



The purpose and prospects of judicial review in India

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Abstract

The concept of Judicial Review gives a new dimension to the Judiciary. Judicial Review is essential for maintaining the supremacy of the Constitution. Judicial review has firm roots in state with democratic principles. The Judicial Review power strengthens the importance of judiciary and secures the independence of judiciary. Judicial review is one of the checks and balances in the separation of powers and a process under which the executive or legislative actions are subject to the review by the judiciary. It means that judiciary is to examine the actions of the legislative, executive and administrative wing of the Govt. & to ensure that such actions confirm to the provision of the constitution of the state. It is an effective weapon for the protection of Democratic values and liberty of the people. Judicial Review can be understood as a form of court proceeding, usually in the administrative Court where the lawfulness of a decision or action is reviewed by the judge. Judicial Review has helped the Supreme Court of India in exercising its constitutional duties.

Keywords: constitutionalism, suo moto, pragmatism, legitimising, administrative adjudication, checks and balances, promulgation, constitutional revolutions, locus standi, authorisedly

Introduction

Judicial review is recognized as a necessary and basic requirement for the construction of a novel civilization in order to safeguard the liberty and rights of the Individual. It is the power exercised by the courts of a country to examine the constitutional validity of law or Constitutional order. It is one of the checks and balances in the separation of powers and a process under which the executive or legislative actions are subject to the review by the judiciary. It is the significance of judicial review, to ensure that democracy is inclusive and that there is accountability of everyone who wields or exercises public power. As Edmund Burke, the father of Conservatism, said: "all persons in positions of power ought to be strongly and lawfully impressed with an idea that "they act in trust," and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people". It has more technical significant in public law particularly in countries having written constitution.

Judicial review has firm roots in state with democratic principles. The administration of justice can't be made unless there is a scope of judicial review. Judicial Review can be understood as a form of court proceeding, usually in the administrative Court where the lawfulness of a decision or action is reviewed by the judge. Where there is no effective means of challenge, judicial review is available. The concern behind Judicial Review is that whether the law has been correctly applied with and right procedures have been followed.

The principle of judicial review became an essential feature of democracy and written Constitutions of many countries. Seervai in his book "Constitutional Law of India" noted that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia and India. Though the doctrine of Separation of Powers has no place in strict sense

in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the functions of another.

Meaning

Judicial review is not an expression exclusively used in constitutional cases. Literally it means the revision of the decree or sentence of an inferior court by a superior court. It has been defined as a process whereby a judicial body determines the constitutionality of an activity undertaken by the country's national legislature. Judicial review has two important functions, like, legitimizing government action and the protection of constitution against any undue encroachment by the Govt. actions judged inconsistent is declared unconstitutional and, therefore, null and void.

Origin and Development

Constitutional judicial review is usually considered to have began with the assertion by John Marshall, the fourth chief justice of the USA, in the famous case of Marbury V.s Madison in 1803 that the Supreme Court of the USA had the power to invalidate legislation enacted by Congress. In the USA, federal and state courts (at all levels, both appellate and trial) are also able to review and declare the "constitutionality". In American legal language, "judicial review" refers primarily to the adjudication of constitutionality of statutes, especially by the Supreme Court of the United States. The most distinctive feature of the work of Supreme Court of USA is its power of judicial review which was copied by several countries including India. In countries that follow U.S. practice are Kenya and New Zealand etc. In 1920, the Czech Republic adopted a system of judicial review by a specialized court, the Constitutional Court as written by Hans Kelsen, a

leading jurist of the time. Later on Austria adopt it and became known as the Austrian System. In these systems, other courts are not competent to question the constitutionality of primary legislation. In France judicial review must take place in the abstract (in the absence of an actual case or controversy) and before promulgation (i.e., before a challenged law has taken effect). Germany, Italy, and South Korea created special constitutional courts and India, Japan, and Pakistan set up supreme courts to exercise judicial review in the manner generally used in the United States. A number of the constitutions drafted in Europe and Asia particularly after 2nd world war felt strong essence to adopt judicial review, and the system of constitutional checks and balances. In some countries like New Zealand, and South Africa, only specialized constitutional courts can hear constitutional claims. Constitutional judicial review also exists in several forms.

