers of judicial review, courts not only check the validity of the legislation action but also check whether impugned or arbitrary legislation has contradicted with the constitution.

New trend of legislature to overrule the decision of judiciary by new legislation, this is also the major setback in the arena of judicial review of legislation. "Because of this trend of legislation's competence to enact a new law or amend on existing law so as to overrule or making ineffective a judgment or decision of court. *Article 141* of the constitution declares that law declared by Supreme Court shall be binding on all courts within the territory of India. Article 144 of the constitution declares that all authorities civil and judicial in the territory of India shall act in the aid of the Supreme Court. This means that all authorities in India cannot disobey the guidelines and decisions of the Supreme Court. This article shows that the aim of the constitutional makers was that harmony should be maintained between the three organs of the state and also maintained the supremacy of the constitution because India constitution is supreme rest with the people of India.<sup>14</sup>

In *Municipal corporation of the city of Ahmedabad v. New Shorckspg and wvy.Co. Limited* A.I.R. 1970 SC 1292, in this case, Supreme Court declares that, "No legislature in this country has the power to ask instrumentalities of the state to disobey or disregard the decision given by courts."

Different decisions made by the apex court revealed that legislature cannot directly overrule the decision of the Supreme Court and High Court, but it has power to make the decision was rendered, consistent with the law of the constitution and the legislature must have power or competence to make the such laws conformity with the constitution.

But there can be no end of such legislation and judiciary being the guardian of the constitution and protector the fundamental rights of the people will continue to fulfilled its duties as the spirit of the constitution.<sup>15</sup>

Judicial Review of Legislation with respect to social and economic justice in India has attracted many legal scholars as well political science scholars. The court's review of



socio-economic justice as well as social and economic rights of the people termed as judicial Activism and it is desirable in a democratic country like India. Judicial Review is designed to improve the social and economic justice as well as political justice by securing the violation and infringement of the right of the citizens. Sometimes the interaction of judiciary in the arena of rulemaking power of legislature is considered as the infringement of separation of powers. Therefore, it is necessary for courts to explore the limitation of their intervention for maintaining the harmony among the three organs of the state.

The Indian position with respect to Judicial Review of legislation in context of socio-economic rights as rule as justice. In this context there are number of cases where Indian judicial has played very important role for safeguarding the socio-economic rights by different decision like many environmental law case where the judiciary has enforced social rights under the arena of fundamental rights.

As *M.P. Jain* observed, the scope the judicial review is narrow in India as compared to USA. The fundamental right in Indian constitution are precisely worded with the restrictions demarcated unlike its U.S. counterpart where a vast power its granted to the judiciary. It is presumed that the constitution makers were apprehensive that the court will be raised to the level of super legislature of such open ended power is vested in the judiciary. In "Keshavanend Bharti case, justice Khenna was of the opinion that the power of Judicial Review has to be exercised as long as the fundamental rights exist in India. And in *minerva Mills Ltd. V. Union of India* (A.I.R. 1980 S.C. 1789), the minority judgment delivered by *Justice J.N. Bhagwati* cleared the picture that it is the duty of the Judiciary to uphold the constitutional values and also enforce the constitutional limitations.

When the legislature chocks a law which is in contravention to part IV of the constitution, the judiciary might exercise its week from of review and entice a deliberation that the provisions of the act violate the basic scheme of the constitution.<sup>16</sup>

### **Limitations of Judicial Review-**

It is right that courts have the powers of judicial review of constitutions and statutory provisions. But these powers can be exercised by the courts with great caution and sag control. The courts cannot step or beyond the limits of their legitimate power.

In India, the rule of law is adopted by the constitutions former which was based on the legacy of the British rule. But apart from this adoption, there is chance of abusing power by legislative authorities, so that is why, there is need of evolving a specific mechanism to check and balance on the authorities. The scope has been limited with the inclusion of judicial review in India. when once looks at the decision of the Supreme Court court on certain questions of India mental issues of constitutions law, this is clear from the decision of apex court that there is deference of opinion among the judges in context of basic structure, federal structure, and power of the parliament to amend the constitution and emergency power of the president etc. This would mean that through these decision, there has been expansion of power of judicial review Judicial self-restrain in relation to legislative power manifests its self in the form that there is a presumption of constitutionality when the validity of the statute is challenged. In the words of Fazalali, the presumption is always in favour of the constitutionality of an enactment, and to border is upon him who attack it to show that there has been a clear transgression of the constitutional principles in the case *Charenjit law V. Vol. AIR 1951 SC 41*.

The judicial review of legislation has certain inherent limitations. It is suited more for adjudication of disputes then for performing administration functions. It is the duty of the courts as well as legislative authorities to do work in accordance with the provisions of the constitution in the case of "*S.R. Bomai V. Vol. G.B., Majajan V. Jalageon M.C. A.I.R. 1991 SC 1153*."

In short power of Judicial Review is supervisory in nature. Unless this short comings are observed, the court under the juice of stopping abuse of power by the legislative authorities as well as administration authority, will itself be guilty of usurping powers.

Judicial review in India is essential not democratic because the Judiciary while interpreting the constitution on the other statutes is expressing the will of the people of India as a whole who have reposed working of Indian Judiciary. There is always tussle between Judiciary and roiling party by judiciary follows the constitution in true spirit, it is difficult for the government to run the country, that is why, there is also need of harmonizing between two organ of the state. If we can appreciate this reality, then all arguments against the democratic nature of the Judicial Review would vanish. Judicial review would be undemocratic only if the judiciary ignores the concept of rule of law and separation of power and intervene in in unnecessary and undeserving judicial activism. The judiciary must not forget the structure of governments and its role of legislature and being an interpreter and guardian of the constitution, should not undertake and venture

into the task of Law making, unless the situation demands so. The judiciary must also not ignore the self-imposed restrictions. If, the India judiciary follows these norms and takes these precautions for becoming democratic, then it have the privilege of being, the most democratic of judicial institution in the world, representing, the bigger democracy of the world.

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## **CHAPTER-3**

### **JUDICIAL REVIEW AND AMENDMENT PROCEDURE OF THE CONSTITUTION OF INDIA**

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Indian constitution is the lengthiest and written constitution of the world. In every constitution, there is provision for amendment. Without the provision of Amendment, Constitution cannot be a dynamic and it will be static. That is why, there is provision for amendment of the Indian constitution. There is always a debate or tussle between Judiciary and Legislature in context of amending power of legislature because of this tussle, Basic structure theory came into being.

- (i) Provision related to Amendment procedure of Indian constitution and power of parliament to amend the constitution.
- (ii) Amendment related to Judicial Review of Legislative Action.
- (iii) Power of Supreme Court and Basis structure doctrine.
- (iv) Fundamental rights and Judicial Review Amending procedure of Indian Constitution.

#### **Amendment Procedure-**

Part-XX of the Indian constitution contained one article that is article 368. According to this article parliament may add, amend or repeal any provision of the constitution as per procedure laid down for this purpose.

However in the Keshevanand Bharti case the Supreme Court has ruled that the parliament cannot amend those provisions which constitute the basic structure of the constitution.

- ❖ A constitution amendment bill can be introduced in any house of the parliament. A bill of the amendment of the constitution cannot introduce in any state legislature.
- ❖ The ordinance making power of the president cannot be used to amend the constitution.
- ❖ A constitution amendment bill can be introduced both as a government bill.

