

ROLE OF JUDICIARY - JUDICIAL REVIEW AND JUDICIAL ACTIVISM - A CRITICAL ANALYSIS

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ABSTRACT

Our Indian Judiciary is a system of Courts that Interpret and apply the law. It uses the Common Law System, Inherited from the Legal system Established by former colonial powers and the princely States, as well as practices from the Ancient and Medieval Times called as Customs. Among the three Backbone of our Country's Democracy, The Judiciary, Executive and Legislature, Judiciary Holds the Supreme Power over other which has its checks and Balance of the Executive and Legislature and inturn they should not encroach each other's functioning having its own Individuality. The Constitution of India, 1950 is the Supreme Law of Land among all the Laws.

Keywords: Judiciary, Law, Justice, Democracy.

I. INTRODUCTION

The Judiciary has the power to determine the validity of a law (or) an Order. This power is called "Judicial Review" The Article 13 of the Constitution of India, 1950 clearly provides that the Constitution is the Supreme Law of the Land and any Law in - consistent there with is Void - ab - Initio. The Term refers to "the power of a court to inquire whether a law Executive Order or other official action is Consistent (or) in - consistent with the provisions of the constitution and if the court concludes that it does, it should be declared as unconstitutional and void.

II. STATEMENT OF THE PROBLEM:-

According to the Constitution of India, 1950 which is the Supreme Law of Land, is the parent (or) statutory Law in Our Country. Any other Laws (or) Acts cannot violate the Statutory law provided which results as void (ie) void - ab - Initio. The Judicial Review and Judicial Activism is the must one for the Judiciary system in which, Justice V.R.Krishna Iyer made Notable contribution in the field of Constitutional Law, focusing on Social, Political and Civil

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Rights. He was eminent Jurist noted for his Literary references in his Judgements which clearly states the Judicial Activism is major cause for positive approach of Judicial system prevailing

III. OBJECTIVES OF THE STUDY

- (i) To Critically Analyse the Role of Judiciary in the Judicial Review and Judicial Activism.
- (ii) To Evaluate the Judicial Decision's by the Jurists in case laws.

IV. REVIEW OF LITERATURE

The Constitution of India, 1950 Guarantees the Rights of the Citizens and Procedure Established by Law. Article 14,17,19 (1) (g), 21,32,226 are the Main provisions which says the Fundamental Rights of The citizens.

According to Dr.M.P.Jain, "The Doctrine of Judicial Review is firmly rooted in India and has Explicit Sanction of the Constitution".

H.M.Seervai, Enumerated Rules that are prevailing the Judicial Review under constitution perspective. Justice P.N.Bhagwati and V.R.Krishna Iyer brought Radical Changes in thought process regarding approaches and Concepts in the cause of Social Justice and Human Rights. They created the "Era of Judicial Activism".

V. JUDICIAL REVIEW AND ITS FUNCTIONS

The Judicial Review Pertains in two aspects. They are

- Legitimizing government Action, and
- To protect the Constitution against any undue encroachment by the Government.

The Supreme Court is the Guardian and Protector of the Supreme Court. It is thus obligated to review the Laws and Executive Orders to ensure that they do not violate the Constitution of the Country and that the Laws that are passed are not unconstitutional. This provision was first acquired by the Supreme Court in Marbury Vs.Madison Case ⁽¹⁾ (1803)

VI. CONSTITUTIONAL VALIDITY OF JUDICIAL REVIEW

In India the Constitution is the Supreme Law of Land. The Parliament's Powers are limited in two ways.

- (i) There is a division of powers between the Union and the States.
- (ii) Parliament is Competent to pass Laws only form with respect to those subjects which are guaranteed to the citizens against every form of Legislative Encroachment.

The Supreme Court is the guardian of the fundamental Rights and the Arbiter of Constitutional conflicts between the Union and the states with respect to the division of power between them. It has the power to reviewing Legislative enactments both of parliament and the State Legislatures. Therefore, the Court is a powerful Instrument of Judicial review under the Constitution. 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. There are several specific provisions in the Indian Constitution, Judicial Review of Legislation such as Article 13,32, 131-136,143,226,145,246,251,254 and 372. Article 372 (1) Establishes the Judicial, review of the Pre - Constitutional Legislation similarly, Article 13 specifically declares that any law which contravenes any of the provision of the part of the Fundamental Rights shall be void. Even our Supreme Court has observed, even without the specific provisions in Article 13.