Judicial Review in India

The judicial assessment in India is considered as an indispensable feature in the country. In India, Judicial review refers to the power of the judiciary to interpret the constitution and to declare any such law or order of the legislature and executive as null and void, if it finds them in conflict with the Constitution of India. The concept of separation of power and rule of law is also judicial review. It means that the constitution of India is the supreme law of the land and any law inconsistent therewith is null and void through judicial review. Judicial review in India plays an important role as a protector when the executive and legislature harm the Constitutional values and deny the rights. The Supreme Court of India has the supreme responsibility of interpreting and protecting it. It also acts as the guardian and the protector of the fundamental Rights of the people. Supreme Court has the power to reject any law or any of its part which is found to be unconstitutional. Apart the Supreme Court, the State High Courts also exercise this power but their judgements can be rejected or modified or upheld by the Supreme Court. The Supreme Court of India is competent to exercise the power of review the legislative enactment both of Parliament and the state legislatures. In India, the influence of judicial assessment has been so long under Articles 226 and 227 in case of High Court and Articles 32 and 136 of the Constitution of India for the review. Even though we have in India the principle of separation of powers between three wings, the judiciary is vested with the power of review over actions of the other two organs. Judicial review has two prime functions

1. Legitimizing the Govt. action
2. Protecting the constitution against any undue encroachment by the Govt.

Former Chief Justice of India, K.G. Balkrishnan remarked that judicial review safeguards civil and political rights of the Individuals and controls every organs of the state. The judicial review has been described as continuous constitutional convention because it still continues to expand the constitution.

Constitutional Provisions of Judicial Review in India

The Constitution of India adopted the judicial review on lines of U.S. Constitution. Here the Parliament is not supreme under the Constitution of India. Its powers are limited in a manner that the power is divided between centre

and states. The Supreme Court enjoys a position which entrusts it with the power of reviewing the legislative enactments both of Parliament and the State Legislatures. This grants the court as a powerful instrument of judicial review under the constitution. Thus doctrine of judicial review is firmly rooted in India and has explicit sanction of the constitution. Various Constitutional provisions of Judicial review are-

Article 13 declares that any law which contravenes with any of the provisions of the part of fundamental Rights shall be void. According to Article 13(2), the Union or the States shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the above mandate shall, to the extent of the contravention, be void. Articles 32 and 226 entrusts the roles of the protector and guarantor of fundamental rights to the Supreme and High Courts. Articles 131-136 entrusts the court with the power to adjudicate disputes between individuals, between individuals and the state, between the states and the union; but the court may be required to interpret the provisions of the constitution and the interpretation given by the Supreme Court becomes the law honored by all courts of the land. Likewise Article 245 states that the powers of both Parliament and State legislatures are subject to the provisions of the constitution. Article 246 (3) ensures the state legislature's exclusive powers on matters pertaining to the State List. Article 251 and 254 states that in case of inconsistency between union and state laws, the state law shall be void. Article 372 (1) Establishes the judicial review of the pre-constitution legislation. Article 372 establishes the judicial review of pre constitutional legislation.

Features of Judicial review

1. Judicial Review is considered as the basic structure of the constitution of India (famous case of Mrs. Indira Gandhi vs Raj Narain).
2. Judicial review is also called the interpretational and observer roles of the Indian judiciary. Suo Moto cases and the Public Interest Litigation (PIL), with the discontinuation of the principle of Locus Standi, have allowed the judiciary to intervene in many public issues.
3. Judicial review is called upon to ensure and protect Fundamental Rights which are guaranteed in Part III of the Constitution. Citizens have the right to directly approach the Supreme Court to seek remedies against the violation of Fundamental Rights.
4. In India judicial review has been elevated to the position of a basic feature of the constitution.

Cases of Judicial Review

In the initial stages of the judicial adjudication Courts have said that where there is a political question involved it is not amenable to judicial review but slowly this has been changed. In Keshavananda Bharathi's case, the Court held that, "it is difficult to see how the power of judicial review makes the judiciary supreme in any sense of the word. Judicial Review as a part of the Basic Structure, In the celebrated case of Keshavanda Bharathi v. State of Kerela, the Supreme Court of India the propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution, The Judges made no

attempt to define the basic structure of the Constitution in clear terms. S.M. Sikri, C.J mentioned five basic features: 1. Supremacy of the Constitution. 2. Republican and democratic form of Government. 3. Secular character of the Constitution. 4. Separation of powers between the legislature, the executive and the judiciary. 5. Federal character of the Constitution.