- ❖ A constitution amendment bill must pass in both the houses separately by absolute and special majority.
- ❖ If there is any contradiction among two houses of the parliament, there is no provision of joint sitting to resolve the deadlock.
- ❖ If a bill seeks to amend the federal provisions of the constitution it must also be ratified by the legislature and half of states by a simple majority.
- ❖ When a constitution bill is passed by both of the houses, the bill is sent to approval. The 24<sup>th</sup> amend Act of 1971 has made it obligatory for the President to give his assent to a constitutional bill.

Amendments that seek to change Federal Provisions of the Constitution. A constitution Amendment Bill which seeks to make any change in articles relating to:

- ❖ The election of the President, or the extent of the execution power of the union and the states, or
- ❖ The Supreme court and High Courts *Or*
- ❖ Distribution of Legislation powers between the union and states or representation of states in Parliament, or the very procedures for amendment as laid down in article 368 of the constitution.
- ❖ Presidential Assent to constitution Amendment Bills :

Constitution Amendment Bills passed by parliament by the prescribed special majority and where necessary, ratified by the essential number of state legislature are presented to the President under Article 368 of the constitution under which the President is bound to give his assent to the bills.

### **Judicial Review and Important Constitutional Amendments-**

Before 1973, Keshavanand Bharti case, the Supreme Court upheld that the amendment acts were ordinary laws and could not be struck down by the application of article 13 (2).

The Judgment of Golak Nath raised acute controversy in the corridors of Parliament, as it was not according to Parliament. The overcome or nullify the judgment effect of the Supreme Court constitutional Twenty Fourth Amendment Act 1971, as enacted to make

the amending power of the Parliament unlimited and created a new subsection (1) of a Article 368, which illustrated that ‘notwithstanding in the constitution, Parliament may in exercise of its constituent power amend by way of addition variation, or repeal any provision of the constitution in accordance by the procedure laid down in this article. Thus the 24<sup>th</sup> amendment restored the amending power of the Parliament and also extended its scope of amending power.

The question of extent of amending power has been in controversy since the beginning of the constitution. Immediately after the commencement of the constitution the Power of Parliament to amend the constitution was questioned in *Sankari Prasad V/s Union of India*, in which it was alleged that the Parliament has no right to abrogate the fundamental rights. These was the issue of the 1<sup>st</sup> constitutional amendments.

### **Before the 24th Constitutional Amendment-**

The question whether a Constitutional Amendment is ‘law ’ under Article 13(3) was for the first time considered by the Supreme Court in *Shankari Prasad v. Union of India*.<sup>1</sup> The Court held that the word ‘*law*’ in Article 13 must be taken to mean ordinary laws and not a Constitutional Amendment made under Article 368. Therefore, Article 13 did not affect the Constitutional Amendments; they cannot be invalidated by the courts on the ground that they violate the fundamental rights of the citizens.

The interpretation of Shankari Prasad’s Case was followed by the majority in *Sajjan Singh v. State of Rajasthan*.<sup>2</sup> However, in Sajjan Singh, *Justices Mudholkar* and *Hidayatullah* while upholding the impugned Constitution (17th Amendment) Act, 1964 made some noteworthy remarks. Mudholkar expressed his worry about the erosion of “*basic features*” of the Constitution by the excessive use of constituent power of the Parliament <sup>3</sup>and Hidayatullah wondered whether “*fundamental rights could be the playthings of a majority*”.<sup>4</sup>

In *Golak Nath v. State of Punjab*,<sup>5</sup> the Supreme Court for the first time interfered with the validity of a Constitutional Amendment made by the Parliament. In this case, the Constitutionality of the Constitution (17th Amendment) Act affecting property rights was challenged again, and the Court reversed its two previous decisions in Shankari Prasad and Sajjan Singh. The majority (6 vs. 5) did not accept the thesis that there was any distinction between ‘legislative’ and ‘constituent’ process. The majority further asserted

that the amending process in Article 368 was merely ‘legislative’ and not ‘constituent’ in nature. In this manner, the Court held that the word ‘law’ in Article 13(3) included every branch of law even the Constitutional Amendments, and hence, if an Amendment to the Constitution took away or abridged fundamental rights of citizens, it would be declared null and void. In the process, **Chief Justice KokaSubba Rao**, for majority propounded the famous “Doctrine of Prospective Overruling”

The doctrine of prospective overruling enables the Court to overrule an earlier decision and restrict the operation of the new ruling only to the future cases or future transactions. The decision in *Golak Nath* overruled the decision in *Shankari Prasad*, however, the Court using the doctrine of prospective overruling held that the decision in *Golak Nath*’s case would be only applicable to the future cases. The Court has laid down the following principles with respect to the application of the doctrine of prospective overruling:<sup>6</sup>

- This doctrine can be invoked only in constitutional cases.
- This doctrine can be applied only by the Supreme Court.<sup>7</sup>
- The scope of the retrospective operation to be given to an overruling decision is left to the discretion of the Court to be molded to the needs of justice.

### **After the 24th Constitutional Amendment-**

In order to remove the difficulty created by the Supreme Court’s decision in *Golak Nath*’s case, the Parliament enacted the Constitution (24th Amendment) Act, 1971. It is specifically declared in Articles 13(4) and 368(3) that a Constitutional Amendment is not a “law” for the purpose of Part III of the Constitution and nothing in Article 13 shall apply to any Amendment made under Article 368.

The validity of the 24th Amendment, to the extent that it made changes in Article 13 and 368, was challenged in ***Kesavananda Bharati v. State of Kerala***,<sup>8</sup> known as the Fundamental Rights Case. In this landmark case, 10 out of 13 judges of the Supreme Court declared that the ‘law’ in Article 13(2) refers to the exercise of an ordinary legislative power and does not include a Constitutional Amendment under Article 368. In other words, a Constitutional Amendment is not a ‘law’ for the purpose of fundamental rights. Therefore, the Supreme Court overruled the earlier decision of the Supreme Court in *Golak Nath* and upheld the validity of the **24th Constitutional Amendment, 1971** to the extent that it affected Articles 13 and 368. However, the Court held that the Parliament has the power under Article 368 to amend all the provisions of the



Constitution including the Part III containing the fundamental rights but without affecting or taking away the 'Basic Structure' or 'Basic Features' of the Constitution.

### **The 38th Amendment Act-**

The Constitution (38th Amendment) Act, 1975 sought to expand the power of the Executive to derogate from the citizens' fundamental rights, during times of emergency. The earlier provisions had merely granted the President the power to suspend the right of the citizen to move courts during an emergency for the enforcement of his fundamental rights and to suspend all pending proceedings for the period during which the proclamation was in force or for such shorter period as specified in the order. An addition to Article 359 of the Indian Constitution, that pertained to the status of fundamental rights during an emergency, barred the citizen, for all times, from challenging any executive measure taken during an emergency that may have violated his fundamental rights, even his right to life and personal liberty.<sup>9</sup> This provision accordingly assured that there would be no need for the executive to account for even *mala fide* violations of the citizens' rights committed during the period that the emergency lasts.