The Court would have the power to declare any Enactment which Transgresses a Fundamental Rights as Invalid. The Supreme Court and High Courts constitutes the protector and Guarantor of Fundamental Rights under Articles 32 and 226 Articles 251 and 254 say that in case of In - Consistent if between union and state Law shall be void. The Basic function of the courts is to Adjudicate disputes between Individuals and the State, between the States and the Union and during the process they have to Interpret the provisions of the Constitution and the laws, and the Interpretation given by the supreme court becomes the law honoured by all courts of the Land. there is No Appeal against the Judgement of the Supreme Court. In Sankari Prasad Vs Union of India ⁽²⁾ (1951), the First Amendment Act of 1951 was Challenged before the Supreme Court on the ground that, the said Act abridged the Right to property and that is could not be done as there was a Restriction on the Amendment of Fundamental Rights under Article 13(2). The Supreme Court rejected the contention and unanimously held, “The Terms of Article 368 are perfectly general and Empower parliament to Amend the Constitution without any exception whatever, the case may be.

In the context of Article 13, of the constitution of India, Law must be taken to mean Rules or Regulations made in exercise of Ordinary Legislative Power and Amendments to the Constitution made in exercise of Constituent power, with the result that Article 13(2) does not

affect Amendments made under Article 368". In Sajjan Singh's Case⁽³⁾, 1984, the 17th Amendment was challenged before the Constitution. The Bench Comprising of Five Judges, on the grounds that it violated the Fundamental Rights under Article 31(A). The Supreme Court reiterated its earlier stand taken in Sankari Prasad's case and held, "When Article 368 confers on the Parliament, the Right to Amend the Constitution, The power is in question can be exercised over all the provisions of the Constitution, it would be unreasonable to hold that the word Law in Article 13(2) takes in Amendment Acts passed under Article 368. Thus, until 1967, the Supreme Court held that the Amendment Acts were not ordinary Laws, and could not be struck down by the Application of Article 13(2). In The Historic case of Golak Nath Vs. The State of Punjab ⁽⁴⁾ (1967), the validity of three Constitutional Amendments (i.e.), the 1st, 4th and 17th was Challenged. The Supreme Court by a Majority of Six to Five reversed its earlier decision and declared that parliament under Article 368 has no power to take away (or) abridge the Fundamental Rights contained in Chapter II of the Constitution, the court observed.

The Judgement provided that,

- i) Article 368 – only provides a procedure to be followed regarding Amendment of the Constitution.
- ii) Article 368- does not contain the Actual power to amend the Constitution.
- iii) The power to amend the constitution is derived from Article 245, 246 and 248 with entry 97 of the Union list.
- iv) 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 made by an Amendment of the Constitution made in exercise of its Constitution Power.
- v) The Amendment of the Constitution being a Law within the meaning of Article 13(3) would be void under Article 13(2) if it takes away (or) Abridges the rights conferred by Part III of the Constitution
- vi) The First Amendment Act, 1951, the fourth Amendment Act 1955 and the Seventeenth Amendment Act, 1964 abridge the scope of Fundamental Rights and therefore void under Article 13(2) of the Constitution.
- vii) Parliament have No power from the days of the Decision to amend any of the provisions of part III of the Constitution so as to take away or abridge the Fundamental Rights enshrined therein.

Subsequently the Constitutional validity of the 14th, 25th and 29th Amendments was challenged in the Kesavananda Bharati case⁽⁵⁾ (or) Fundamental Rights case. The Government

of India claimed that it had the right as a matter of Law to change (or) destroy the entire fabric of the Constitution through the Instrumentality of parliament's Amending power. One of the First major cases, that was brought before the Supreme Court in this regard, was A.K. Gopalan Vs state of Madras⁽⁶⁾, in which the Preventive Detention Act, 1950 was challenged as invalid and unconstitutional. The Court by an unanimous decision declared Section 14 of the Act as Invalid.

VII. PRINCIPLES OF JUDICIAL REVIEW:-

A Valid Law has to conform to the constitutional Norms and the Responsibility of deciding upon the validity of Laws, is laid up on the Judges of the Supreme Court. If a Statue isn't within the scope of Legislative authority or it offends Constitutional restriction or prohibition, that statue is unconstitutional and hence Invalid. This is the power of Judicial Review. The Court has to balance both the need of Time and Fundamentals of the Constitution while exercising their power.

H.M. Seervai Enumerated following Rules in regard:

- i) There is a presumption in favour of the Constitutionality, and the Law will not be declared unconstitutional unless the case is so clear as to be free from Doubt; and the onus to prove that it is unconstitutional, lies upon the person who challenges it.
- ii) Where the validity of a statue is questioned and there are two Interpretations, one of which would make the law valid, and the other void, the former must be preferred and the validity of the Law upheld.
- iii) The court will not decide a Larger Constitutional question than if it is required by the case before it.
- iv) The Court will not decide constitutional Questions of a case (or) if they are capable of being decided on other Grounds.
- v) The Court will not hear an objection as to the constitutionality of a Law by a person whose rights are not affected a person whose rights are not affected by it.
- vi) Ordinarily, court should not pronounce on the validity of an Act (or) part of an act, which has not been brought into force, because till then question of validity would be merely academic. Now the "Judicial Review" is considered to be the basic feature of our constitution.

