A Case Study Of Judicial Review In India

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JUDICIAL REVIEW: A CONCEPTUAL DISCUSSION

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

- *Chief Justice John Marshall*

In democratic countries judiciary is given a place of great significance. It is because the Judiciary plays role of protector of constitutional values. Therefore, the Constitution of India has created an independent judiciary which is vested with the power of judicial review to determine the legality of law and any executive action. Judicial Review can be defined as the power of judiciary to interpret the Constitution and to declare any law or order of the legislature and executive void, if it finds them in conflict with the provisions of the Constitution.[2] Judicial Review in India is governed by the principle of Procedure Established by Law. Under this principle the court checks following things:

i. Whether the law made is in accordance with the powers granted by the Constitution to the law-making body.

ii. Whether the law making bodies have followed the prescribed procedure or not.

If the court finds that the Act of the law making bodies violate the provisions of the Constitution and are violative of the procedure established by law then the Court strikes down the said law and declares it as void. The power of judicial review is granted to the Supreme Court and High Courts under Articles 13, 32,131-136,143, 226 and 246 of the Constitution. Thus, it can be said that unlike the United States, the Constitution of India explicitly establishes the doctrine of judicial review. [3]

A LOOK AT THE PAST: HISTORY OF JUDICIAL REVIEW IN INDIA

The power of judicial review was firmly established and the limitations for its exercise were clearly enunciated in the case of AK Gopalan v. State of Madras.[4] Even though Indian Constitution recognizes court's supremacy over the legislative authority, but such supremacy is confined to the field where the legislative power is circumscribed by limitations put upon it by the constitution itself. It is within this very restricted field the court may, on a scrutiny of law made by the legislature, declare it void if it is found to have transgressed the constitutional limitations. The court in this case further declared that the judiciary's power of judicial review is subordinate to the 'procedure established by law'. Therefore, the Constitution of India refers to 'procedure established by law' and not 'due process of law' like the American Constitution.

In the case of Shankari Prasad v. Union of India,[5] validity of first Amendment Act, 1951 [Amendment involved curtailing of the "Right to Property" guaranteed by Art. 31 of the Indian Constitution]was challenged. The Supreme Court in this case held that the power to amend Constitution including fundamental rights is contained in Article. 368 of the Constitution and that the word 'law' in Article 13(2) includes only an ordinary law made in exercise of the legislative powers and does not include constitutional amendment which is made in exercise of constituent power. Therefore, a constitutional amendment will be valid even if it abridges or takes any of the fundamental rights.

This very question was again raised in the case of Sajjan Singh v. State of Rajasthan [6] when the validity of the Constitution (Seventeenth

Amendment) Act, 1964, was called in question. While deciding the case court once again revised its earlier view that constitutional amendments made under Article 368 are outside the purview of Judicial Review of the Courts.

In GolakNath case,[7] the court held that the provisions of Article 368 related to the amendment of the Constitution, merely laid down the amending procedure. Article 368 did not confer upon the Parliament the power to amend the Constitution. The amending power of Parliament arose from other provisions contained in the Constitution (Articles 245, 246, 248) which gave it the power to make laws.

Thus, it can be observed from above that initially the courts in India followed literal and narrow interpretation. However in course of time this very judicial positivism transformed into judicial activism.

In the landmark case of Kesavananda Bharati v. State of Kerela,[8] Supreme Court of India propounded the basic structure doctrine. According to Basic Structure Doctrine the legislature can amend the Constitution, but it should not change the basic structure of the Constitution. CJI S.M. Sikri, mentioned five basic features of constitution in his judgment which were as follows:

1. Supremacy of the Constitution.
2. Republican and democratic form of Government.
3. Secular character of the Constitution.
4. Separation of powers between legislative, executive and judiciary.
5. Federal character of the Constitution.

As a result of this case the judicial system moved away from the 'procedure established by law' to 'due process of law'. However the Constitutional Bench in Indira Nehru Gandhi v. Raj Narain[9] held that Judicial Review in election disputes was not a compulsion as it is not a part of basic structure.

