

## JUDICIAL REVIEW OF LEGISLATIVE ACTION

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*“I am of the view that if there is one feature of our Constitution which, more than any other is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution”- Justice Bhagwati*

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

India is lucky enough to have a constitution in which the fundamental

rights are enshrined and which has appointed an independent judiciary as guardian of the constitution and protector of the citizen's liberties against the forces of authoritarianism. In a true form of democracy, the rule of a fearless independent and impartial judiciary is indispensable and cannot be over-emphasized.

Judicial review of legislation is a result of two of the most fundamental features of Indian constitution. The first is the two-tier system of law with the constitution as the Supreme law and other legislation being the ordinary law which is valid only in so far as is consistent with the constitution. The Second is the separation of the legislative, the executive and the judicial powers of the state.

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 a 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.

Judicial Review of legislative acts indicates review of legislative actions to judicial restraint on the legislative and executive organs of the Government. The concept has the origin in the theory of

limited Government and in the theory of two laws, an ordinary law and the supreme law (i.e. the Constitution). From the very assumption that there is a supreme law which constitutes the foundation and source of other legislative authorities in the body polity, it proceeds that any act of the ordinary law making bodies which contravenes the provision of the supreme law must be void and there must be some organ which is to possess the power or authority to pronounce such legislative acts void.”

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 by the state legislature by examining whether they are inaccordance with the constitution.

## JUDICIAL REVIEW

- Judicial review is the doctrine under which legislative and executive actions are subject to review (and possible invalidation) by the judiciary.
- Judicial review is an example of the separation of powers in a modern governmental system (where the judiciary is one of three branches of government).
- This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms.

### MEANING AND DEFINITION OF JUDICIAL REVIEW:-

The word 'review' stands for an act of inspecting or examining something with a view to correct it or to improve it. This meaning shows that there is something which is already done by somebody whose correction or improvement is envisaged in the process of review. The word 'review' in the phrase '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 the power of the Judiciary to review and determine the validity of a law or an order may be described as the power of "Judicial review". It means that the constitution is the supreme law of the land and any law inconsistent therewith. 'Judicial Review' legislation or executive action can be defined as "Judicial review is the ultimate power of any court to declare any act of legislatures or of executives as unconstitutional and hence unenforceable as:-

- a) Any law.
- b) Any official action based upon a law

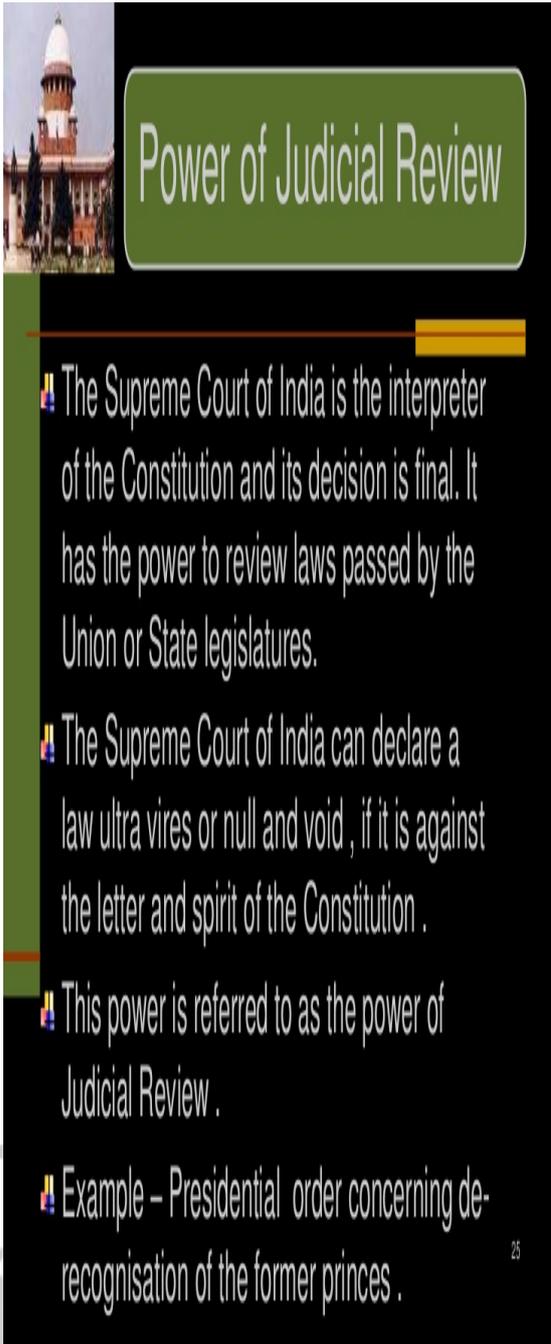
c) Any other action by a public official that it deems to be in conflict with the constitution."

