

## JUDICIAL REVIEW: A BASIC TOOL TO BALANCE POWER AND RIGHTS

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### Abstract

*“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.<sup>2</sup> Amidst, the democratic countries it holds a very wide varied meaning and judiciary in India herein plays a very important role in determining the constitutional values that our founding fathers gave us. India has been fateful enough to have basic human fundamental rights enshrined in its constitution and having judiciary as a protector of it against any rule of authoritarianism. The constitution of India enables Government to be responsible to the parliament but the parliament, the president and the judiciaries will be held responsible to the constitutional limitations.<sup>3</sup>*

*As India has separation of powers, i.e. Legislative, Executive and Judiciary, The Supreme Court acts as an arbiter between both unions and states with respect to their powers and also plays a competent role of reviewing the legislative enactments by both the centre as well as state legislatures. There are several specific provisions in the Indian constitution, judicial review of legislation such as Act 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372.<sup>4</sup>*

**Keywords:** *Judiciary, Judicial Review, limitations, Separation of Powers.*

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<sup>2</sup> <http://www.internationalseminar.org>, last accessed on 03/03/16 at 8:15 PM.

<sup>3</sup> *Ibid.*

<sup>4</sup> <http://papers.ssrn.comsol3papers.com>, last accessed on 03/03/16 at 8:15 PM.

## INTRODUCTION:

India follows a federal structure of governance where there is a separation of powers making it more of a kin to U.S Constitution rather than British Constitution where Parliament supremacy still holds good. The division of federal structure as mentioned in Part (XI) of the Indian Constitution defines the power distribution between Legislative, Executive and Judiciary. This power facade between union and states can lead to various issues related to rights of individuals or interests of Constitution of India and therefore what comes to the rescue is Judiciary, which acts as a watchdog to Legislative/Judiciary if it exceeds its authority as well as acts as a guardian towards protecting the rights and interest of people. In the framework of a constitution which guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and delimits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review<sup>5</sup>, Article 13 specifically states that any law which will contravene any of the given provision of the part of section of Fundamental Rights shall be deemed void.

## MEANING AND DEFINITION OF JUDICIAL REVIEW:

The word 'review' is defined as a way of inspecting something with a view to improve it. The word 'review' in the term 'judicial review' stands for something which is performed by a court to examine the validity of the action of some other agency.<sup>6</sup>

Judicial Review has two prime functions:

- (1) To provide legitimacy to any government ; and
- (2) To maintain the basic essence of the constitution conflicted by any law made by government.<sup>7</sup>

The concept of Judicial Review first came into the picture by the case of Marbury v Madison<sup>8</sup> in the Supreme Court of United States of America. Marbury v. Madison, arguably the most important case in Supreme Court history, was the first U.S. Supreme Court case to apply the principle of "judicial review" -- the power of federal courts to void acts of Congress in conflict with the Constitution. This judgement by John Marshall was the reason to create a separate branch of judiciary known as Supreme Court<sup>9</sup> Marshall in the judgement declared that-

*“The legislature has no authority to make laws repugnant to the constitution and in the case of any violation of the constitution the court possess the absolute and inalienable rights to accommodate the system of judicial review.”*<sup>10</sup>

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Supra* Note 1.

<sup>7</sup> <http://www.preservearticles.com/2011/10/03/14420essays-on-the-doctrine-of-judicial-reviewq-in-the-indian-constitution.html>, last accessed on 03/03/16 at 8:15 PM.

<sup>8</sup> 5 US (Cranch) 137 (1803).

<sup>9</sup> [http://www.pbs.org/wnet/supremecourt/democracy/landmark\\_marbury.html](http://www.pbs.org/wnet/supremecourt/democracy/landmark_marbury.html), last accessed on 03/03/16 at 8:15 PM.

<sup>10</sup> *Supra* Note 1.

In India For the first time the definition of Judicial Review was interpreted in the case *L. Chandra Kumar Vs Union of India*<sup>11</sup>, where the Supreme Court of India held that:

*“Henry J. Abraham’s definition of judicial review in the American constitution is subjected to a few modifications, equally applicable to the concept as it is understood in Indian constitutional law. Indian Judicial System has widely two variations in the form of Judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action.”*

According to Howard Mebain who was an American author judicial review means, the power authored by American courts declaring the legislative actions are null and void if they are contrary to the written constitution.<sup>12</sup>

### **SPECIFIC PROVISIONS AND CASE LAWS:**

There are a few particular procurements in the Indian constitution, legal survey of enactment, for example, Articles 13, 32, 131-136, 143, 226, 145, and so on. Article 372 (1) builds up the legal survey of the pre-protected enactment. The Supreme Court and High Court has the power to transgress any law which renders the major perfectly fine/invalid. The Supreme and High courts are constituted as the defender and underwriter of Fundamental Rights under Articles 32 and 226. While, Articles 251 and 254 say that in the situations where any irregularity wins in the middle of union and state laws, the state law might be void.