The Presidential 'satisfaction' to issue a proclamation of Emergency, as prescribed in Article 352(1), was also declared to be final, non-justiciable, and conclusive by the 38th Amendment.<sup>10</sup>

In *PranNath v. Union of India*,<sup>11</sup> the Delhi High Court held the **38<sup>th</sup> Constitutional Amendment Act** valid although it excluded judicial review of the satisfaction of the President to declare emergency under **Article 352(1)**. The Court argued that judicial review was not a basic feature of the Constitution and that, in specific fields, lack of judicial review might not affect any basic feature of the Constitution.

### **The 39th Amendment Act-**

A day before Indira Gandhi's election appeals case came up for hearing before the Supreme Court, the Constitution (39th Amendment) Act, 1975, was passed. The 39th Amendment excluded all disputes regarding the election of the Prime Minister and the Speaker of Lok Sabha from judicial scrutiny. Clause (4) of Article 29A inserted by the 39th Amendment said that no law made by Parliament before the commencement of this Amendment insofar as it relates to election petitions was to apply or be deemed ever to have applied, to the election of the Prime Minister or the Speaker to Parliament. Such

election was not to be deemed to be void, or ever to have become void, on any ground on which such election could be declared to be void, or had before the commencement of the Amendment been declared to be void under any such law. The Clause further said that notwithstanding any order made by any court before such commencement, declaring such election to be void, it was to continue to be valid in all respects. Any such order and any finding on which such order was based was to be deemed always to have been void and of no effect.

That Amendment was obviously passed with a view to preventing scrutiny of Mrs. Gandhi's election to the Lok Sabha by the Court. The hurry with which the bill was passed showed the anxiety that lay beneath its enactment. It was introduced in the Lok Sabha on Aug. 7, 1975 and was passed in that house on the same day; it was passed by the Rajya Sabha on Aug. 8, was ratified by half the State Legislatures on Aug. 9, and obtained the President's assent on Aug. 10. The appeal of Indira Gandhi was to come up before the Supreme Court for hearing on Aug. 11.<sup>12</sup>

The validity of the 39th Amendment was challenged in *Indira Gandhi v. Raj Narain*<sup>13</sup> on the ground that it destroyed the basic structure of the Constitution. The Supreme Court avoiding confrontation with the political establishment dismissed Raj Narain's petition on merits and upheld Mrs. Gandhi's election but struck down the impugned Amendment relying on the basic structure doctrine.

The 39th Amendment also amended the Ninth Schedule to bring within its scope 38 Acts (entries 87-124) which by virtue of their inclusion in the Schedule would be extended protection from judicial scrutiny. Of these Acts, the *Maintenance of Internal Security Act (MISA)* and the *Conservation of Foreign Exchange and Prevention of Smuggling Act (COFEPOSA)* are worth mentioning here due to their obvious violation of the citizens' fundamental rights.

Following the proclamation of the Emergency MISA was amended and the few safeguards that the define retained under it were all virtually eliminated. The MISA (Amendment) Act of August 5, 1975 provided for a new category of detentions "*for dealing effectively with the emergency.*" Provided the detaining authority made a declaration that the detention was necessary for this purpose, the define could be held for a maximum of one year without being informed of the grounds for the detention order.<sup>14</sup> Detention may extend even beyond that period, but only after pursuing the normal course

such as supplying him with the grounds for the detention and refer the detention to advisory boards etc.<sup>15</sup> The Amendment also provided that the revocation of a detention order shall not constitute a bar against the issue of another detention order against the same person.<sup>16</sup> Further, no MISA detenu was allowed to be released on bail, bail bond or otherwise;<sup>17</sup> nor could they seek relief under “**rules of natural justice**” nor claim a “right to personal liberty by virtue of natural law or common law.”<sup>18</sup> Another major provision authorized the attachment of properties of a person against whom a detention order had been made and who had failed to surrender himself, or had absconded or was in hiding.<sup>19</sup> Because of these Amendments MISA detents were effectively prevented from approaching the courts for relief either because no grounds had been given to them or because the detention order had violated “canons of natural justice” or “natural or common law.”

In January 1976, the MISA was again amended. The new provisions further eroded the safeguards against abuse that the original Act had included. The Amendment stipulated that an individual whose detention had been revoked or disallowed earlier may be redetained and that no person against whom an order of detention had been made shall be entitled to the communication of the grounds of detention or be afforded the opportunity to make representation.<sup>20</sup>

It further mandated that the grounds on which an order of detention had been made shall be treated as confidential and shall be deemed to refer to matters of state and that it shall be against public interest to disclose the grounds.<sup>21</sup> Finally, it required the Central Government to obtain details on detentions from the State Governments.<sup>22</sup> The major objective of this Amendment was to eliminate those safeguards that would have offered detenus relief from detentions ordered under the Act.

The MISA underwent a third and final ‘Emergency Amendment’ in August 1976. This Amendment related to detentions in connection with the Emergency and was made applicable with retrospective effect from June 29, 1975, the date the MISA was first amended during the Emergency. It extended the maximum period all such Emergency detentions from 12 to 24 months.<sup>23</sup> The cumulative effect of the Amendments to MISA was the virtual elimination of all restraints against the abuse of preventive detention powers by the Government particularly as it related to detentions under the new provision 16A of the Act that authorized detentions to deal with the Emergency.

The other preventive detention measure, which was used, was the Conservation of Foreign Exchange and Prevention of Smuggling Act (COFEPOSA) originally passed in December 1975. The COFEPOSA Amendment of August 1975 provided that no person detained under the Act may be released on bail, bail bond or otherwise.<sup>24</sup> It further stated that no detention order under the Act may be held invalid or inoperative merely because some of the grounds of the detention order are vague, nonexistent, not relevant, or invalid for any reason.<sup>25</sup> Moreover, if detention is made for dealing with the Emergency no grounds need be conveyed to the detune and no review of the charges by the Advisory Board may be permitted.<sup>26</sup>

### **Thirty Ninth Amendment Act, 1975-**

On the petition of Raj Narain, the election of Prime Minister Smt. Indira Gandhi to Lok Sabha was declared void by the Allahabad High Court. To nullify by the effect of the decision of Supreme Court, Parliament enacted 39<sup>th</sup> Amendment Act which introduced change in the method of deciding election disputes relating to high officials – the President, Vice President, Prime Minister and the speaker. In this process Article 329-A was inserted in the constitution of India has withdrawn the jurisdiction of all courts our election matters or disputes, which was challenged in Smt. Indira Gandhi V/s Raj Narain (1975) as destroying the basic structure of the constitution and declared it as unconstitutional and void.

Khanna J. in this case held that clause 14 of Article 329 was constitutionality invalid on the ground that it violated the principles of free and fair elections which is an essential part of basic structure doctrine. For nullifying the decisions of Supreme Court in India in this case and enacted the 42<sup>nd</sup> Amendment Act 1976) to limit and negate the basic structure limitation on the amending powers as also the constant threat in the form of judicial review powers.

As discussed above, the constitutional courts in India, particularly the Supreme Court have claimed the power to invalidate a constitutional amendment acts. As the Indian Scholar Upendra Baxi, rightly pointed out, the Supreme Court Of India, is probably the only court in the mankind history that has asserted the power of Judicial review over the constitutional Amendments.

Another limitation on the power of Judiciary is the case of amending the constitution of India, from the 1960 to 1980's, there was a running conflict between Parliament and Judiciary over the amending power. There are many incidents which highlight the controversy between Parliament and Judiciary in context of Emergency Provisions, Power of President and Right to Property and Fundamental rights and ninth schedule.