VIII. LIMITS OF JUDICIAL REVIEW:-

As seen above the doctrine of judicial review provides that the constitution is the supreme law of the land and any law inconsistent therewith is void and that a superior court can reconsider that a superior court can reconsider any decree (or) sentence of an inferior court. Nowadays the Literal meaning of Judicial review is no longer valid. The power to judicially review and decision is an Extra-ordinary power vested in a superior court for checking the exercise of power of the public authorities, whether they are Constitutional, Quasi-Judicial (or) Governmental while performing Administrative functions Public authorities have to take various decisions and for that, they should be provided with ample space and power of discretion. Therefore, only the decision making process that is actually subjected to judicial review. The legislature, Executive and Judiciary under the Constitution are to exercise powers with checks and balance, even in that case judiciary holds the supreme power of all.

In India, on the basis of Articles 32 and 137, 226, 246, etc., The Supreme court can exercise power of judicial review. also, under articles 226 and 227 the high courts have a power of judicial review. There are three aspects to judicial review in India:

- i) Judicial Review of Legislative Action,
- ii) Judicial Review of Administrative Action,
- iii) Judicial Review of Judicial Decisions,

Article 32 has been discussed earlier. Article 137 of the constitution expressly provides the power of judicial review of any judgement to the Supreme Court. This power is exercisable under rules made by the court under Article 145 on ground mentioned in order 57 rule 1 of CPC, 1908. According to which the judicial review shall be in the supreme court on:

- Discovery of new Important matters of Evidence.
- Mistake or error on the face of record.
- Any other sufficient reason.

In *R.D. Sagar Vs V.Nagary* ⁽⁷⁾, the supreme court has held that a judgement of the final court of the land is final. A review of such a judgement is an exception phenomenon permitted only where a grave and glaring error (or) other well established grounds present. In a review petition, although an error of substantial nature only can be reviewed.

The constitution provides power to the court to consider whether a delegated or subordinate legislation is consistent with the provisions of the enabling act. Their validity can be challenged on the ground of Ultra vires, i.e, beyond the competence of the legislature. The courts have the power to declare the parent Act, Unconstitutional on the grounds of excessive delegation or violation of the fundamental rights or against the schemes of distribution of powers as provided under article 246. Judicial review has a longstanding history and its scope and extent varies from case to case. It is considered as the basic feature of the constitution. The court under the exercise of power of judicial review protects the Human rights, Fundamental rights and Citizen rights of life and liberty (i.e) Individual rights.

It also safeguards many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds, which could be expanded on building, hospital, roads and the like or overseas aid, or compensating victims of crime. The supreme court has defined Sovereign power and distributed amongst the three branches of Government namely, the Legislature, the Executive and the Judiciary. It maintains the balance among the three. The decision of the honourable supreme court of India in kesavananda bharati's case marked and explained the term which is called "Basic Structure" to measure whether the parliament is seeking to destroy the constitution, by using its power under article.368, which was so far, understood to be a power, the exercise of which was not subject to judicial scrutiny. Basic structure is not contained in one (or) more provisions of the constitution of India, but is supposed to be the sum total of the core of our constitution.

The court in the above mentioned case has Interpreted the scope and meaning of judicial review. The court has held, "the power of judicial review confined not merely to decide whether in making laws and in the central and state legislature's have acted within the fore comers of the legislative lists earmarked for them; the courts also deal with the question as to the constitution, the power of judicial review has also to be exercised with the view to see that the guarantees afforded by those rights are not contravened. Thus, review has become an Integer Part of our constitutional system and a power has been vested in the High courts and the Supreme court and the high courts to decide about the Constitutional validity of any Article.

In *Minerva Mills vs. Union of India*⁽⁸⁾, it was observed by the supreme court that the clauses of Article 31- C as introduced by the constitution (42nd Amendment) Act, 1976 which required to take away the power of Judicial Review were Unconstitutional. However, the Judicial Review was not held to be part of the Basic structure of the constitution by the majority in this

decision, although Justice Bhagwati in his decision traced the power of Judicial Review to Articles 32 and 226 and observed it to be a part of the basic structures of the constitution, and if taken away by a Constitutional Amendment would amount to “Subversion of the Constitution”

So, from the above Arguments and reference that, the power of Judicial Review is a part of the Basic structure of the Constitution, permanent even by a Constitutional Amendment, affirmed by the supreme court in Kesavananda Bharati case, and representative Democracy as an expression of the people’s will, speaking through their elected representatives is a Non-Negotiable principle of our Republican agreement which itself is the unbroken sovereign power. The Supreme Court of India, as the guardian of Democratic Morality will without a doubt remember that the exercise of Constitutional power is Persistent in the final analysis by the Intellectual Integrity, Independence and fearlessness of Judges.