The Judicial Review along these lines is the colossal force in the hands of courts to strike down any law/procurement which is in struggle with the fundamental tradition that must be adhered to. This has been demonstrated by the judgment of I.R. Coelho v. the State of Tamil Nadu by setting up the pre-greatness of legal survey of every single piece of the Constitution. The court in this judgment laid two stages, (a) whether the specified alteration or a law is violative of any of the Fundamental Rights given in under Part III of the Indian Constitution (b) and on the off chance that it is thus, does it disregards the essential structure of it. Along these lines, if the court understands that the said institution is violative of essential structure, it might be pronounced void, despite the anecdotal insusceptibility given to it by Article 31B.

Under our Constitution, judicial review can conveniently be classified under three heads.

- (1) Judicial review of Constitutional amendments.*
- (2) Judicial review of legislation of Parliament, State Legislatures as well as subordinate legislation*
- (3) Judicial review of administrative action of the Union of India as well as the State Governments and authorities falling within the meaning of State.<sup>13</sup>*

For the brevity and clarity of the paper, this article is going to deal majorly with the “Judicial Review of Constitutional Amendments”. Some of the worth mentioning cases under it are:-

<sup>11</sup> AIR 1997 SC 1125.

<sup>12</sup> *Supra* Note 1.

<sup>13</sup> Justice Syed Shah Mohammed Quadri, *Judicial Review of Administrative Action*, (2001) 6 SCC (Jour) 1.

*Shankari Prasad case*<sup>14</sup>, *Sajjan Singh case*<sup>15</sup>, *Golak Nath case*<sup>16</sup>, *Kesavananda Bharati case*<sup>17</sup>, *Minerva Mills case*<sup>18</sup>, *Sanjeev Coke case*<sup>19</sup> and *Indira Gandhi case*<sup>20</sup>.

### SPECIFIC CASES:

While ironing the conflicts between state and union, the court is required to interpret the laws and provisions in the most extensive manner and those interpretations are honoured and followed by all the courts in the country. There lies no appeal against the judgements of Supreme Court.

In **Shankari Prasad vs. Union of India**, the first amendment act of 1951 was challenged on the grounds that it encroaches the fundamental right to property and shall not be touched with because of the limitations imposed on fundamental rights under Article 13(2). But, the court refuted this particular basic assertion and held:

*“The constituents of Article 368 are perfectly general and empower parliament to amend the constitution as it deems fit considering the general welfare of the people without any exception or what the case is. In the context of Article 13 law must be taken to mean rules or regulations created in the exercise of ordinary legislative power and amendments to the constitution with the result that Article 13 (2) does not affect amendments made under Article 368.”*<sup>21</sup>

In **Sajjan Singh Case**, where the constitutional validity of 17<sup>th</sup> amendment was challenged questioning the competency of the parliament to make law, the Supreme Court reiterated its stand taken in the Shankari Prasad Singh Deo case and held that Art. 368 was “*perfectly general*” and allowed amendment of “*the Constitution,*” (no exception) and therefore Art. 13 (2) did not cover a constitutional amendment. It was also observed in this regard that if was deemed essential to save Fundamental Rights a clear proviso in Art. 368 would have conveyed/maintained the said intention without any second thought.”

In the landmark judgement of **Golak Nath v State of Punjab**, the court overruled and reversed its previous two judgements as are mentioned following above. The case was heard by a special bench consisting of 11 judges since the validity of three constitutional amendments (1st, 4th and 17th) was subsequently challenged. The Supreme Court ruled by a majority of 6 to 5 reversed its earlier decision and declared that parliament under article 368 cannot take away or encroach upon the Fundamental Rights by any form of law contained in chapter II of the constitution observing the following:<sup>22</sup>

- (1) *Article 368 only provides procedure and nothing more for an amendment.*
- (2) *Article 368 does not imply an absolute authority.*
- (3) *Article 245, 246 and 248 provide the power to amend the constitution.*

<sup>14</sup> Shankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458.

<sup>15</sup> Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

<sup>16</sup> Golak Nath v. State of Punjab, AIR 1967 SC 1643.

<sup>17</sup> Kesavananda Bharati v. Union of India, AIR 1973 SC 1461.

<sup>18</sup> Minerva Mills v. Union of India, AIR 1980 SC 1789.

<sup>19</sup> Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., (1983) 1 SCC 147.

<sup>20</sup> Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1.

<sup>21</sup> *Supra* Note 3.