In *L. Chandra Kumar Vs Union of India*, the Supreme Court held that "Henry J. Abraham's definition of judicial review in the American constitution is, subject to a few modifications, equally applicable to the concept as it is understood in Indian constitutional law. Broadly speaking judicial review in India comprises three aspects. Judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action."

According to **HOWARD MEBAIN**, an American author judicial review mean, the power possessed by American courts to declare that legislative and executive action are null and void if they are volatile of the written constitution.

## Judicial Review

- Judicial review
  - means by which courts control the exercise of governmental power
  - ensure that public bodies (government departments; local authorities; tribunals, etc) exercise their powers in a lawful manner
  - concerned with legality of decisions NOT merit

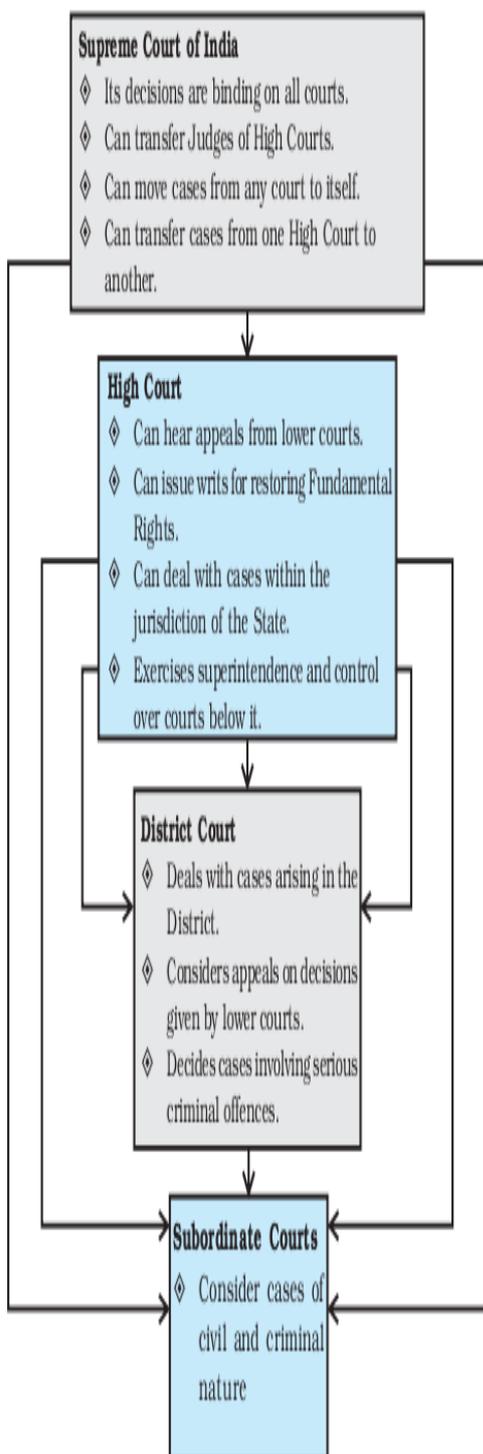


### Power of Judicial Review

- The Supreme Court of India is the interpreter of the Constitution and its decision is final. It has the power to review laws passed by the Union or State legislatures.
- The Supreme Court of India can declare a law ultra vires or null and void, if it is against the letter and spirit of the Constitution.
- This power is referred to as the power of Judicial Review.
- Example – Presidential order concerning de-recognition of the former princes.

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**JUDICIAL PROCEDURE FOR JUDICIAL REVIEW:-**

The power of judicial review has in itself the concept of separation of powers an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by the reason of a doubt raised in that behalf, by the courts. The methods of judicial scrutiny are still inadequate in India. Though the constitution makers of India have inserted a specific provision under Article 32 of the constitution to go directly to the Supreme Court regarding legislative lapses concerned with infringement of Fundamental Rights.