IX 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 stand. This is Evident from the ruling in A.K.Gopalan case, but however it did not take long for judges to break their shackles and this led to a series of right

to property case in which the Judiciary was directly in conformation with the parliament. 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 the fundamental rights were frustrated to the upholding of the fundamental Rights of Individuals by the Supreme Court.

X. EXPANSION OF JUDICIAL REVIEW THROUGH JUDICIAL ACTIVISM:-

After the draconian exposition of power by the Executive and the Legislature during Emergency, the Expectations of the public soared high and the Demands on Courts to improve the Administration by giving appropriate directions for ensuring Compliance with statutory and Constitutional prescription. Likewise, the Judiciary has taken an Activist view. With the

Interpretation of given by it in the Menaka Gandhi case ⁽⁹⁾ , Supreme Court brought the Ambit of Constitutional provisions to Enforce the Human Rights of Citizens and Sought to bring the Indian Law in Conformity with the Global trends in Human- Rights- Jurisprudence. This gave rise to phenomenon of Social Action Litigation or public Interest Litigation , as for Judicial Activism in Supreme Court.

SAL⁽¹⁰⁾ - a Manifestation of Judicial Activism has introduced new Dimension regarding Judiciary's Involvement in public Administration. The Sanctity of Locus standi and procedural Complexities are totally side – tracked in the causes brought before the Courts through SAL.

XI. JUDICIAL ACTIVISM – VIEW OF INDIAN JURISTS:-

The Indian Constitution, promulgated in 1950, largely borrowed its principles from Western models- Parliamentary democracy and an Independent judiciary from England's common law system, the fundamental Rights from the Bill of Rights, and Federalism from the Federal structure in the U.S. Constitution, and the Directive principles of state policy from Irish Constitution. These modern principles and institutions were borrowed from the West and imposed in India. Before Justice, Gajendragadkar became Chief Justice of India in 1964, Indian Supreme Court followed the Traditional British Approach of judges being passive and Not Activist. There were very few Law creating Judgements in that period. After 1964, Justice Gajendragadkar Known to be very pro- labour, as much of the Labour Law which he developed was Judge made Law. Example: If a worker in an Industry was sought to be dismissed for a misconduct there must be an Enquiry held for which the person must be given an opportunity to defend himself with follow of principles of Natural Justice.

According to Justice Base, the scope of Judicial Innovation in India is limited. Judicial Activism has created a New Jurisprudence in India. In the 1970's , the Supreme Court acted as an Instrument of status quo upholding the traditional way of Judiciary and resisted the innovative and Radical change in the Judiciary. But with the Eminent Jurists view of Judiciary like the Justice V.R. Krishna Iyer, Chinnappa Reddy, P.N. Bhagawati, Desai who made the System of courts as an Activist court in Judicial system.

According to Justic Bhagawati, the constitutional traditions found in Judiciary are mainly based upon the Bureaucratic Tradition, Abuse of power approach, Controlling State Lawlessness an the approach of social Justice. He revolutionalized the Judicial process and

widened the sphere of relief under Existing models. He so found, for people to approach the court easily through public Interest Litigation (PIL), Legal Aid and Lok Adalat. His Legal and social Activism broadened frontiers of constitutional Jurisprudence. Justice V.R.Krishna Iyer , for the Judicial Activism has modified the role of Indicial process especially the Doctrine of Locus Standi Whereby the process been made Easier, who made drastic changes in Judiciary Introduced the public Interest Litigation (PIL) along with Justice Bhagwati which is a revolutionary tool in Indian Judiciary. The procedural hindrances have been removed. The courts Can take action in Suo moto and letters, Post cards are recognized as writ petition. This has revolutionized the Judicial process.

XII. CONCLUSION

To conclude, it may be said that the Growth of “Judicial Review” is the inevitable response of the Judiciary to ensure proper check on the exercise of public power. The Judges have a duty to perform, which is even more onerous to keep the Judicial ship afloat on even keel. It must avoid making any ad - hoc decision without the foundation of a Juristic Principle, Particularly, when the decision appears to break new grounds, The Judgements must be Logical, Precise, Clear and Sober, rendered with restraint in Speech avoiding Saying more than that, which is necessary in the Case. The New role of the Supreme Court has been criticized in some quarters as being violative in the Doctrine of Separation of power, hence it is claimed that the Apex court has, by formulating policy and issuing directions in respect of various aspects of the Country’s Administration, Transgressed into the domain of the Executive and Legislature. As Justice Cardozo Puts it, “A Constitutional States or ought to state not rules for the passing hour nut principles for an Expanding future”. It is with this view that Innovations in the rules of standing have come into Existence.

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