INDIAN JOURNAL OF CONSTITUTIONAL STUDIES

Issue – July, 2017

Volume I Issue V

ISSN 2456 - 5008

Published bimonthly

- - Disclaimer - -

- - Note - -

This compilation has continuous footnoting. Kindly read the references to previous footnotes in all the Articles in isolation upon the particular Article only.

Publisher Details -
Bishikh Mohanty
E33, AWHO Colony Chandrasekharpur, Sailashree Vihar,
Khorda, Odisha, Pin – 751021
Telephone: +91 8106743973
Email: editor@ijcons.com

- Acknowledgement -

Efforts from many quarters have gone into the successful publication of this Inaugural Issue of the Indian Journal of Constitutional Studies. We would like to express a deep sense of gratitude towards our blind peers who thoroughly validated all articles sent to them for reviews. We would also like to thank our contributors for contributing extraordinary submissions to the issue which stood at par on the rigorous scrutiny.

THE EVOLUTION OF THE DOCTRINE OF JUDICIAL REVIEW IN INDIA

***"Judicial Review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the State governments, which in the Court's opinion transgresses the Constitution."*- Edward S. Corwin[1]**

THE AUTHOR

Nayan Gupta, Akansha Jindal, students, Amity Law School, Noida

CONTENTS

I. WHAT IS JUDICIAL REVIEW?

"Judicial Review" as the name suggests and contemplates is "the power of the courts to pronounce upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void."[2] In India there are three organs of the government, i.e., the Legislative, the Executive and most importantly the Judiciary. The power of judicial review is vested in the judiciary which determines the validity of a law and invalidates the inconsistent laws in order to undo the harm caused and also tries to provide the citizens with the rights that has been promised by the Constitution as it is the supreme law of the land and anything inconsistent therewith is void.

Having mentioned a brief definition of the term judicial review it is very much pertinent to under the meaning and the scope of the term the Doctrine of Judicial Review. The term 'review' in the phrase 'Judicial Review' means the power conferred on the courts to assess a law or an order with the intentions of instituting a change. Such a change comes into force when the courts examine the validity or the correctness of a law which, when considered to be inconsistent with

[1] Corwin, Edward S., A Constitution of Powers in a Secular State, The Michie Company, USA, 1951, p. 3-4.
[2] E.S. Crown- Essay on the Judicial Review in Encyclopedia of social science, vol. VIII, p.457

the constitution, is held invalid or void. This power of the judiciary is known as 'Doctrine of Judicial Review'.

Summarizing the above view it is stated that Judicial Review is thus the interposition of judicial restraint on the legislative as well as the executive organs of the government. According to Smith & Zurcher,[3] it is "the examination or the review by the Courts, in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written Constitution or are in excess of powers granted by it, and if so, to declare them void and of no effect".

II. THE VIEWS OPINED BY THE COURTS ON JUDICIAL REVIEW

The Doctrine of Judicial Review was for the first time propounded by the Supreme Court of America in the historic case of **Marbury vs. Madison**[4]. Chief Justice John Marshall of the United States Supreme Court propounded that the powers of the court to declare the acts of legislative as ultra vires from the famous clause of "Due Process of Law" of the American Constitution. ***The word "Due" in this clause has been taken to mean "What is just and proper" and "Law" means "Natural Justice". The Judicial Review in American constitution has two aspects, namely, procedural and substantive, where the Supreme Court has the authority to challenge an act if either procedure is defective or the substance contained in it is against the concept of natural justice or natural law. Marshall in the above case ruled that "the legislature has no rights to make laws repugnant to the constitution and in the case of constitutional violation the court has the absolute authority or the rights to invent the system of judicial review which was already in the process of evolution".***

However the Indian Supreme Court got the opportunity to interpret the term Judicial Review and to give it a better meaning only when the famous fundamental rights case was listed before the 13 judge's bench commonly known as the **Kesavananda Bharti Case**, or the **Fundamental Rights Case**[5], wherein the majority in the ratio of 7:6 observed, that ***'judicial review has thus become an integral part of the constitutional system and a power is vested in the High Court and the Supreme Court to decide about the constitutional validity of the provisions of statutes. If the provisions of the statues are found to be violative of any of the Articles of the Constitution which is the touchstone for the validity of all laws the Supreme Court and the High Court are empowered to strike down the said provisions'.*** The Supreme Court and the High Court are constituted as the protector and guarantor of Fundamental rights. Thus the power of the Judicial Review is incorporated under Article 226 and 227 of the constitution insofar the High Courts are concerned, whereas Article 32 and 136 of the constitution includes Judicial Review in the case of Supreme Court of India.