Article 32 itself is the fundamental right and according to Dr Ambedkar “it is the soul of the constitution as without which there would be no meaning of inserting the other fundamental rights in the constitution”. But there has been no any specific provision in the constitution to move the Supreme court direct on the unconstitutionality arising out of the violation of the constitutional mandate relating to distribution of powers or separation of powers or other constitutional restrictions which is equally vital. If the issue does not involve infringement of fundamental rights guaranteed under part III of the constitution, the aggrieved party has to move first the High court under article 226 and then only in appeal he can go to the Supreme Court if relief is not given by the High Court. Such pitfalls deserves

rectification by a suitable provision in the constitution so as to enable an aggrieved person to move the Supreme court directly concerning the unconstitutionality relating to the distribution of powers or delegated legislation or other constitutional restriction.

This speedy remedy would quicken the conscience of the citizen in a more fruitful manner in protection of his rights. Thus the Power of Judicial Review is incorporated in Articles 226 and 227 of the Constitution insofar as the High Courts are concerned. In regard to the Supreme Court Articles 32 and 136 of the Constitution, the judiciary in India has come to control by judicial review every aspect of governmental and public functions.

#### **HISTORY OF JUDICIAL REVIEW:-**

The concept of Judicial Review has a long and chequered history. It originated in English legal system and became a very important principle in the systems of government based on Rule of Law. When India was a colony of the British Empire the concept of Judicial Review was followed by the Courts and has continued to be a part of the legal system of our country since then. In order to know more about its ambit and scope it is necessary to note the historical background of the concept in English legal system and its adoption in Indian Legal system.

In ancient Britain, the king of England being the Supreme authority enjoyed enormous powers. For a proper exercise of his powers however the king used to consult a few Nobles who together with

the king constituted the Curia Regis (the Royal Council) and with the aid and advice of the said Curia Regis the king exercised his legislative, executive and judicial powers.

Later on, due to certain administrative reasons there was a split of the Curia Regis because of which the Royal powers turned into specific kinds of powers, and fell into the hands of three different institutions called the Executive, Legislative, and judiciary. After the split of Curia Regis the judicial powers were exercised by the Judges, sitting in the palace of the king and were designated as the Royal Courts. These Royal Courts performed the function for building up a uniform system of law and they exercised a variety of powers including the supervisory powers of the King. By this particular kind of power the Royal courts could review the actions of any of the branches of Government, its officers and functionaries, and issue Writs in the name of the king. Thus emanated the system of 'review' by the Royal courts which assumed the responsibility of maintaining the majesty of Royal power and got settled in the judicial system of England as an inherent power of the courts, i.e. a power which is not based on any Statute or statutory provision but on the assumption that it is a fundamental attribute of the kingdom to supervise the functioning of various agencies of the Royal Administration.

When the monarchical form of government lost much of its apparent features and came under the way of democratic principles, even the concept of Judicial Review continued as an inherent

feature of the judicial institutions of England. Of course, certain political developments affected the scope of Judicial Review in certain matters but the basic form of the idea of Judicial Review continued to remain the same. When the Royal Courts became the Courts of common Law, and performed the function of unifying the law of the realm, they developed further the judicial method of tackling the new problems. The inherent power helped the Courts of common Law in maintaining the traditions of the British Society. It was this power which helped the judges in maintaining the high ideals of the British legal system, such as the supremacy of law; due process of law and protection to the life, liberty and property of the subjects.

Although England drifted, in course of time, from Judicial Supremacy to Legislative Supremacy the one particular theory which it was not able to shed off was the theory of inherent powers of the kingdom and the theory of Judicial Review the method of judicial process.

Justice M.Hidayatullah of the Supreme Court of India has said, "The power of judicial review was abandoned in England some three hundred years ago after which sovereignty of parliament is beyond control."

Judicial Review flourished in English legal system on the theory that there is always a higher law to which the legislative, Executive or judicial action must be subservient. In the early days of its growth and development the concept of Judicial Review proceeded on the theory

that Natural Law is the supreme law and any action by the officers or institutions of the kingdom must adhere to the dictates of this supreme law.

While this has been the background of Judicial Review in English Legal System this concept has a bit different background in the legal system of India. The difference is based on the historical truth that in all those countries which formed part of the British Empire either as colonies or Protectorates or Mandated Territories the British had introduced the system of Judicial Review for the purpose of maintain the principles which were fundamental to the system of responsible government. So, the system of Judicial Review as part of the common Law of England got introduced into in the legal systems of America, Canada, and several other got introduced into in the legal systems of America, Canada, of the several other countries in the continent of Africa.