<sup>22</sup> *Ibid.*

- (4) *The term 'law' as defined in Article 13 (3) not only includes law made by the parliament through ordinary legislative power but also includes an amendment of the constitution made through its constitution power.*<sup>23</sup>
- (5) *Any amendment of the constitution would be void under Article 13 (2) if it proves to take away or infringes the fundamental rights conferred by part III of the constitution.*
- (6) *The First Amendment Act 1951, the fourth Amendment Act 1955 and the seventeenth Amendment Act. 1964 are against the Fundamental Rights and are void under Article 13 (2) of the constitution.*
- (7) *Parliament will have no power amend or make any law so as to take away or abridge the Fundamental Rights enshrined in Part III of the constitution.*<sup>24</sup>

In **Minerva Mills case**, the Supreme Court in its majority decision struck down section 4 of the 42nd Amendment Act which gave predominance to the Directive Principles of the State Policy over Articles 24, 19 and 31 of part III of the constitution, on the basis that part III and part IV of the constitution are equally important and the priority of one over other is not allowed.

### EXTENSIVE PRINCIPLE OF JUDICIAL REVIEW:

The initial years of Judiciary might be said to be shackled by cautions and not so bold decisions which let many arbitrary laws and provisions to flourish and prevail. It can be pretty evident by noticing that in 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 opening up a lot of deliberations of chaos and struggle between power sections. But sooner or later the Judiciary woke up taking its toll of power and ratified its mistakes starting from landmark case of Golak Nath as mentioned in the paper earlier.

Even though the doctrine of Judicial Review in India is said to be adopted by US, India holds a deeper footing considering Article 13(2) of the Constitution of India as mentioned/discussed earlier in the paper which says "*the state shall not make any law which takes away the rights conferred by Part III of the constitution containing fundamental rights or any law made in the contrary shall be deemed void.*" This gives the court a constitutional duty to maintain the interest of the basic nature of the Constitution.

The following are some cases which will show how the judiciary has been playing such a crucial role in maintaining the supremacy of the Constitution:

In **State of Madras v Row**,<sup>25</sup> while confirming the validity of any legislation to the constitution, the court further stated:

*"While the court naturally attaches great weight to the legislative judgments, it cannot desert its own duty to determine finally the constitutionality of an impugned statute"*.

<sup>23</sup> *Supra* Note 3.

<sup>24</sup> *Supra* Note 4.

<sup>25</sup> AIR 1952 SC 196.

In *A.K. Gopalan v/s state of Madras*,<sup>26</sup> the court held that “the constitution holds supremacy in India and any law which is to be made should be made in conformity with it and judiciary shall play the role of watchdog in it”.

In *S.S. Bola v/s B. D. Sharma*,<sup>27</sup> Justice Ramaswami held “the propounders of the constitution intelligibly added the judicial review to maintain a balance in federalism, so as to protect the fundamental rights and duties of the people.”

Justice Bhagwati in *Sampath Kumar v/s Union of India*,<sup>28</sup> held that “Judicial Review forms the essential feature of the constitution and Parliament by any means of law cannot take away or abridge it.”.

Ahmadi, C.J in *Chandra Kumar v/s Union of India*,<sup>29</sup> has observed “it is the judges who have and are ascertained by the responsibility of upholding the constitutional validity under the basic essence of the constitution. They have to ensure the balance of power between executive and legislature so that no part transgresses their constitutional limits, in the discharge of their constitutional functions”.

## CONCLUSION:

With the right open mindfulness in India, each significant government activity on legal audit is of the pattern of legitimate improvement in India. Some official branches of government have started to take the activity to bring legal audit of some questionable issues keeping in mind the end goal to decrease choice making obligations. From India, the improvement of legal audit and the fundamental system can reach the accompanying determinations. To begin with, India is a vital legal audit of the sacred framework in Indian private enterprise. The tenet of law assumes a positive part in protecting the sacred framework. Furthermore, the fundamental capacity of legal survey of the framework is to equalization the authoritative and regulatory requirements, and fundamentally is the hobbies of all areas. The motivation behind legal survey from the Indian courts is to set up the protected standard of legal survey, and in addition the development of legal audit. The legal survey of established administration is to be a helpful device to assume its compelling part. Courts need to adjust distinctive social hobbies, to take proper activism or restriction convention in the legal survey also, to consider numerous elements like the strategies laws and projects, the watchfulness allowed to the objective and the nature and extent of the optional choices that may influence the rights and hobbies of the results. At long last, the advancement of legal audit in India is acquired from the British pioneer period and its protected framework and the result of basic law legal framework is the entrepreneur way of the sacred instrument.

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<sup>26</sup> AIR 1950 SC 27.

<sup>27</sup> AIR 1997 SC 3127,3170.

<sup>28</sup> AIR 1987 SC 386.

<sup>29</sup> AIR 1997 SC 1125.

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