In Minerva Mills Ltd. V. Union of India[10] the scope and extent of doctrine of basic structure was again considered by the Supreme Court. The Supreme Court by a majority of 4:1 struck down clauses (4) and (5) of Article 368 [These were inserted by the forty second amendment act] on the ground that these clauses destroyed the essential feature of the basic structure of the constitution.

In S.P. Sampath Kumar v. Union of India[11], P.N. Bhagwati, C.J., held that *judicial review was a basic and essential feature of the Constitution*. If the power of judicial review will be absolutely taken away, then the Constitution would cease to be what it is. In Sampath Kumar case the Court further held that if a law made under Article 323-A (1) were to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure and hence outside the constituent power of Parliament.

Subsequently, in L. Chandra Kumar v. Union of India[12] a larger Bench of seven Judges unequivocally declared that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution [Constituting part of its basic structure].

The judgment in I.R. Coelho v. the State of Tamil Nadu[13] further established the pre-eminence of judicial review of each and every part of the Constitution. It was held that if the court finds that a particular enactment damaging the basic structure of the Constitution, it shall be declared void, notwithstanding the fictional immunity given to it by Article 31B. Thus, the basic structure doctrine requires the State to justify the degree of invasion of Fundamental Rights in every given case; and this is where the court's power of judicial review comes in.

Further in the case of State of W.B. v. Committee for Protection of Democratic Rights,[14] the 5 judge bench of Supreme Court held that power of judicial review is an integral part of the basic structure of the constitution. As a result no Act of parliament can exclude or curtail the powers of the constitutional courts with regard to the enforcement of fundamental rights.

On 16th October, 2015 the Supreme Court of India by a majority opinion of 4:1 declared the constitutional amendment and the NJAC Act unconstitutional. The Apex Court held that NJAC is interfering with the autonomy of the judiciary which as a result is violating the basic structure of the constitution wherein the parliament is not empowered to change the basic structure. But, the Supreme Court has also acknowledged the fact that the collegium system [System wherein the judges appoint judges] is lacking transparency and credibility which should be rectified by the Judiciary itself.[15]

POSITION OF JUDICIAL REVIEW IN OTHER COUNTRIES

UNITED KINGDOM

United Kingdom has no written constitution. As a result there is no explicit provision dealing with judicial review. However, courts do resort to indirect judicial review at times. They interpret constitutional provisions restrictively to protect civil liberties.[16]

The Courts in U.K. strictly follow the principle of judicial review in regard of Administrative actions and Secondary legislations. Primary legislations are kept outside the preview of judicial review but in exceptional circumstances Primary Legislations can also come under Judicial Review.[17]

UNITED STATES OF AMERICA

The doctrine of Judicial Review is an integral part of the American judicial and constitutional process, although the U.S. Constitution does not explicitly mentions the same in any provision. The Constitution merely states that it is the supreme law of the land.[18]

In the famous case of Marbury v Madison,[19] the U.S. Supreme Court has very clearly and specifically claimed that it had the power of judicial review and that it would review the constitutionality of the Acts passed by the Congress. The Court argued that the Constitution seeks to define and limit the powers of the legislature, and there would be no purpose in doing so if the legislature could overstep these limits at any time.[20]

Thus, the theoretical foundation of the doctrine of judicial review in the U.S.A. is that in exercise of its judicial functions, the Supreme Court has the power to say what the law is, and in case of a conflict between the Constitution and the Legislative Statute, the court will follow the former which is the superior of the two laws and will declare the latter as unconstitutional.[21]

AUSTRALIA AND CANADA

The Constitution of Australia and Canada does not contain any express provision for judicial review, yet the process goes on and judicial review has become an integral part of the constitutional process. The historical origin of judicial review in these countries is traceable to the colonial era. The colonial legislatures were regarded as subordinate legislatures vis-à-vis the British Parliament and they had to function within the parameters of the statutes of the British Parliament. The colonial laws were, therefore, subject to judicial review, and this process continued long after the colonies ripened into self-governing dominions. The doctrine of judicial review was thus ingrained into the legal fabric of Canada and Australia and, therefore, no need was felt to include a specific constitutional provision in the basic laws of these countries.[22] [23]