India as a colony of the British Empire had adopted the pattern of judicial organization as well as the judicial practice of review by the courts. Despite the fact that the former colonies have ceased to be part of the British Empire most of them have retained the concept of Judicial Review as an inherent power of the Courts. Same has been the case with the Indian Republic under its Constitution of 1950. The principles which the English courts had developed in the context of Judicial Review were adopted by the courts in India too.

In *Hylton v. United States*, chief justice Chase remarked in 1796 as under: “It is unnecessary for me to determine whether the court constitutionally possesses the power to declare an act of the congress void on the ground of its being contrary to and in violation of the constitution, but if the court has such powers, I am free to declare it but in a clear case.”

The federal convention was much concerned with the problem of keeping of the powers of congress within constitutional bounds. Chief Justice Marshall before the expressed his view on Judicial Review in *Marbury v. Madison*, spoke in the capacity of a delegate to the Virginia convention. “If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.

In 1795 in *Van Horn’s Lessee v. Durance*, Justice William Paterson, Associate Judge of the Supreme Court observed: “every act of the legislature repugnant to the constitution is absolute void.”

The doctrine of judicial review established by Chief Justice Marshall in *Marbury v. Madison* is still vibrant and its force stands unabated, although it has been criticised. By 1803 Judicial Review had a long history in America. Chief Justice Marshall through his various constitutional decisions established the following principles:

(a)The people as a whole are sovereign.

(b)The Government is the Government of the people, it emanates from the people, its powers are granted by the people and it is to be exercised for the benefit of the people.

(c)The constitution is Supreme.

(d)The Central Laws have Supremacy over the State Laws.

(e)A law repugnant to the Constitutions is void.

(f)The court has power to determine the constitutionality of a legislative Act and declare it void when it is repugnant to the constitution.

(g)Doctrine of implied powers can be invoked to expound the Federal powers.

(h)Legislation can be declared unconstitutional only in clear case of unconstitutionality and not in any doubtful case.

(i)The constitution is a living instrument adaptable to all new condition of life.

Mason has given a comparative picture of the English and America systems by writing In England the only safeguard against legislative tyranny was the power of free public opinion represented in commons. America was not content to rely solely on political checks, these had to be supplemented by legal and constitutional control is enforced by judges.”

In India, judicial review is not an event of sudden emergence but its gradual evolution depended on the constitutional ideas in different stages of Indian constitutional history. The Supreme Court at Calcutta was established by the Charter of 1774, which was issued under the Regulating Act, 1773. The powers of the judges of that court were same as those of the judges of the court of Kings Bench in England.

The Indian legislature from 1858 to the enforcement of the Government of India Act, 1935 was like subordinate body and had no plenary power of legislation but nevertheless the power of judicial review existed. The law court had power to examine the constitutionality of legislative Act on the ground of legislative incompetence of legislative powers. The Government of India Act, 1858 put certain restrictions upon the law-making power. Positive restrictions were imposed by the Indian Council Act, 1861. Section 22 of the Indian Council Act, 1861 lays down constitutional restrictions in framing laws, as follows:

“Provided always that the said governor General in Council shall not have the power of making any law or regulations which shall repeal or in any way affect any of the provisions of this Act”.

The Constitutional thinkers of India were of the view that in the Constitution of free India there must be provision for a supreme court with the power of judicial review. That the Supreme Court should be conferred with the power to declare

ultravires measure which go against constitution.”

At the time of making of Constitution the framers of the Indian Constitution were inclined towards the British principles of Parliamentary Supremacy but although they adopted the English model of parliamentary Government and made parliament the focus of political power in the country and the dominant machinery to realize the goal of social revolution, they did not make it a sovereign legislature in the same sense and to the same extent as the British Parliament was sovereign. They placed, as much supremacy in the hands of the legislature as was possible within the bounds of a written constitution with a Federal distribution of powers and a bill of rights.

The Judiciary has been assigned a superior position in relation to the legislature, but only in certain respects. The constitution endows the judiciary with the power of declaring the laws as unconstitutional, if that is beyond the competence of the legislature according to the distribution of powers provided by the constitution or if that is in contravention of the constitution. Thus, while the basic power of review by the judiciary was recognized and definitely established, significant restrictions were placed on such a power, especially in relation to the fundamental rights concerning freedom, and liberty.

The constituent assembly was evidently keen on preventing judicial review from becoming an instrument of judicial policy-making judicial review from becoming an instrument of judicial policy-making and

thereby upsetting governmental balance of power.