### **Evolution of Judicial Review and Basic Structure Doctrine Evolved by Supreme Court-**

Basic structure doctrine propounded by Supreme Court of India in Keshavanand Bharti case. According to this doctrine, Parliament can amend the constitution, but cannot amend the basic part of the constitution which mentioned in constitution itself.

*Justice S.M. Sikri* Mentioned Five Basic Features:

1. Supremacy of the Constitution.
2. Republican and democratic form; of government.
3. Secular character of this constitution.
4. Separation of powers between the legislature, the execution and the judiciary.
5. Federal character of the constitution.

According to him, these features are related to the preamble as well as the scheme of the constitution. He observed that these features are the foundation dignity and freedom of the individual which cannot be destroyed the Parliament whether Parliament has the power for amending the Constitution. The Constitutional Bench in Indira Nehru Gandhi V/s Raj Narain held that judicial review in election disputes was not a compulsion as it is not a part of basic structure. P.N. Bhagwati, C.J. relying on *Minerva Mills Ltd.*, declared that it was well settled that judicial review was a basic and essential feature of the constitution. If the power of judicial review was absolutely taken away, the Constitution has no relevance.

Although the important of Judicial Review and basic structure cannot deny, at that same time one cannot also give an absolute power to review and by recognizing judicial review as a part of basic feature of the constitution.

## **Power of Amendment in the Constitution by the Legislature and Judiciary-**

Under art: 368 parliament has the power of Amendment the constitution under the heads which are as follows:-

- (1) Amendment by simple Majority
- (2) Amendment by special Majority
- (3) By special Majority and Ratification by the states.

Art 368 however, does not constitute the complete code. The process of amending the constitution is the legislative process governed by the rules of that process in American and Australian Constitution.

### **Amendment in Fundamental Rights:**

In *Shankari Prasad V. Union of India* (1951) 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 court unanimously held, “The terms of Article 368 are perfectly general and empower Parliament to amend the constitution without any exception whatever”.

In *Sajjan Singh V. State of Rajasthan* (1964) the validity of 17<sup>th</sup> amendment of constitution was challenged before the constitution. The Supreme Court approved the majority judgment given in *Shankari Prasad’s* case and held that the words “amendment of the constitution” means amendment of all the provisions of the constitution. Gajendra Gadkar, C.J. said that if the constitution-makers intended to exclude the fundamental rights from the scope of the amending power they would have made clear provisions in that behalf.

The case of *Golak Nath Vs. The State of Punjab* (1967) was heard by a special bench of 11 Judges as the validity of three constitutional amendment (1<sup>st</sup>, 4<sup>th</sup> and 17<sup>th</sup>) 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 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, constituent.
- (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 right conferred by PART-III of the constitution power.
- (6) The first amendment Act, 1951, the fourth Amendment Act, 1955 and the Seventeenth Amendment Act, 1964 abridges the scope of fundamental right and, therefore void under article 13(2) of the constitution. On the application of the doctrine of retrospective overruling the decision of the court will have only aforesaid three amendment acts will continue to be valid.
- (7) Parliament will have no power the acts 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 therein.

The constitutional validity of the Twenty-fourth, Twenty fifth and twenty ninth amendment was challenged in the fundamental rights case (Keshvanand Bharti V. State of Kerala 1973) the court held that:

1. Parliament's amending power is limited, while parliament is entitled to abridge any Fundamental right or amend any provision of the constitution, the amending power does not extend to damaging or destroying any of the essential feature of the constitution. Therefore, while they may be abridgement cannot end to the point of damage or destruction of their core.

2. Article 31(c) is void since it takes away invaluable fundamental rights, even there unconnected with property.

The election appeal of the prime minister was disposed of on Nov. 7, 1975 and the relevant portion of the 39<sup>th</sup> Amendment was held invalid on the basis of Keshvananda's case.

In *Minorva Mills* case (1980) the Supreme Court by a Majority decision struck down section 4 of the 42<sup>nd</sup> Amendment Act, which gave preponderance to the Directive principles over to the article 14, 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 two parts will ipso facto destroy an essential element of the basic structure of the constitution. Between the 1950-1980, parliament passed as many as 1977 Acts (excluding Amendments) and the Supreme Court invalidated laws passed on 22 occasions only.

### **The Supreme Court has evolved certain maxims and norms-**

*H.M. Seervai* has enumerated following rules-

- (1) There is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt, and the onus to prove that it is unconstitutional lies upon the person who challenges it.
- (2) Where the validity of a statute is question and there are two interpretations, one of which would make the law valid, and the other void the former must be preferred and the validity of the law upheld.
- (3) The court will not decide constitutional questions if a case is capable of being decided on other grounds.
- (4) The court will not decide constitutional questions if a case is capable of being decided on another grounds. Than is required by the case before it.



- (5) The court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.
- (6) Ordinarily, courts should not pronounce on the validity of an Act or part of an Act which has not been brought into force because till then the question of validity would be merely academics.

### **The 42<sup>nd</sup> Amendment devalued the Judiciary and Judicial Review-**

The following provisions were added through the 42<sup>nd</sup> Constitutional Amendment-

- (1) The jurisdiction of the Supreme Court under Article 31 to invalidate a State law was taken away. A New article, "12 A" was inserted which said "Notwithstanding anything in Article 32, the Supreme Court shall not consider the constitutional validity of any state law in any proceedings under that Article unless the constitutional validity of any central law is also an issue in such proceedings".
- (2) **New Articles i.e. 226 A and 131 A** were inserted in the constitution. As a result of these new articles the High Court no longer had the jurisdiction to invalidate any central law. Even in other cases, the jurisdiction of the High Court was reduced. Article 226 was revised. The High Court no longer had to power to examine validity of both state law and central law it refer to the Supreme Court. The expression "any other purpose at the end of clause 1 of 226 was omitted. This reduced the discretion of the High Court substantially. A new article 228 A was inserted by the Forty-Second Amendment. It was provided that "the minimum number of judges who shall sit for the purpose of determining any question as to the constitutions validity of any state law shall be give. Unless the High Court consists of less than five judges when all the judges may sit and determine of less than five judges when all the judges may sit and determine such a question." It was also provided that a state law shall not be declared to be constitutionally invalid by the High Court unless not less than 2/3 of the judges sitting for the purpose of determining the validity of laws, hold it to be constitutionally invalid. It was also provided for that in case the High Court consists of less than five judges, all the judges sitting for the purpose must hold the state law to be institutionally invalid.

## **Violation of Fundamental Rights and Judicial Review-**

Fundamental rights mentioned in PART-3 of the constitution and Preamble as the spirit of constitution talked about the right of freedom expression, speech and also affirmed the rights mentioned in Constitution itself. The process of Judicial Review as an important process for safeguarding the fundamental rights of the citizens.

In protecting, the fundamental rights, Supreme Court of India has played important role via the use of Judicial Review. In article 13 clearly stated that Parliament cannot amend or abridges the fundamental rights which gives directly power of Judicial review to the Supreme Court and High via the use of writ Jurisdiction. Article 13 has been considered in several cases and has been the subject of conflicting decisions which are result of controversy between legislature and Judiciary. Parliament can amend the constitution the provisions of PART- III subject to limitation of basic structure doctrine. Judicial review is also integral part of the constitutional scheme, the essence of the Principles behind Article 14, 19 and 21 are also part of basic structure.

