

CHAPTER-5

CONCLUSION

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.¹ 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.²
- 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.³

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.⁴

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.⁵ 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?”⁶ 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.”⁷

Thirdly, practice of appointing retired judges to the high offices is likely to affect the judicial independence adversely.⁸ 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.⁹ 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.¹⁰

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".¹¹

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.

References

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- ¹ *The Constitution of India, Bare Act, Central*; Law public agency Art. 125, 221 & 560.
- ² Ibid. Arts. 146 & 229.
- ³ Ibid.
- ⁴ Pandey, Jai Narayan, (1997) *Constitution of India*, Allahabad Central Law agency p.416, pp. 485.
- ⁵ Ibid. p. 483.
- ⁶ Sathe, SP., *Judicial review in India: Limits and Policy*, State Law journal (1974) Vol.35, .
- ⁷ Pandey, Jai Narayan, (1997) *Constitution of India*, Allahabad Central Law agency p.416, pp. 485.
- ⁸ Rai, supra note 421, pp. 413.
- ⁹ Sathe, SP., *Judicial review in India: Limits and Policy*, State Law journal Vol.35, 1974.
- ¹⁰ 480 Law Commission of India. 14th Report. Ministry of Law, Government of India, 1958, cited in Pandey, supra note 416, pp. 485.
- ¹² Dhawan, Rajiv, *Supreme Court and Parliament Sovereignty* Delhi, Sterling Publishers pp. 25 (1970).