[3] Smith, Edward Conard and Zurcher, Arnold Jhon, Dictionary of America Politics, Barnes and Noble, New York, 1959, p. 212.
[4] 2L Ed. 60.
[5] Kesavananda Bharti v. State of Kerala, AIR 1973 SC 1461.

One peculiar fact is that in India, on the other hand, courts are eligible to question only the procedure through which a person's rights are infringed. The reasonableness of law cannot be challenged on the substantive grounds by the Supreme Court of India. Judicial Review in India for the first time saw its light in the case **Emperor vs. Burah**[6] wherein the Calcutta High Court as well as Privy Council adopted the view that the Indian courts had power of Judicial Review under certain limitations.

III. SUPREME COURT MAKES A DISTINCTION BETWEEN DUE PROCESS OF LAW AND PROCEDURE ESTABLISHED BY LAW

In 1950, our apex court in **A. K. Gopalan vs. State of Madras**[7] ruled that ***the "Procedure established by Law" is not same as "Due Process of Law" of the American Constitution and by adopting that phrase, the Constitution-makers of India gave the Legislature the final word to determine law. Thus Supreme Court can declare any legislation in toto as ultra vires if it goes against any provision of the Constitution. It can declare any act of the Legislature or the Executive as unconstitutional if it violates any of the Fundamental Rights guaranteed under the Constitution.***

In the light of the above ratios of the Supreme Court it is pertinent to mention at this juncture that Judicial Review is not an event that has taken a sudden emergence but a process which has gradually evolved. Its evolution is based on the constitutional ideas that have been different at different stages of the Indian constitution. The Constitution of India is based on the British principles of the parliamentary supremacy. The makers of our constitution adopted the English model of parliamentary Government. They placed the powers in the hands of the legislature which was possible within the bounds of the constitution.

IV. DID JUDICIAL REVIEW EXIST IN PRE-INDEPENDENT INDIA?

One of the first legislations passed by the phenomenal English legislators In India were Government of India Act, 1858 and Indian Council Act, 1861 wherein they imposed some restrictions on powers of the Governor General in Council in evading laws, but sadly there were no such provisions for judicial review.

Over a period of time the doctrine evolved for the first time in **Emperor vs. Burah (1877)**[8] wherein it was held ***that aggrieved party had rights to challenge the constitutionality of a legislative act enacted by the Governor General council in excess of the power given to him by the imperial parliament.***

Further in **Secretary of State vs. Moment** [9]**(1913)**, Lord Haldane observed that ***"Government of India cannot by the legislation take away the right of Indian subject conferred by Parliament Act i.e., Government of India Act, 1858."***

[6] ILR Cal 63 1877
[7] AIR 1950 SC 27
[8] ILR Cal 63 1877
[9] (1913) 40 ILR 391 (cal)

It was observed that the Privy council decision in **Annie Besant vs. Government of Madras**[10] ***that there was a fundamental difference between the legislative power of the Imperial Parliament and the authority of subordinate Indian legislature, and any act of the Indian legislature in the excess of the delegated powers or in violation of the limitation imposed by the imperial Parliament will be null and void. The constitutional problem arising before the court necessitated the adoption of judicial review in a wider perspective.***

V. THE CONCEPT OF JUDICIAL REVIEW IN THE INDIAN CONSTITUTION

Thus to sum it up it can be said without even an iota of doubt that "The doctrine of Judicial Review is thus firmly rooted in India, and has the explicit sanction of the constitution".[11] There are specific and extensive provisions of judicial review in the Constitution of India, such as Article 13, 32, 131-136, 143, 226, 227, 246 and 372. Though the term "Judicial Review" is not mentioned in either of the above Articles but it is implicit in these Articles.