Limitations on Court could never hope to equal its American counterpart. It seems that, at times, members were almost haunted by an imaginary ghost of judicial activism transplanted from the far-off America.

### **POSITIVE CONSIDERATION FOR JUDICIAL REVIEW:-**

(a) Our Constitution is federal constitution and interpretation of the constitution is the constitutional duty of the SC. Through Judicial interpretation judiciary keeps organs and departments of the government within their limits. Without the power of judicial review federal structure may be damaged. Therefore, judicial review is necessary ingredient of our constitution.

(b) It is true that Judicial Review places reliance on judges and their ability and integrity. Judges are part and parcel of the Society. Our experience proved judiciary much more honest than legislature and executive. Day-to day scandal happens in executive and legislature, while no conspicuous scandal has been noticed in Judiciary so far. Judicial Review saves country from arbitrariness and tyranny of executive and legislature. One can very well suppose that when there was no Judicial Review or judicial activism to what extent corrupt executive and legislatures would have spoilt moral and social life of the people.

(c) Legislature and executive are pressurized by vested interests whereas

judiciary has no such chances of pressure from vested interests.

(d) Judicial Review not undemocratic rather it keeps the democracy alive through keeping organs of state within their own limits.

(e) Judiciary is accountable to the people the consumers of the justice as rightly observed by Justice Frankfurter.

(f) Judicial Review affords protection against legislative excesses and executive arbitrariness. The Indian judiciary is the best fitted to the role of an umpire for deciding the proper functioning of the constitution. Judiciary has saved the constitution and democracy.

(g) Through judgments and orders of SC and HC are found generally well considered and balanced. Even Art. 137 empower SC to review its own judgment or order. This power of correction makes the judiciary more fool proof. With the change of circumstances and conditions and coming into existence of new facts and laws SC and HC overrule and set aside their own judgments and orders.

(h) Thus, Judicial Review is essence of federal structure of polity and democratic set-up of the country. Chandrachud in Bharti's case held that Judicial Review as the basic structure of the constitution.

### **DEMOCRATIC ELEMENTS IN JUDICIAL REVIEW:-**

The future of democracy in this country will depend upon the preservation and

maintains of the Rule of Law. One of the important achievements of democracy is that law must be just for human safety and it must be subservient to the human needs. A federal republican country in order to establish an ideal democratic rule and to create confidence in the mind of the people about democratic federalism must allow Judicial Review to thrive so as to eliminate unjust and unconstitutional laws and to relieve the people from legislative tyranny.

We are living in an age of constitutional and limited democracy which imposes limitations on the power of the Government and banks on majority rule to avoid tyranny and arbitrariness. But democracy cannot thrive in the absence of an all pervading justice.

The Preamble of the Indian Constitution has promised equality and justice to all citizen of India and has the laws of India liable to be tested judicially. The majority rule, though the best rule is found generally to be addicted to tyranny. That why the existence of some impartial body is essential for the maintenance of democracy.

#### **B.K. GOKHALE HAS ENUMERATED THE MERITS OF JUDICIAL REVIEW IN DEMOCRACY:-**

- 1) Judges are competent to make judicial review by virtue of their knowledge & experience.
- 2) Courts are less biased than Legislatures.
- 3) It guarantees the rights of minorities.

4) It protects the rights if the individual and also those of the federal units in a federation.

#### **EXTENT OF JUDICIAL REVIEW IN INDIA:-**

The initial years of the Supreme Court of India saw the adoption of an approach characterized by caution and circumspection. Being steeped in the British tradition of limited judicial review, the Court generally adopted a pro-legislature stance. This is evident from the rulings such as A.K. Gopalan, but however it did not take long for judges to break their shackles and this led to a series of right to property cases in which the judiciary was loggerhead with the parliament.

The nation witnessed a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect, followed by another decision reaffirming the earlier position, and so on. The struggle between the two wings of government continued on other issues such as the power of amending the Constitution. During this era, the Legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court.

At the time, an effort was made to project the Supreme Court as being concerned only with the interests of propertied classes and being insensitive to the needs of the masses. Between 1950 and 1975, the Indian Supreme Court had held a mere one

hundred Union and State laws, in whole or in part, to be unconstitutional.