Once article 32 is triggered the legislation must answer a complete test of fundamental right. First the violation of fundamental rights of PART-III is required to be determined, then its impact examined, and if it shows that in effect and substance, it destroys the basic structure doctrine. Thus Judicial Review is a constitutional imperative necessary for checking the arbitrariness of the execution as well as legislation forbearance. *Dr. Amartya Sen* says, the justification for protecting fundamental is not on the assumption that they are higher rights, but the protection is the best way to promote a just and tolerant society. *Lord Steyn* also said that judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation.

## **Ninth Schedule under the Indian Constitution-**

A good Constitution must have some fundamental restrictions on the powers of government and legislation. The limitations may be direct or indirect, express. A good Constitution must have the power of judicial review over the Constitutional amendments and legislative Acts. Judicial review tests the unconstitutional legislation and inspects the action engaged by the executive. Any law enacted either by the Parliament or State

legislature must always discuss an opportunity to the judiciary to test the laws, whether such laws are against to the common right and reason. If such laws are not based on any reason and irrational, they shall be declared void. Such being the case, there should not be any scope under Constitution for excluding the power of judicial review even for special laws. Otherwise it affects the principles of Constitutionalism which exist in Constitution of India and there may be chance to abuse the same by so called Parliamentarians. In addition to that the Parliament inhabits the supremacy, which Constitution is having. This happened in the Constitution of India in the Ninth Schedule which included some laws which are irrational, controversial, unscientific, illogical, unreasonable and no way related to land reforms also. (Example Tamil *Nadu Reservation Act* provides 69% reservation against to the mandate of *Indrasawhney's* case). Thereby this Schedule talks unlimited power to the Parliament to make judiciary quiet to question the constitutional validity of laws listed in the Ninth Schedule by excluding the judicial review. Initially land reforms laws were placed in the Schedule with sole object of abolishing the Zamindari system, though they were violative of right to property which was earlier considered as fundamental right. But thereafter, especially in thirty ninth and forty ninth, Constitutional Amendments during Indira Gandhi's period, Schedule was misused like any thing by putting disparate laws into the Ninth Schedule and it has become Constitutional Dustbin in the hands of legislatures.

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## **CHAPTER-4**

### **LANDMARK JUDGMENTS RELATED TO THE JUDICIAL REVIEW OF LEGISLATIVE ACTION (1950-1980)**

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The Supreme Court of India today wields a degree of power that many foreign legal observers would find extraordinary and unusual. The court's initial assertion of the basic structure doctrine and power of parliament to amend the constitution in the late 1960s and early 1970, was a response to the central government's efforts to insulate land reform and other economic legislation from judicial review, through the addition of a new section- the Ninth schedule to the Indian constitution.<sup>1</sup>

Within the past two decades, the Indian court wrested control over judicial appointments from the executive from and assumed a important role in policy making in the areas of affirmative action, environmental policy, education and development.

What make the expansion of judicial power in Indian so remarkable is that the Indian Court has overcome important political and structural constraints to emerge as an important institution of governance in modern India. Although the Indian Supreme Court was armed with the power of judicial review, appellate jurisdiction over the state High Courts, advisory jurisdiction through presidential references of issues, and original jurisdiction based on article 32 which allows for direct suits in the Supreme Court to enforce the fundamental rights provision, and empowers the Courts to issue writs to enforce these rights three important aspects of India's political structure and historical legacy limited the courts development early on.<sup>2</sup>

First, under the original scheme of the constitution, framers of Indian constitution in constituent assembly, the court was intended to be a junior subservient institution, whose decisions could easily be overridden by the parliament through constitutional amendments process by simple majorities, second the constituent assembly placed important limits on the power of the Indian Court, including eliminating a due process clause from the final draft of article 21 to prevent the court from reviewing the socialist pattern regime's redistributive, collectivist, and economic policies as well as reviewing the government provision for preventive detention.

Third British legacy of *Austinian positivism* followed in Indian because so many of India's early jurists were schooled or trained in England meant that India's early jurisprudence would be limited by more formalist modes of constitutional interpretation.<sup>3</sup>

This present work traces the origins and development of the concept of Judicial Review in India and its relation with basic structure doctrine, fundamental Rights, from the battle over through the Court's landmark decision from A.K. Goplan to Minerva Mills. And then proceeds to examine the development of the doctrine to the present.

### **A.K. Goplan Case-**

Since A.K. Goplan case up to this date and has brought out the development of judicial construction of the constitution and Doctrine of Basic structure. The Indian constitution, while establishing a constitutional rule of law, nonetheless authorizes the national government to use preventive detention to aid in the defense and security of nation consequently Supreme Court of India, though time to time asked to strike down laws authorizing preventive detention laws because there as acts are against soul of the constitution. At that time, Supreme Court's follows the American due process of law. Accordingly following the wording procedure established by law. The court rejected a substantive challenge to a preventive detention law allowing detention without trial in the case of A.K. Goplan V. Sate of Madras and upheld the first national preventive detention act. In this case, the court was confronted in the question of relation between 19 and 21 but the majority of judges was in favour that Article 19 could not applied in the domain. According to some scholars, the decision in Goplan's case, judiciary was in favour of narrowing the scope of judicial review and follows the procedural law not substantive. The Gopan approach adopted by court during 1950 to 1970. But A.K. Goplan approach is not an overwhelming approach to govern the relation between article 19 and 21.<sup>4</sup>

### **The Cooper Case-**

In *R.C. Cooper V/s Union of India*, A.I.R. 1970 S.C. 564, 608. The Supreme Court in the case wanted to nullify the effect of the fourth Amendment and this case was about the Nationalization policy of congress government. Petitioner filed the suit against the central government far arbitrary policy which is against fundamental rights like article 19/21 and

14 also. Cooper decision began a new era in the interpretation of fundamental rights and prepared a clear pathway for integrated application of fundamental rights.

In this case the court stipulated that the adequacy of compensation and in takings would be non-justiciable. In *R.C. Cooper V/s Union of India*, the court invalidated the Bank Nationalization Act passed by Indira Gandhi's government on the grounds compensation, and constituted hostile discrimination by imposing restrictions only on certain banks. The court went on rule that it could hold that regulations were not "reasonable" under article 31(2) of the constitution where those regulations failed to provide adequate compensation. In another challenge, to the Gandhi government effort, the Court in *Madhev Rao. Scindia V. Union of India* (A.I.R. 1971 S.C. 530, 658.) Invalidated the Gandhi government's effort to abolish the titles, privileges and privy purses of the former rulers of the princely states.

In response to these decisions of Supreme Court, Indira Gandhi dissolved the Lok Sabha early which was the first time in Indian political history, and openly campaigned against the Court, promising the citizens to provide economic justice and social security and poverty alleviation.<sup>5</sup>

### **Golak Nath Case-**

In this case the issue was that in front of Supreme Court that whether parliament can amend the constitution under article 368 was unlimited. In *Shankari Prasad V/s Union of India* (1952) 1 S.C.C.R. 89) a challenge to the first amend Act, the petitioners argued that the new amendment violated article 13 (2) which prohibited the government from passing any law that was against the spirits of PART-III of the constitution. However, the court rejected this argument and declared that, there is clear difference between ordinary law made in exercise of legislative power, and constitutional law made in exercise of constituent power.<sup>6</sup>

Similarly in *Sajjan Singh V. State of Rajasthan (1965)* 1 S.C.R. 933 the court adjudicated a challenge to the validity of the seventeenth Amendment in the case, the court, reaffirmed its earlier decision in *Shankari Prasad*.