Furthermore it is only through Article 13 that the Constitution prohibits the Parliament and the state legislatures from making laws that "may take away or abridge the fundamental rights" guaranteed to the citizens of the country. The provisions under Article 13 ensure protection of the fundamental rights and consider any law "inconsistent with or in derogation of the fundamental rights" as void. At this juncture to give the readers a deep insight as to what Article 13 says the relevant part of the Article has been quoted herein under:

Article 13: Laws inconsistent with or in derogation of the fundamental rights-

(1) All the laws in force in the territory of India immediately before the commencement of this constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The state shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,--

(a) "law" includes Ordinances, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law ;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

[10] AIR 1918 Mad 1210
[11] M.P. Jain, Indian Constitutional Law, 5th Ed., Wadhwa, 2 003, p. 1831.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

According to the clause (1) of Article 13, all the pre-constitution or the existing laws, that is, laws which were in force immediately before the commencement of the Constitution shall be void to the extent to which they are inconsistent with the fundamental rights from the date of the commencement of the constitution, though they are not void ab initio.

According to clause (2) the main objective of the Article 13 is to secure the paramountcy of the constitution especially with the regard to fundamental rights. Article 13 prohibits state to make any laws which takes away or abridges rights conferred by Part III of the Constitution. If the state makes such law then it will be ultra vires and void to the extent of the contravention. Though post-constitution laws inconsistent with the fundamental rights are void from the very inception yet a declaration by the court of their invalidity will be necessary.

VI. JUDICIAL INTERPRETATION OF ARTICLE 13 BY THE APEX COURT

The Supreme Court in **Deep Chand vs. State of U.P**[12], held ***that a post constitutional law made under Article 13(2) which contravenes a fundamental right is nullity from its inception and a still-born law. It is void ab initio. In clause (1) and (2) the voidness of the pre-constitution law is not from its inception but only from the date of the commencement of the constitution. On the other hand, the voidness of a post-constitutional law is from its very inception and such a law cannot therefore exist for any purpose. The expression 'law' as defined in Article 13 (3) includes not only the law made by the parliament in exercise of its ordinary legislative power but also an amendment of the constitution made in exercise of its constitutional power. But clause (4) makes it clear that the Constitutional amendments passed under Article 368 is not be considered as a 'law' under Article 13 and nothing under this said article is applicable to the amendments made under Article 368 of the Constitution.***

The question whether the word 'law' in clause (2) of this said article also includes a 'Constitutional amendment' was for the first time considered by the Supreme Court in **Shankari Prasad vs. Union of India**[13]. The lordships of the hon'ble apex court held that ***the word 'law' in clause (2) did not include law made by the Parliament under Article 368 as law under the said article included rules and regulations made under the exercise of ordinary legislative powers and, therefore, Article 13 did not affect amendments made under the Article 368.*** This interpretation by the Supreme Court was further followed by majority view in **Sajjan Singh vs. state of Rajasthan**[14]**.**

But it was in **Golak Nath vs. State of Punjab**[15]**,** the Supreme Court held that ***the word 'law' in Article 13 (2) included every branch of law, statutory, constitutional and etc., and hence if a***

[12] AIR 1959 SC 648
[13] AIR 1951 SC 458
[14] AIR 1965 SC 845
[15] AIR 1967 SC 1643

amendment to the Constitution took away or abridges the fundamental rights of citizens, the amendment would be declared unconstitutional. In order to remove the difficulty caused by the Supreme Court in the above case, a new clause (4) was added to Article 13 of the Constitution which clearly said that the amendments made under Article 368 shall not be considered as 'law within the meaning of Article 13 and also it could not be challenged. The Validity of the Constitution (24th Amendment) Act, 1971 was considered by the Supreme Court in Kesavananda Bharti case in which the majority view overruled the Golak Nath and upheld the validity of the said amendment.

VII. THE DOCTRINE OF JUDICIAL REVIEW IN INDIA IS INSPIRED BY THE DOCTRINE OF USA

The judicial review in India is inspired by the doctrine of judicial review of United States of America. The difference between the judicial review of India and United States of America is in its working otherwise the philosophy of both is the same. In America the judicial review determines the validity of law. Under this any action of the government which contradicts the Constitution is declared as null or void. In the constitution of USA the judicial review has been implicitly incorporated in the Article III, IV and V. Otherwise there are no expressed provisions under the American Constitution.

In one of the earliest cases on judicial review Justice Frankfurter in 1940 said "Judicial review is a limitation on popular government and is a part of constitutional scheme of America."

Thus to put in brief the objectives of the doctrine of Judicial Review in USA it can be said that:

1) It declares the unconstitutional laws as void.
2) It defends the valid laws which are challenged as unconstitutional.
3) It protects the supremacy of constitution by interpreting its provision.
4) It saves the legislative function of congress.