**THE SUPREME COURTS  
INTERPRETATION OF  
LEGISLATIVE ACTS TO MAINTAIN  
THE SUPREMACY OF THE  
CONSTITUTION:-**

Under the constitution of India, the scope of judicial review has been extremely widened. Unlike the U.S.A., the constitution of India has made express provision for judicial review. The scope of judicial review is present in several articles of the constitution, such as, 13, 32, 131-136, 143, 226 and 246. Thus, the doctrine of judicial review is firmly rooted in India and in this sense it is on a more solid footing than it is in America.

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 derive 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 or abridges the rights conferred by Part III of the constitution containing fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void”.

The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to any constitutional 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.

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

In *Subhash Sharma v/s Union of India*, The court observed that judicial review is a basic and essential feature of the constitutional policy and held that the Chief justice of India should play the primary role in the appointment of judges of High court and Supreme Court and not the Executive.

Justice Bhagwati in *Sampath Kumar v/s Union of India* held that “Judicial Review is essential feature of the constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the constitution will cease to be what it is”.

In **Minerva Mills case**, **Chandrachud, C.J** speaking on behalf of majority observed “It is the function of the judges, nay their duty, to pronounce the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will become uncontrolled”.

In the same case, **Bhagwati, J** observed “it is for the judiciary to uphold the constitutional values and to enforce the constitutional limitation. That is the essence of the rule of law, which inter alia requires that the exercises of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the constitution and the law. The power of judicial review is an integral part of our constitutional system and without it there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our constitution which, more than any other is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionable, to my mind, part of the basic structure of the constitution”.

**Ahmadi, C.J** in **Chandra Kumar v/s Union of India**<sup>13</sup> has observed “The judges of the Supreme Court have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the constitution is maintained and that the legislature and the

executive do not, in the discharge of their functions, transgress constitutional limits”.

After the period of emergency the judiciary was on the receiving end for having delivered a series of judgments which were perceived by many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution. The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen.

Judicial review extends to every governmental or executive action – from high policy matters like the President's power to issue a proclamation on failure of constitutional machinery in the States like in **S.R. Bommai v/s Union of India case**, to the highly discretionary exercise of the prerogative of pardon like in **Kehar Singh v/s Union of India case** or the right to go abroad as in **Satwant Singh v/s Assistant Passport Officer, New Delhi case**.

Judicial review knows no bounds except the restraint of the judges themselves regarding justifiability of an issue in a particular case. In **Maneka Gandhi v/s Union of India**, the judicial review has acquired the same or even wider dimensions as in the United States. Now ‘procedure established by law ‘in Article 21 does not mean any procedure lay down by the legislature but it means a fair, just and reasonable procedure. A general principal of reasonableness has also been evolved which gives power to the court to

look into the reasonableness of all legislative and executive actions.

Recent Judgment of Supreme Court dated 11.01.2007 rendered in the case in **I.R Coelho (Dead) by LRs Vs. State of Tamil Nadu and Others** is a master stroke of the judiciary. Prima facie, it is laudable for the reason, that it is a unanimous judgment of nine judges Constitution Bench of the Supreme Court, unlike fractured earlier judgments on the point.

In **Keshavananda Bharati vs. State of Kerala** which is said to have first propounded the Doctrine of basic structure of the Constitution, the Hon'ble 13 Judge Constitution Bench of Supreme Court delivered 11 truncated judgments. Since 24th April 1973, the date of the judgment of the Keshavananda Bharati case, the debate is, what is the ratio decidendi, viz., the point of law laid down in the said judgment. Fortunately, the present judgment of Supreme Court by providing unanimous verdict saved the Nation from such turmoil of searching for the ratio decidendi with magnified glasses. Fractured Judgments pains the Nation a lot to understand what is the Law and much time and energy of legal fraternity is spent on debating, interpreting and searching laws from such truncated judgments.

The whole of the present judgment is devoted to understand and lots of pains have been taken to impress that Doctrine of Basic Structure was propounded in Keshvananda Bharati case. Much effort is made to highlight and explain Justice Khanna's views in Keshavananda Bharti's case and as clarified by Justice Khanna in

Indira Gandhi case, since Justice Khanna's vote in favor of Basic Structure Doctrine will give the much needed majority in its favor in Keshavananda Bharti's case.

However the propriety and validity of the clarifications provided by Justice Khanna in Indira Gandhi case, whether the same clarification can be read into Keshavananda Bharati case, is a question to be answered. Now a day, it is a welcome feature that most of the landmark judgments are unanimous.