The court in *Golak Nath* case nullify their earlier judgments by a 6 to 5 ruling and declared that that parliament cannot enact constitutional amendments that violate the

fundamental rights provisions of the constitution. Writing for the majority, Chief Justice K. Subha Rao held that Article 368 did not actually confer the power to amend the constitution, but it is just procedures for amendment. He asserted that 368 were ordinary laws under Article 13 and thus could be subject to judicial review. In this case Supreme Court of India, postulated the doctrine of prospective overruling which means that ruling would and apply to future amendments, and that the first, fourth and seventeenth Amendment though deemed to be unconstitutional, would remain in effect, In this case Supreme Court of India, widened the scope of Judicial review of legislative action.<sup>7</sup>

### **Keshvanand Bharti Case-**

This case known as the fundamental rights case. In Keshavananda case, a thirteen- judge bench of the court heard a series of challenges to the twenty fourth twenty fifth, and twenty ninth Amendments in when Keshevanand Bharti was being decided, the congress party led by Mrs. India Gandhi had on our whelming majority in the new parliament. Some legal scholars was also in favour of parliamentary supremacy and against the decision of Keshvanand Bharti case they argued this decision of Supreme Court is against sovereignty of state and sovereignty rests with the people which manifests in Preamble as well as constitution itself. In this case, leading justices of the court were clearly divided in two groups, several justices like Hedge, So she let and Grover reasserted their power to challenge the government's amendments to the constitution, while others Ray and Bhagwati disagreed and sided with the governments, justifying their positions. When government responded to its defeat in Keshavenanda decision by passing over the three most senior justice hedge, Grover and shelat and appointed justices A.N. Ray one of the dissenters, for the position. The three senior most judges resigned their post and this act was against the independence of Judiciary. The clash between parliament and the Supreme Court on the right to property was continued until 1978 when that right (Article 31) was deleted from the chapter on Fundamental rights by the constitution (44<sup>th</sup> Amendment 1978 ).

What was striking about the Keshvanand decision was that it represented a direct challenge to the Parliament Supremacy. It manifested that Gandhi's congress party sought a mandate for the reassertion of parliamentary supremacy in matter of basic structure of the constitution and in this case, Court considered fundamental right as the part of basic structure. In terms of its historical importance, most scholar of Indian constitutional law



today here recognized and noted the significance this moment in India's political and constitutional history, though the immediate reaction to the decision was more hostile.

### **Indira Nehru Gandhi V. Shri Raj Narain (1975) and Emergency Period-**

This was the most important decision of Supreme Court of India during the emergency period. The case was involved a challenge to the thirty ninth Amendment enacted in response to a decision of the Allahabad Court set aside Indira Gandhi election on the ground that her, election. Campaign had committed a corrupt practice. The amendment added six new clause to article 329 (A). because of this decision Indira Gandhi declared national emergency on June 25, 1975, in addition to appealing the High Court's decision to the Supreme Court. Part of the thirty-ninth Amendment was enacted to retroactively validate Indira Gandhi's election by superseding the applicability of all previous election laws and immunizing all election involving the prime minister or speaker of the Lok Sabha from Judicial Review.<sup>10</sup>

The five judge bench in Indira Nehru Gandhi which comprises of four Justices ("Chief Justice Ray", Justice M. Beg, K.K. Mathew, and Y.V. Chandrachud) ultimately accepted and applied the basic structure doctrine, with four out the five justices voting to invalidate clause four of Article 329 (A). Justice Khanna observed in this case that these clause violated the basic structure doctrine and fundamental rights of the Indian constitution, by contravening the democratic set up of the constitution and 'Rule of Law' given that democracy requires that "elections should be free and fair": In contrast, justice Chandrachud invalidated the clause on the grounds that it violated the basic structure in that it represented "an outright negation of the right to equality" and as "arbitrary and calculated to damage or destroy the rule of law". Justice Ray and Mathew held that article 329 A was invalid "because constituent power cannot be employed to exercise judicial power".<sup>11</sup>

During the emergency period, parliament passed or enacted several laws for curtailing the power of Supreme Court and but restrictions on the use of judicial review of legislation. The main purpose of these constitutional amendments was the elimination of judicial review of several laws violating the fundamental rights.<sup>12</sup>

Because of these decision, Supreme Court maintained the heart and soul of the constitution and safeguarded the fundamental rights of the citizens and put restrictions on amending power of the parliament.

### **Post- Emergency Period and Power of Judicial Review-**

According to some scholars, Indian Judiciary is most active judiciary in the world. After the end of National emergency in 1977, Supreme Court was the ardent Championed of citizens rights and freedom and all fundamental rights. Because of activist approach of Supreme Court, *Upendra Baxi*, in an influential analysis, has interpreted that development as an attempt by the Court to regain legitimacy lost during its acquiescent response to the emergency.<sup>13</sup>

Because of these landmark judgments of Supreme Court and leading judges of that time, played a very important role for developing the new jurisprudence. Upendra Baxi has shown a strong incentive after the emergency for the egalitarian justices to redeem their reputations as supporters of constitutional rights.<sup>14</sup>

### **Maneka Gandhi V/s Union of India and Dynamic Approach of Supreme Court-**

In famous case '*Maneka Gandhi V. Union of India* (A.I.R. 1978 Sc. 597). Supreme Court has assumed a new character and rejected the approach of A.K. Goplan case and followed the American due process of law. In this case, the issue was infringement of article 14 and 21 personal life and liberty and constitutional validity of an executive order and related provisions of the passport Act 1967 conferred undefined power of impounding and hence was violative of article 14. Since petitioner's freedom of speech and occupation was incidentally denied because of impaneling of her passport without any reasonable justification and it is against spirit of the constitution and violation of article 21 which is related to personal life and liberty and procedure established by law should be fair, just and reasonable and court declared that an executive order cannot infringed the personal right and freedom. Although Maneka Gandhi decision was criticized on the grounds that it is against the Parliamentary sovereignty and sudden change of judicial approach of the constitutional adjudication is against the norms of the

constitution. But apart from these criticisms, in this case, Supreme Court plays a very important role in refiguring natural justice.<sup>15</sup>

### **Bacchan Singh Case-**

In, this case, judiciary adopted the Maneka Gandhi case approach and followed the natural justice and rule of "*Audi Alterm Partem*". In this case, the majority while upholding section 302 of Indian Penal code and 354 of criminal procedural code and elaborately the inter relationship between article 14, 19 and 21 in order to refine the approach of Maneka Gandhi case. While interpreting article 21 providing for procedure established by law, which is just, fair and reasonable, the Court analyzed the adequacy of procedural safeguards in case of death penalty under the new criminal procedural code, and in this case, the court reformulated that death penalty should be imposed only in rarest of rarest case.

Justice P.N. Bhagwati in his dissenting judgment made out his case for abolition of death penalty. It points out that value system responses and social philosophy of each judge would weigh on the court in deciding on the death sentence, leaving justice to the chance of court composition rather than a rule of 'law'.