PRESENT SITUATION AND WAY AHEAD

Today there is lack of harmony between

the different wings of government i.e. the Legislature, Executive and Judiciary because their powers are overlapping in nature. Due to this very power of Judicial Review, the Judiciary in India is at loggerheads with the Legislative. It can be said as the government had taken a stance and wanted all forms of Talaq to be abolished but the Supreme Court of India decided that it cannot change what is integral part of religion and banned only Talaq-e-Bidat [Instant Divorce].[24] Further in K.S. Puttaswamy case[25] the Apex Court unanimously held that Right to Privacy is an integral fundamental right granted to the citizens of India thus denting the Aadhar scheme of the government. The above can be even considered as a classic case of judicial review in sync with the changing times.

There is a crisis between the organs of the government and this crisis can only be solved when all the three organs of government sit together and decide their limits and draw their boundary. The Legislature and the Executive need to understand that the institution of judicial review has a vibrancy of its own and has even been declared as the basic feature of the Constitution. Therefore, they should not make any effort to curtail the scope of judicial review and handicap the judiciary. Apart from that Executive despotism in the appointment of judges is a pre-condition for the debasement of democracy.[26] Hence the Executive have to change their approach in terms of judicial appointment. Further the Judiciary also needs to ensure that their exercise of power of judicial review should not retard the process of socio-economic development of the nation and hamper key policies of the government necessary for country's overall development. The proposed changes are required in Modern India because when the three organs of Government will work together in co-operation then only our country can move forward.

(Endnotes)

1. 4th Year BA LLB ;Chanukah National Law University, Patna

2. *An analysis of the concept of judicial review and a comparison between the judicial review of India and U.S.,* Legal Services India, available at http://www.legalservicesindia.com/article/1734/Judicial-Review-in-India-And-USA.html , last seen on 25/06/2018.
3 Ibid.
4 AK Gopalan v. State of Madras, 1950 SCR 88.
5 Shankari Prasad v. Union of India, AIR 1951 SC 458.
6 Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.
7 Golaknath v. State Of Punjab, AIR 1967 SC 1643.
8 Kesavananda Bharati v. State of Kerela, (1973) 4 SCC 225.
9 Indira Nehru Gandhi v. Raj Narain 1975Supp SCC 1.
10 Minerva Mills Ltd. V. Union of India, AIR 1980 SC 1789.
11 S.P. Sampath Kumar v. Union of India,(1987) 1 SCC 124.
12 L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.
13 I.R. Coelho v. State of T.N., (2007) 2 SCC1.
14 State of W.B. v. Committee for Protection of Democratic Rights, AIR 2010 SC 1476.
15 Supreme Court Advocates-on –Record – Association and Another v Union of India, Writ Petition (Civil) No 13 of 2015.
16 M.P.Jain, *Indian Constitutional Law*, 1605 (7th edition, 2014).
17 Ibid.
18 M.P.Jain, *Indian Constitutional Law*, 1605 (7th edition, 2014).
19 Marbury v Madison, 1 Cranch 137; 2 L Ed 60.
20 Marbury v Madison, 1 Cranch 137; 2 L Ed 60.
21 M.P.Jain, *Indian Constitutional Law*, 1605 (7th edition, 2014).
22 M.P.Jain, *Indian Constitutional Law*, 1605 (7th edition, 2014).
23 Edward Mcwhinney, Judicial Review, 49 -75 (1969); Lederman, The Courts and the Canadian Constitution (1964).
24 Shayara Bano v Union of India, Writ Petition (Civil) No. 118 of 2016.
25 K.S Puttaswamyvs Union of India, Writ Petition (Civil) No. 494 of 2012.
26 Premila Krishnan, "*Judiciary at Loggerheads with Legislative?",*Flair Talk, October 2017.