#### **ROLE OF SUPREME COURT TO DISBANDED SOCIAL INEQUALITY OF WOMAN BY JUDICIAL REVIEW:-**

The constitution has tried to establish social equality. The court is the best organ for realization of social equality and human dignity. The social equality of woman has been greatly strengthened through judicial review and equality of woman is one of the predominant features of the Indian democracy.

In **Air India v/s Nargiz Mirza**, a regulation framed by Air India authorizing the employer to terminate services of an air Hostess on her first pregnancy was held to be extremely arbitrary, unreasonable abhorrent to notions of civilized society and interfering with the ordinary cause of human nature.

In **Randhir Singh v/s Union of India** the Apex Court held that although the principle of 'equal pay for equal work' is not expressly declared by our Constitution

to be a fundamental right, but it is certainly a constitutional goal under Article 14, 16 and 39(c) of the Constitution.

In a landmark judgment in *Vishaka v/s State of Rajasthan*, the Supreme Court has shown a class example of judicial activism. It was laid down exhaustive guidelines to prevent sexual harassment of working women in places of their work until Legislation is enacted for this purpose. The judiciary criticized the Legislature for not creating legislation in that area and give effect to International Convention on the elimination of All Forms of Discrimination against women.

#### **ROLE OF JUDICIAL REVIEW IN DEVELOPING SOCIAL JUSTICE:-**

Social justice has received a great importance for last 62 years than before. No doubt the Supreme Court through its innumerable decisions has defined clarified and widens the fundamental principles underlying the concept of social justice in India. For instances, section 25 FFF of the Industrial Disputes Act 1947, was challenged as unconstitutional. The section lays down that where an undertaking is closed down for any reason, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure, shall subject to the provisions of sub-section (2) be entitled to notice and compensation in accordance with the provisions of section 25 of the act, as if the workman has been retrenched.

The Apex court held the validity of the said section and observed that "Closure of

an industrial undertaking involves termination of employment of many employees, and throws them into the ranks of the unemployed, and it is in the interest of the general public that misery resulting from unemployment should be redressed.

In *Jalan Trading Co. v/s mill Mazdoor Sabha*, the validity of Payment of Bonus act, 1965 was challenged by the plaintiff companion the ground that the Act is fraud on the Constitution or is a colourable exercise of the legislative power. The Supreme Court upheld the validity of the Act and ruled that the validity of the law authorizing deprivation of the property can be challenged on following three grounds.

- 1) Incompetence of the Legislature to frame the law.
- 2) Infringement of Fundamental Rights guaranteed in part III of the Constitution
- 3) Violation of any other express provision of the Constitution.

#### **AN INVISIBLE AMENDMENT TO THE CONSTITUTION:-**

Since 1951, questions have been raised about the scope of the constitutional amending process contained in Article 368. The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any fundamental right through constitutional amendment. Since 1951, a number of amendments have been effectuated in the Fundamental rights. The constitutionality of these has been challenged for number of times before the Supreme Court.

In *Shankari Prasad v/s Union of India*, the 1st amendment which inserted Article 31-A and 31-b of the constitution challenged. The amendment was challenged on the ground that it takes away the rights conferred in Part III of the constitution. However the Supreme Court held that the power to amend the constitution including the fundamental right contained in Article 368 of the Constitution.

Again in *Sajjan Singh v/s state of Rajasthan*, the validity of the constitution 17th amendment was challenged. The Supreme Court approved the majority judgment given in Shankari Prasad's case and held that the words 'amendments to the constitution' means amendment of all the provisions of the constitution.

But these two landmarks decisions were overruled by the Supreme Court in *Golaknath v/s state of Punjab* where certain state acts in Ninth schedule were again challenged.

The Supreme Court by a majority decision prospectively overruled its earlier decisions of Shankari Prasad and Sajjan Singh cases and held that Parliament have no power from this date of the decision to amend Part III of the Constitution so as to take away the fundamental rights.

In *Keshvananda Bharati v/s state of Kerala*, the Supreme Court overruled the Golaknath case, which denied parliament the power to amend fundamental rights of citizens. The Court observed that 24th amendment does not enlarge the amending power of the Parliament. The parliament is

having unlimited power to amend the constitution but it should not destroy the basic structure of the Constitution.

In *Indira Gandhi vs. Rajnarayan* the Supreme Court struck down the clause inserted by the amendment which said once elected Prime Minister and Speaker of Lok Sabha are not answerable to any court against violation of Right to equality in the Constitution.

