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Indian Constitutional Law on Judicial Review: A Critical Analysis

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ABSTRACT

In democratic countries, the constitution is declared as the highest and superior law of the nation and is mentioned in the constitution to protect the rights of the citizen. All the other laws of the land derive authority from the Constitutional law. Law plays an important function in society. The concept of law changes from time to time. Laws are enacted by the legislature and implemented by the executives, and before implementation, it is checked by the judiciary by using their power of judicial review. The validity of laws is to be checked according to the Constitution. That is why today many countries have proudly accepted the judicial review in the constitution of their nation.

Keywords: *Judicial review, Constitution.*

I. INTRODUCTION

Without law there can be no order and without order there can be no peace and progress. Let us look at the universe and reflect. Right from the smallest particle to the great heavenly bodies, all are bound by rules, which regulate their movement. According to Blackstone, the law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational.[2] Thus every inanimate object in the universe is governed by a law that nature has laid down for all times to come to regulate its movement and behavior. The inanimate bodies implicitly obey the law and that is why life is possible on this planet. If a single heavenly body were to break the law and move about in an erratic manner so as to collide with earth, there would be a major catastrophe and all soothe-sayers would be vindicated in their doomsday premonitions. Thus life is possible only because these inanimate objects conform to the laws of nature and behave in a predetermined and predictable manner. What applies to inanimate objects also applies to human beings. If every human being were free to act arbitrarily at his pleasure there would be chaos. It is for this reason that the importance of law was realized even in the earliest stages of human civilization, as an instrument regulating the conduct and affaire of society for the

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[2] Salmond 'Jurisprudence' p.20 (11th edition)

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common good. Just as law for inanimate objects is of superhuman origin, law for human beings was also conceived to be of divine and, therefore no human being not even the king or monarch could claim to be above the law.

In the Vedic days of Hindu India, the monarch alone was the administrator and source of all law. From him alone emanated all justice. However, this sovereign was not above the law but under it. If he swerved from the accepted law of the land, he could be punished just like any other citizen of the State.[3] The Brihadaranyak Upanishad says that the law is the king of kings. Thus according to our Dharma Shastras, no one is above the law, not even kings. This dominating position of law among the Hindus is due to the fact that the law, as conceived by them was not man-made but a divinely sacred thing. The Dharma Shastras were not only legal but also religious.[4] The Shatpath Brahman (XIV.4.2.26) and the Brihad-Aranyak Upanishad (1.4.14) in identical terms lay down the supremacy of the law, " *law is the ruler of even the rulers and kings. Therefore there is nothing higher than law. With the aid of law even a weakling overcomes the strong"*.[5]

II. Judicial review: meaning & role

Man is a creature of imitation. He is essentially in nature like water, one of the five elements that he is composed of. He is shapeless when born, with no form, no hue, no colour. He comes into being possessing only that which is inherently his, his body. But then he becomes conscious of others around him; he is keen, observant. He watches; he imitates. He learns; he ruminates. He takes the shape of the mould that he sees those closest to him settled in. Of course, there are exceptions, like there are to every rule. However, exceptions are not the basis for generalisations. We are concerned with generals and not exceptions. Every action of the modern man is imitated. Please do not construe the above statement to be an innuendo. It is not my intention to insinuate that modern man has not one original bone in his body (of course, technically speaking he doesn't!) my implication is merely that man learns by imitating the creatures and things around him. In life, as in literature, he lives by drawing analogies. The purpose of the above discourse is merely to forward a point that, if I am only just learning something new, how would I best explain it to someone who has no knowledge of it whatsoever. By drawing parallels between the new, unfamiliar concept and an old familiar concept. Like they did in Kindergarten, "*A FOR APPLE*".

