

CHAPTER-2

JUDICIAL REVIEW OF LEGISLATIVE ACTION IN INDIA

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".¹

Extreme deference to legislative actions or weak from of Judicial review appears to be problematic to *Rosalined 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.²

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.³

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.⁴

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.⁵

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.⁶

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.⁷

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.⁸

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.*"⁹ 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.¹⁰

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.¹¹

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”.¹²

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.¹³

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, Judiciary 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 can not 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.¹⁴

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 can not 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.¹⁵

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.¹⁶

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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