The American Supreme Court till 1973 had not declared any act of the government as ultra vires to its constitution and it was only in 1974, in **United States vs. Tale Todd**[16] wherein the supreme court of USA declared an act of the government unconstitutional. Again in **Hylton vs. United States**[17] it was stated by chief Justice Chase that "It is necessary for me to determine whether the court constitutionally possesses the power to declare an act of the congress void on the ground of it being contrary to and in violation of the constitution, but if the courts has such powers, I am free to declare it but in a clear case."

The working of judicial review in USA can be studied in the landmark case of **Marbury vs. Madison**[18]**.** The apex Court of USA observed that Supreme Court has the authority to review acts of Congress and determine whether they are valid or not. It is inherent power of the Supreme Court to determine the validity of any law. In this way, Supreme Court of US formulated the

[16] United States V. Yale Todd (U.S. 1794), 15 Wash. & Lee L. Rev. 220 (1958)
[17] 3 *U.S.* 171 (1796)
[18] 2L Ed. 60

concept of Doctrine of Judicial Review. This landmark judgment was given by Chief Justice Marshal. This case provides the foundation to power of judicial review to the Supreme Court to determine the validity of any legislative action of Congress. It also provides great extent of power to the judiciary to maintain check and balance. The Marbury judgment has widened the scope of Judicial Review in USA.

In one of the recent case, **Reed vs. Town of Gilbert, Arizona**[19] (US reports slip opinion volume) Justice Clarence Thomas observed:

1) The distinctions drawn by the ordinance were impermissible.
2) The "content based law" requires the exacting form of judicial review and strict scrutiny.
3) The content based laws which are target speech based on its communicative content are presumed to be unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling State interests.

VIII. THE DOCTRINE OF JUDICIAL REVIEW AS PREVALENT IN THE UK

The Concept of Judicial Review is also prevalent in U.K. The Judicial Review was founded by Lord Coke in England in 1610 in **Dr. Bonham's Case**[20]. There is no written Constitution and the Parliamentary supremacy is the foundation in United Kingdom. Principle of "Parliamentary Sovereignty" dominates the constitutional democracy in United Kingdom.

Chief Justice Holt in the case of **City London vs. Wood**[21] said that "An act of parliament can do no wrong, though it may do several things that look odd."

It would be interesting to observe that the scope of Judicial Review in U.K is very limited in nature. Since there is no written Constitution, cases are dealt on the discretion of the courts, which at times, lead to biases and impartiality. This also means that there is no scope to check the validity of the legislative acts of parliament and these acts cannot be challenged on any grounds in any of the court.

In the present scenario the Courts in UK follows the principles of judicial review with regard to administrative actions and secondary legislations. So far as primary legislations are concerned, they are outside the purview of judicial review but with some exceptional cases. Judicial review of administrative actions which are executive in nature are mostly subject matter in the present scenario in UK.

IX. COMPARING THE SCOPE OF JUDICIAL REVIEW IN INDIA VIS-À-VIS UNITED STATES AND THE UNITED KINGDOM

Giving a deep insight about the practice, ideology and expression of Judicial Review in India, United States and the United Kingdom it is now important to highlight the differences between the scope, nature and the expressions of how this doctrine has been interpreted in these countries.

[19] 13-502(2014)
[20] Thomas Bonham v. College of Physicians, 77 Eng. Rep. 646 (1610)
[21] (1701)12 Mod rep 669

1) **Scope-** If we talk about the scope of judicial review in these three countries then the scope in India is wider in India as compared to US and UK because the US constitution is the most rigid constitution in world whereas Indian constitution is rigid as well as flexible and on the other hand, since there is no written Constitution in U.K, it scope of judicial review automatically diminishes.
2) **Expressed in Constitution-** In India, the powers of the court under judicial review are mentioned under Article 13, 32,131-136,143,226, 227, 246, and 372. But in constitution of US there is no such provision for the judicial review, only Article III, IV and V of the constitution are incorporated with the powers of court. Whereas in UK, it completely depends upon the discretion of court as there is no written constitution.
3) **Constitutional Amendments, Legislative Acts and Administrative Acts-** In every country judicial review can be used in three dimensions i.e. Constitutional Amendments, Legislative Acts and Administrative Acts. In India it is used in all the three dimensions. In USA, due to the rigidity of the constitution it is rarely used in constitutional amendments. The court can scrutinize the legislative act and administrative act which contradicts the constitution. In UK there is no scope for legislative acts of parliament only secondary legislations are subject to judicial review.
4) **Different terms under Judicial Review-** In India the term "procedure established by law" gives the power to the judicial review to declare the law as void on only substantive grounds. Judiciary can make law. In USA due process of law, it extends the power of judicial review. In USA the judge-made law exists, judges strictly scrutinize the law and if found invalid, they declare it void.
5) **Administrative Acts-** In all these three countries the judicial review of administrative acts is very wider. If an administrative and ministerial acts can be challenged if they exceeds his power, doctrine of ultra-vines exist in all the three countries.
6) **Doctrines-** In UK there is no scope for the formation of the doctrines. In India the judiciary forms various doctrines like doctrine of severability and doctrine of eclipse etc. these doctrines are also implicitly incorporated in US.