### **Minerva Mills v/s Union of India (1980)-**

Keshvanand Bharti decisions of Supreme Court considered as the boldest assertion of judicial authority in India. After this decision, the Supreme Court struck down the. Clause 4,5 of Article 368 inserted by 42<sup>nd</sup> amendment, on the ground that these clause destroyed the essential basic structure of the Indian constitution. This judgment of Supreme Court declared that "Constitution is supreme not parliament in India". With respect to development of the basic structure doctrine, the truly pivotal role may indeed be the court's twin decision in *Minerva mills and Waman Rao*, in which Court, reasserted the basic structure doctrine against arbitrary action of the executive and legislature and invalidating several emergency amendment that had limited or curbed the court's jurisdiction and power of judicial review.<sup>16</sup>

In Minerva Mills V. Union of India the court heard a challenge to the sick textiles Nationalization Act of 1974, which had been added to the ninth schedule of the constitution through the thirty- Ninth, Amendment which made for immunizing the Act

from Judicial review. The petitioners challenged the thirty Ninth Amendment passed during the emergency which had barred judicial review of constitutional amendments by amending articles 368(4) and 368(5) of the constitution. The Court nullified two provisions of the forty- second amendment, section four, which subordinated the fundamental rights in article 14 and article 19 to the directives principles, and section fifty five which provided that the validity of any constitutional amendments promulgated following the enactment of the forty- second amendment could not be challenged in any court, on any ground, and that the consistent power of parliament to amend the constitution was an unlimited one. Writing for the majority, Chief Justice Chandrachud reaffirmed the basic structure doctrine of Keshvanand, and found that both sections were unconstitutional in that they sought to expand the amending power to enable the government to repeal or abrogate the constitution given that a limited amending power is one of the basic gestures of our constitution and therefore, the limitations on that power cannot be destroyed. In holding that Justice Chandrachud observed that PART III and PART IV of the Indian constitution, which refer to fundamental rights and directives principles, respectively were of equal importance, and that his “harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the constitution.” Justice P.N.s Bhagwati, in his concurring opinion, held that both a limited amending power as well as the power of judicial review of government actions, were part of the basic structure of the constitution.<sup>17</sup>

In “*Waman Rao V. Union of India*”, the court reaffirmed the basic structure doctrine and power of Judicial Review and announced that all enacted amendments after the Keshvanand Bharti decision including laws added to the Ninth schedule were subject of Judicial review under the basic structure doctrine.<sup>18</sup>

As one leading scholar and senior advocate observed, the court, decisions in *Minerva* the court the opportunity to regain the role of ‘sentinel’ which has suffered significant erosion during the emergency. Since 1980, the court’s application of the basic structure doctrine, while no doubt significant, has been limited.

During this period 1950 to 1980, Judicial review of legislation was at highest stage of Judicial indolence and protection of fundamental rights and judiciary has played a significant role.

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## **CHAPTER-5**

### **CONCLUSION**

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The Supreme Court has displayed creativity. The High Court water mark of such judicial creativity has been reached in such landmark cases, as GolakNath, Keshvanand Bharti case Maneka Gandhi. In this case, the role of the Supreme Court is comparable to being constituent or constitution making.

Several other provisions of the Constitution of India have been made to ensure the judicial independence:

- According to Article 124 (b) every judge of the Supreme Court shall, before he enters upon his office, make and subscribe an oath or affirmation in the form prescribed before the President or some person appointed by him for the purpose. Similarly, according to Article 219 every judge of a High Court has the same duty before the Governor of the State or some person appointed by him for the purpose.
- The salaries and allowances of the judges of the Supreme Court and the High Courts have been fixed by the Constitution of India under the provisions of Articles 125 and 128. The judges are entitled to be paid such salaries as determined by Parliament. They cannot be varied by the legislature except during the period of financial emergency. Once appointed, their privileges, rights and allowances cannot be altered to their disadvantage.<sup>1</sup> The expenditure in respect of the salaries and other allowances of the judges of the high judiciary are drawn from the consolidated fund of India and they are not subject to any vote in any legislature.<sup>2</sup>
- According to Articles 121 and 211 of the Indian Constitution, no discussion shall take place in the legislature of a state or in the Parliament with respect to the conduct of any judges of the Supreme Court or of a High Court in the discharge of his duties. The only exception appears to be in the case of impeachment proceedings. According to Articles 129 and 215 of the Constitution, the Supreme Court and High Courts have been designated as a court of record and vested with the power punish for contempt of itself.
- The Supreme Court and the High Court's enjoy administrative autonomy. They have been given authority to recruit their non-judicial staff and frame rules regarding conditions of service.<sup>3</sup>

## **Serious Dangers on Judicial Independence in India**

The foregoing discussions make it clear that the framers of the Indian Constitution have provided enough safeguards to enable the Indian constitutional courts to work in an impartial and independent atmosphere. However, there are some disturbing trends, which may threaten the independence and impartiality of the courts.

Firstly, the incidents of indiscipline and corruption charges levelled against certain judges of various High Courts damage the independence and the legitimacy of judiciary. For example, resort arrest of the Delhi High Court judge for his links with land mafia is one of the numerous events, which show that the higher judiciary is suffering from malice that is in dire need of cleaning.<sup>4</sup>

Secondly, the non-effectiveness of the impeachment proceeding under Article 124(4) and (5) of the Constitution based on political maneuvering also harms the independence of judiciary as the erring judge is not afraid of any action taken against him.<sup>5</sup> Some questions that arise in this connection are, “Whom are the judges accountable to? What should be done to remove a corrupt judge? If a judge is corrupt, should he continue? Would his continuance not adversely affect the legitimacy of the Court?”<sup>6</sup> The failure of impeachment motion in the Ninth Lok Sabha against Justice V. Ramaswami of the Supreme Court is a glaring example to show that there is no mechanism in the Constitution to punish a guilty judge. In 1998 J.S. Verma, the former Chief Justice of India, said, “Today judges of the superior judiciary in India are not answerable to any one for their misconduct, as neither the impeachment procedure nor internal machinery is workable.”<sup>7</sup>

Thirdly, practice of appointing retired judges to the high offices is likely to affect the judicial independence adversely.<sup>8</sup> Although Articles 124(7) and 220 of the Constitution of India bar a judge after retirement from practicing as a lawyer, retired judge can work as arbitrators. Moreover, judges are appointed to some National Commissions such as the National Human Rights Commission and various other administrative agencies and tribunals. Therefore, there is a possibility that a judge compromises his independence by looking forward to such post-retirement appointment by the government.<sup>9</sup> The Law Commission has rightly pointed out the dangers of such undesirable practices. The government is one party in a large number of cases in the highest court, and because a judge might look forward to being employed after his

retirement, he may not remain impartial and unbiased in cases that government is one party. This practice has a tendency to affect the independence of the judges.<sup>10</sup>

### **Rajeev Dhavan has concluded:**

"Consisting, at any given point, of some 500 add. Supreme and High Court judge India's higher judiciary has claimed more than the general custodianship of the constitution. The Supreme Court has become the God of many, if not all, things- large and small. "The immediate post Emergency phase of the judiciary twined out to be a dramatic social double promotion for the judiciary".<sup>11</sup>

Becoming an institution of governance is too much of a charge for the courts to undertake. It has neither the willing ness nor the capability to run a country of more than one hundred crores of people. At is best the judiciary is an oversees of the rule of law, a problem-solver when issues became too hot politically and a facilitator when the government default from fulfilling its duties.