Now, hopefully without sounding too juvenile, I have one request to make of you; for the next

[3] Ramchandr Dixitaar ' Hindu Administrative Institutions' pp.216-226.
[4] Ibid pp. 216-226
[5] Chobe, 'Principles of Dharma Shastra' p.1

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few seconds forget whatever it is that your occupation in life is and think of yourself as a trained full-fledged gardener. You have been commissioned a new garden to take care of and nurture. You stand at the edge of the garden and survey your territory. It's a tastefully and meticulously architected garden. The choice of plants, herbs, flowers, and fruits is stupendous, with a varied variety of flora and fauna. Nothing wrong with the basic structure either. However, there are wild outgrowths, innumerable creepers, uncut branches, and untrimmed bushes. You know what you have to do. Not plant a new garden, but trim this one. You don't have to make anything new, only garnish what is already made. You know you must regularly weed out creepers, unwanted bushes, bad leaves, and infected fruit, anything that threatens the health and prosperity of your botanical extravaganza. You must not interfere with the growth mechanism of plants but must only stop the rot. You must add sporadically the much-needed fertilizer that boosts growth, and then stand by silently to admire. Yours is not the life-giving role, but a life garnishing one.

This is exactly what the concept of judicial review is. With the 'courts' being the 'gardener', the 'Legislature' being the 'architect of the garden', and 'laws that alter the basic structure of the Constitution' being the 'weeds and the unwanted growth', threatening to disfigure your garden of democracy against which the courts must protect the country at all times, by curbing the rot from corroding the foundations of the Republic.

India achieved independence on 15th August 1947 after a long political struggle in which a number of patriots laid down their lives and countless others suffered to secure self-government. But self-government in itself was not the end. It was means to an end. They struggled and suffered to merely not be ruled by their chosen representatives in place of foreign rulers but to achieve basic human rights and freedom, to secure social, political, and economic justice so as to build a welfare State from which poverty, ignorance, and disease could be banished and to lay the foundation of a strong independent Republic which commanded the respect of the world. The fathers of this new Republic thus wanted a State ruled by law and not by men, for history had taught them a bitter lesson that men must never be given power over other men and any nation can truly call itself a democracy where the individual is not his own master. They set to work embarking on a Sisyphean task. Framing a Constitution for a country divided by history, religion, language, mountains, rivers, monarchs, colonists, and time, one might almost say the almighty. They set to integrate a land of snake charmers, poets, philosophers, tyrants, rich and the fabulously rich, poor and the desperately poor. A land where Hindus and Muslims were to live as good neighbours without fences, as they have never lived anywhere in any part of the world in any given period. Good fences don't make good

neighbours in our part of the world.

Nay, not only poets, but all men are dreamers, but those that dream with their eyes open are the most dangerous. The constituent assembly gave unto the people of India on the 26th day of January 1950, the Constitution of the Sovereign, Socialist, Secular, Democratic Republic of India. One that promised to transform the wilderness into a paradise. It is this Constitution that the mechanism of judicial review guards, against encroachments on the Constitution's integrity and basic structure, the ideals that form the essence of our democratic State, and those freedoms which form the sixth element in a humans body, without which man is no better than a piece of furniture, those rights which cannot be given to him but are his by virtue of his being a man, rights who's premise is found in the human mind. These rights the Constitution enshrines in a civilized society and the judicial review is commissioned to guard, rights though as essential as the air that we breathe, are valued by men just as trivially.

III. ORIGIN OF JUDICIAL REVIEW

Judicial review is the creation of the American Supreme Court whose Chief Justice George. C. Marshall declared more than a century and a half ago, in the historical judgment of Marbury.v. Madison in 1803, *" Constitution is what the Judges say it is"*. The initial source of judicial review however goes even further back. It traces back to the common laws, certain principles that were earlier deemed to be ' fundamental' and to comprise of 'higher law' which even the Parliament could not alter. "*And it appears*", wrote Chief Justice Coke in 1610, in his famous dictum in the Bonham case, *" that when an act of Parliament is against common right and reason…the common law will control it and adjudge such law as void"*. This idea first appealed to the Americans as offering a ready weapon against the pretensions of the Parliament in the agitation leading to the revolution.[6] With the establishment of a written Constitution an additional basis for judicial review was suggested, the argument for which was elaborated by Hamilton, with the pending federal Constitution in mind, in the Federalist no.78, as follows, *" the interpretation of the laws is the proper and the peculiar province of the courts. A Constitution is in fact and must be regarded by a judge as a fundamental law. It therefore belongs to them to ascertain the meaning of any particular act proceeding from a legislative body, and in case of irreconcilable differences between the two to prefer the will of the people as declared in the Constitution to that of the Legislature as expressed in the statue"*.