Since A K Gopalan case up to this date and has brought out the development of judicial construction of the Constitution and the Doctrine of Basic Structure. 24th April 1973, the date of Judgment of Keshavananda Bharati is made the cutoff date to test the legislative action on the touch stone of Basic Structure Theory. All Laws passed; even if they are kept in IX Schedule of the Constitution has to pass through the Basic Structure Doctrine. By making 24th April 1973 as the cut off date, the Supreme Court has admitted that they have propounded the said Doctrine of Basic Structure from the said date. Its impact and its repercussions are very serious to the Nation and it tells a lot on the amending powers of the Constitution by the Judiciary itself. We find no written letters Basic Structure in the whole of the Constitution and it is undoubtedly a judicial invention.

Article 32 of the Constitution confers the power on the Supreme Court, for the enforcement of any of the rights conferred by this part viz. Part III of the Constitution and not beyond the same. No doubt, the said power is apart from the powers conferred under Part V, Chapter IV of the

Constitution. If there is a violation of fundamental rights in state action, including legislative action, the same can be struck down under Article 32 of the Constitution. The touchstone could only be the Constitution and more specifically Part III of the same. Fundamental rights are enshrined in the Constitution at the time of its adoption itself. By making 24th April 1973 as cutoff date, judiciary admits introduction of a new Chapter called Basic Structure to the Constitution, to be a touchstone, to test the state action and it is in the nature of an invisible amendment without inserting any letter to the Constitution.

Certainly, judiciary does not have powers to amend the Constitution, but by propounding the Basic structure doctrine as touchstone to test the legislative actions and by evolving the same from Keshavananda Bharati case to the present case and making the same as an enforceable doctrine, the judiciary had exceeded its delineated powers. While holding on one hand that the Parliament, while exercising constitutional amending power under Article 368, cannot amend the Basic structure of the Constitution, the judiciary has exactly done the same by usurping to amend the Constitution by inserting the Basic Structure Doctrine in the Constitutional Arena, without having even semblance of power to amend the Constitution.

Basic Structure Doctrine is certainly an invisible amendment to the Constitution or otherwise the date 24th April 1973 is irrelevant. The Judiciary can have the Constitution as touchstone and not the

doctrines, theories, propounded later by the judiciary.

The doctrines and theories can only serve as tools to understand or to interpret the constitution. But they themselves cannot be touchstones and replace the constitution. The judiciary possibly, unconsciously made a theory, laid it as a touchstone and put a cut off date, everything without introducing a word in the constitution.

Again, the big question is who can review the power of judiciary to make such invisible amendments to the constitution. There is no provision or mechanism spelt out in the Constitution to review the judicial action by any independent organ, similar to judicial review of legislative action read into Article 32 of the Constitution.

At times, legislature and the executive could only be helpless spectators of judicial action. If the Supreme Court in the present case does not restrict the date as 24th April 1973 things could have been possibly different. The Supreme Court should have continued to have Part III of the Constitution as touchstone and not beyond. Supreme Court in the present case has proclaimed at Para 78 that this Court being bound by all the provisions of the Constitution and also by the Basic Structure doctrine has necessarily to scrutinize the Ninth Schedule Laws. By such assertion, the Supreme Court openly admitted that they are bound by not only provisions of the Constitution but also Basic Structure Doctrine and it evidences that Basic Structure Doctrine is apart from

the Constitution and not part of the Constitution.

### CONCLUDING REMARKS:-

The Indian Judiciary has played a remarkable role by the way of Judicial Review to maintain the supremacy of the Constitution. As said by Holmes that life of law is not logic but experience. Hamilton, one of the framers of the constitution of United States of America says that if there is conflict between constitution and the law the judges should prefer constitution. In India it is reflected 100%. After the decision of Keshavananda Bharti's case 42nd amendment was made to the Constitution which inserted Clause 4 and 5 which declared that their shall be no limitation on the amending power of the parliament of what so ever. According Mr. Swaran Singh, the Chairman, and Congress Committee on Constitutional Amendments, put an end to any controversy as to which is Supreme, Parliament or the Supreme Court.

But In **Minerva Mills v. Union of India** The Supreme Court struck down Clauses (4) and (5) of Article 368 inserted by the 42nd Amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the Constitution. The Judgment of the Supreme Court thus makes it clear that "the Constitution-not the parliamentis supreme in India."

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