That is why judicial review is the main element of basic structure of constitution. Without the power of judicial review the High Court is only nominal artificial organization. For safeguarding the constitution and democracy. It is expedient in the federal system.

### **Justification:**

- (1) Judicial review is important because, law passed need to be checked to make sure that they are constitutional. This review is performed by members of the Supreme Court.
- (2) Judicial Review is something important to focus on because it empowers the judicial branch to determine laws passed by legislative branches, as well as action take.
- (3) If the power of Judicial Review is taken out the sphere of High Court. There is no meaning of independency of Court.
- (4) When there is democracy and written constitution. This power is necessary for safeguarding the democracy and rule of constitution.
- (5) In India, there is separation of power. In this type of governance and institution. Judicial Review has assumed greater importance because it is impediment in



respective of check and balance and rule making body cannot abridge the fundamental rights. That is why Supreme Court of India is protector and guarantor of constitution.

Apart from the importance and significance of Judicial Review it has also some demerits. Otherwise we can say that it has many lacking points. Because it represents the dictatorship of Judiciary. In Judicial Review Supreme Court or High Court have very important ordinances. In this power of Judicial Review. Supreme Court or High Court can discard and rectify his own decisions also like in Keshvanand.

Judicial review in India is based on assumption that constitution is the supreme law of the land and all the governmental organs derive their power from the constitution itself and all organs must function within the framework of the constitution. Under the Indian constitution article 13(2) clearly stated that, state shall not take or make any action against the PART-III fundamental rights of constitution. It is the duty of the court to interpret the constitution and protects its from arbitrary administration and legislative action. This article 13 gives wide power of judicial review to the apex court of nation for justifying their validity and court can declare void on the basis of inconformity with constitution. There of many landmark judgments, Supreme Court maintained the supremacy of the constitution.

The Supreme Court in state of madras Vs. V.G. Row stated that the constitution contains express provisions for judicial review of legislation as to its conformity within the constitution. The Court further observed that while the court naturally attaches great weight to the legislative judgments, it cannot, it cannot desert its own duty to determine the constitutionality of an impugned statute.

In A.K. Gopalan case, the court held that, “In India constitution is supreme and a statute law to be valid must in all cases be in conformity with constitutional requirements and it is judiciary to decide whether any enactment is constitutional or not”.

After the end of emergencies the judiciary was on the receiving end for having delivered a series of judgments which were perceived by many as being violative of basic of the basic and changed the way it looked at the constitution. In many cases, Supreme Court of India declared that judicial review is basic need of nay federal country because it maintains the equilibrium between different organs of state that is legislature executive and judiciary and promotes the rule of law and separation of powers. Judicial review

checks the legislative power from delegating its essential functions and also sometimes discourages the legislature from enacting void and unconstitutional legislation. It is the basic assumption under Indian constitution that legislature cannot go beyond its power to make law it cannot enact a statute against the principle of natural justice” which adopted by Indian judiciary on the pattern of U.S. “Due process of law”.

In present study, there should be more expansion of judicial review in all the countries in the world like U.K. the power of judicial review of legislative Acts should be given to the courts in U.K., U.S.A. and India and judicial review creates faith in the minds of citizens for democratic structure of the country and its norms. One organ should be accountable to one another in a manner that no one can transgress the limits and its authority. It is the crux of the judicial review of legislative action.

As justice P.N. Bhagwati in his judgment in “Minerva mill case observed that”, It is for the judiciary to uphold the constitutional limitations, that is the essence the rule of law, which inter alia requires that the exercise of powers by the government whether it be legislative or the executive or any other authority be conditioned by the constitution and the law.”

Through this power of Judiciary, Judiciary can protect individual as well as collective rights. The basic feature of judicial review is to protect the fundamental right and basic structure of Indian constitution, therefore there is a need of expansion of judicial review. For strengthening the judicial review, there is need to protect or strengthen the individual freedom and liberty. The concept of judicial review is also criticized by many scholar and political scientist because it is against the spirit of the democracy and people’s sovereignty and rule making power rests with the people.

The expansion of Judicial Review in India supported by inauguration of Judicial Activism and Public interest litigation. Judicial activism is symbol of the independency of Judiciary in every federal country. In India Judicial activism came into being after the decision of “Maneka Gandhi case” in the history of Supreme Court of India. Public Interest litigation acquired a new approach in the case of Sunil Batra V/s Delhi Administration and in this Judiciary initiated the action on the behalf of the letter of a prisoner; this was the highest mark of the expansion of judicial review. After the Maneka Gandhi case, Supreme Court enlarged the scope of Judicial Review as Judicial activism on the pattern of U.S. Judiciary

'Due process of Law'. Through this principles Justice can be accessed by any individual on the infringement of his/her fundamental right. In many cases, Supreme Court adopted Directive Principles as Fundamental right of the individual. According to this approach, Directives Principles and Fundamental are complementary to each other. During the period of eighties and first half of the nineties the court, have broken the shackles of procedure established by law and followed the principle of natural justice, and it should be fair and justiciable. Judicial activism has introduced a new dimension in the name of Judicial Activism.

- (1) Judicial review provides an opportunity to the individual and common people to challenge the legality of any act or statute made by legislature or government agencies for their arbitrary action and judiciary can protect their rights and it is a crucial component of the rule of law and make government accountable.
- (2) Judicial review promotes lawful and accountable decision-making by executive and legislature in the form of statutes, acts and byelaws, all are under the scrutiny under the judicial review.
- (3) Research suggests that in a number of cases, judicial review protected the fundamental rights many times and maintained the supremacy of the constitution.
- (4) Comparing with the U.K. system because, our constitutional makers adopted many system like parliamentary Sovereignty, rule of law. In U.K. Judiciary and its scope restricts to the review of administrative action only but this is not in the case of India. In India Judiciary is more powerful then every form of sate action, whether it be legislative, administrative judicial action.
- (5) Further in Indian, there as has been tremendous development in the arena of juridical review. After the Maneka Gandhi case and Minesva Mills case, the system of Judicial review acquired the new character in the name of theory of Basic in the name of theory of Basic structure doctrine, the theory of due process, the theory of Judicial activism and public interest litigation etc which enlarging the scope of judicial review.
- (6) The Basic task of the court in India is to maintain the supremacy of constitution and protect the fundamental rights and also enabling the state authorities for implementing the directions principles because they are complimentary to each other.

(7) In short, the courts are exercising their power of judicial review for upholding the rule of law, Sovereignty of the nation and promoting principle of socialist pattern of society, human rights and good government.

### **Recommendations-**

- First and foremost recommendation is that the law and regulation on judicial review should be codified because there is lack of clear provision for judicial review because in Indian constitution, Judicial Review derives its authority from various provisions.
- Because of uncodified law, the concept of Judicial Review is facing challenges because of constitutional amendments so often made to the constitution.
- Independence of Judiciary should be maintained because of this judges can fulfill their responsibility for maintaining the supremacy and dignity of constitution and it is the sole duty of any judge.

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- *Pioneer*
- *Statesman*
- *Sunday Times*
- *Socialist India*
- *The New York Times*
- *Times of India*
- *Tribune*
- *The Hindu*



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- *Aligarh Law Journal*
- *Annual Survey of Indian Law*
- *Delhi Law Review*
- *Economic and Political Weekly*
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- *Indian Journal of Political Science*
- *Indian Journal of public Administration*
- *Mainstream*
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