Golaknath Case (1967)

The questions, in this case, were whether amendment is a law; and whether Fundamental Rights can be amended or not. SC contented that Fundamental Rights are not amenable to the Parliamentary restriction as stated in Article 13, and that to amend the Fundamental rights a new Constituent Assembly would be required. Also stated that Article 368 gives the procedure to amend the Constitution but does not confer on Parliament the power to amend the Constitution. Judicial Review and judicial activism Judicial Review refers to the power of judiciary to review and determine the validity of a law of constitutional order while Judicial Activism refers to the use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. Judicial review can be defined as the doctrine under which legislative and executive actions are subject to review by judiciary. It can be classified into three categories-reviews of legislative actions, review of judicial decisions, and review of administrative action. Therefore, it is also the duty of judges to ensure that balance of power is maintained, protect human rights, fundamental rights and citizens' rights of life and liberty. On the other hand, Judicial Activism can be defined as a philosophy of judicial decision making where by judges allow their personal views regarding a public policy instead of constitutionalism. There is only a thin line of separation between review and activism like judicial review means to decide if the law / act is consistent with the constitution. On the other hand judicial activism is more of a behavioral concept of the judge concerned.

Limitations of Judicial Review

There are some limitations on the judiciary while exercising its power of judicial review.

1. Locus standi is the first limitation on judicial review in India. It means that only a person aggrieved by an administrative action or by an unjust provision of law shall have the right to move the court for redressal. Under this traditional rule a third party who is not affected by the action can't move to the court.
2. The judiciary can't interfere in political questions and policy matters unless absolutely necessary.
3. The court will not decide constitutional questions if a case is capable of being decided on other grounds.
4. The court will not decide a larger constitutional question than required by the case before it.
5. The scope of Judicial Review stand limited to only legal and constitutional cases. It means that the court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.
6. The grant of specific fundamental rights also limits the scope of Judicial Review.
7. Ordinarily, courts should not pronounce on the validity of an Act or part of an Act which has not been brought into force, because till then the question of validity would be merely academic.

Constitutional Amendments and the use of Judicial Review

Until 1967, the Supreme Court upheld that the Amendment Acts were not ordinary laws and could not be struck down by the application of Article 13 (2). It was in the famous Golak Nath Vs. the state of Punjab case in 1967, where the validity of three constitutional amendments (1st, 4th and 17th) was challenged, that the Supreme Court reversed its earlier decision and uphold the provision under article 368 which put a check on the Parliament's propensity to abridge the fundamental Rights under chapter III of the Constitution.

Judicial Review for the fundamental rights

Under the Constitution, legislative and administrative actions can be reviewed by courts under Articles 32, 136, 226 and 227. Such review is called public law review. Article 32 guarantees the right to move the Supreme Court if any fundamental right can be reviewed under this provision.

Writs

Article 226 can be, and is more often, used for reviewing the action of administration. The High Court can issue directions, orders or writs in the nature of habeas corpus mandamus, prohibition, quo-warranto, and certiorari for the enforcement of fundamental rights or for any other purpose.

1. Habeas corpus: It is a writ issued by the court to bring before the court a person from illegal custody. The court will examine the legality of detention and release the person if detention is found illegal.
2. Mandamus is issued to a public authority to do an act which under law, it is obliged to do or to forbear from doing.
3. Prohibition is a writ to prevent a court or tribunal from doing something in excess of its authority. High Court has power to issue an order of prohibition to the executive authority prohibiting it from acting without jurisdiction.
4. Certiorari is a writ issued to a judicial or quasi-judicial authority to correct its order. This writ is issued on specified grounds like violation of natural justice; excess, abuse or lack of jurisdiction; fraud; and error of law apparent on the face of the record.
5. Quo-warranto is a writ issued to a person who authorisably occupies a public office to step down from that office. High courts and the Supreme Court have the power to issue not only these writs but also appropriate directions and orders.

Conclusion

The concept of Judicial Review gives a new dimension to the Judiciary. The Judicial Review power strengthens the importance of judiciary. It is an effective weapon for the protection of Democratic values and liberty of the people. Judicial Review is essential for maintaining the supremacy of the Constitution. It is very useful system for Indian liberal democratic and federal structure. It has been playing an important role for the protection of individual as well as for the development of the Constitution. It secures the independence of judiciary. It put a restriction over legislature and executive for their possible misuse of power. Judiciary acts as an umpire to dissolve the problems between the centre and states for maintaining the federal balance.

With the power of judicial review, the courts act as a custodian of the fundamental rights. Thus, the power of judicial review is recognized as the part of the basic constitution of India.

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