X. CONCLUSION

Judicial Review with time has evolved to be a much powerful weapon in the hands of the Judiciary today. The Supreme Court of India since the first case of Emperor v. Burah of 1877, then of A.K Gopalan of 1967 till date has magnified the concept of Doctrine of Judicial Review. In the present scenario, Supreme Court and the High court of the country play a very crucial role in interpreting the constitutional provisions and now it is the fundamental feature of the constitution.

The judicial review also has some objectives which are as follows:-

1) To ensure that the authority i.e., the legislative and the executive doesn't abuse its power and the individual receives just and fair treatment.
2) The ostensible purpose of judicial review is to vindicate some alleged right of one parties to litigation and thus grant relief to the aggrieved party by declaring an enactment void.

3) The real purpose is that no statue which is repugnant to the constitution should be enforced by court of law.

In **I.R Coelho v. State of Tamil Nadu**[22], with regard to a law judicially pronounced to be violative of fundamental rights and which is subsequently inserted in the Ninth Schedule after the 24th April 1973, the Court ruled that such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14 and Article 19.

In its recent judgment in **Madras Bar Association vs. Union of India**[23], the Supreme Court scrutinized the provisions of Companies Act, 1956 and declared some provisions ultra vires. It was held that certain provisions under this act were unconstitutional in nature on the ground that any institution performing a judicial function should be constituted of the members having judicial experience and expertise and thus judicial member were to exceed the technical members so as to maintain the essential feature of the constitution.

In 2015, in **Supreme Court Advocates-on-Record Association vs. Union Of India**[24] the Supreme Court bench with the majority of 4:1 rejected the National Judicial Appointment Commission (NJAC) Act and the 99th Constitutional Amendment as "***unconstitutional and void"*** as it violates the basic structure of the constitution. So the provisions of Article 124A allows the President of India to appoint the Judges of the Supreme Court, Chief Justice and other Judges of the High Court's as existing prior to the constitution (Ninety-ninth Amendment) act, 2014, known as the "collegiums system"

Our constitution is federal in nature and the Supreme Courts have been vested with the power of interpreting the constitutional provisions which is an extremely important feature of the judiciary that keeps the organs and the departments of the government within their limit and helps in preventing it from any sort of damage. Judicial Review saves the country from arbitrariness and tyranny of executive and legislature. The Supreme Court of India is no doubt playing a significant role in protecting the constitution and its people, and is working at its best since the commencement of the constitution. It is the final interpreter of the constitution as we have studied and analyzed from many cases. With its intellect and time Supreme Court has achieved a lot more than bare rigid law interpreter made by the legislation. It has rendered hundreds of decisions expounding various provisions of the constitution.

Till date attempts are being made to make this doctrine serve the needs of many and how to use it in the welfare of the society. The apex court has given various interpretations on the scope, applicability and the propoundness of the doctrine of judicial review and with time several more interpretations are bound to follow but what needs to be kept in mind that the fundamental feature or to put it in the language of the drafting committee of our constitution it can be said that judicial review forms a core basic structure of the constitution and its existence in our constitution is serving as a boon against many arbitrary actions of the state. At this final juncture

[22] AIR 2007 SC 861
[23] (2015)scc484
[24] (2015) AIR SCW 5457

to highlight the relevance of the doctrine of judicial review it is very important to quote one of the finest judges of Indian Judiciary Justice P N Bhagwati wherein his lordship states that “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”. Thus Interpretation given by the Supreme Court becomes the law honored by all the courts of the land.