The attention of the federal convention was drawn to judicial review as offering a means for securing the conformity of State laws and Constitutional provisions with the 'supreme law of

[6] Edward Corin, The Constitution and What it Means Today, 1973, pp.141-2

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the land'. Significant debate on this subject continued for quite some time and was finally settled by justice Marshall's famous ruling 1803. Justice Marshall's decision has been debated over but never disturbed and the American Judiciary has made use of this power of judicial review in many leading cases.

IV. Judicial review in India

In India, the proper position of the Judiciary and its power of judicial review should be understood in light of the government structure adopted by the framers of our Constitution adopted via media between the American concept of judicial supremacy and the British system of Parliamentary sovereignty. In England, the Parliament is the supreme body and its legislative powers are virtually unlimited. Courts in England have no power to override any parliamentary enactment, but can only interpret and apply the law passed by the Parliament. As Lord Erskine May puts it, *" The Constitution has assigned no limits to the authority of the Parliament over all matters and persons within its jurisdiction. A law may be unjust and contrary to the sound principles of government but the Parliament is not controlled in its discretion, and when it errs its errors can only be corrected by itself"*[7]. In the United States, on the other hand, Congress has been vested with the legislative powers of the union, but the Constitution is the 'supreme law of the land', laws passed by the Parliament must be in conformity with the provisions of the Constitution. The Supreme Court of the United States has the power to invalidate a law passed by Congress not only on the grounds that it transverses legislative jurisdiction but also on the grounds of the inherent *'goodness'* or *'badness'* of the law or wisdom of the legislative policy, as covered by flexible undefined and undefinable expression *'due process of law'*.[8]

The framers of the Indian Constitution adopted the British model of parliamentary government and made Parliament the focus of political activity in the country and the dominant machinery to realize the goal of social revolution. However, they did not make it a sovereign law-making body like its English counterpart. They placed as much supremacy as possible in the hands of the Legislature, but it had to be restricted because, unlike great Britain, India has a lengthy written Constitution, a federal distribution of powers, and a list of fundamental rights. As Chief Justice Kania remarked, *" under the Constitution of India the ministers are responsible to the Legislature and to that extent, the scheme of British Parliament is given to Indian Legislature, the principle point of distinction between British and Indian Parliament remains, and that is that the Indian Parliament is a creature of the Constitution of India and it's powers, rights,*

[7] Erskine May, Parliamentary Practice, p.28 (16th edition)
[8] S.N.Ray, Judicial Review and Fundamental Rights, p.69 (1974)

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privileges have been found in the relevant Articles of the Constitution of India. It is not a sovereign body with unlimited powers. The Constitution of India has conferred on the Indian Parliament the power to make laws in respect to matters specified in appropriate schedules, and curtailed it's rights and power under certain other Articles found in chapter three dealing with fundamental rights".[9]

Thus the Judiciary in India was endowed with the power of judicial review through which it was to keep a check on the Parliaments' powers to make laws and to see that it is kept within the bounds of the Constitution. A law could be declared unconstitutional by the Judiciary if it felt that it was beyond the competence of the Legislature according to the distribution of powers specified in the Constitution or if it altered the basic structure of the Constitution. Though the Judiciary in India is supposed to have some power of judicial review, it is limited in comparison to the power enjoyed by the US Supreme Court. In the long-drawn controversy regarding individual rights vis-à-vis the society's needs, that characterised the debates of the constituent assembly, judicial review was circumscribed to a great extent. Thus unlike in the United States, the expression used is 'procedure established by law' and not ' due process of law'. In the US the courts can discuss whether a particular law or decision or action is under the 'due' or 'undue' process of law whereas in India we must depend on the 'procedure established by law'. The words 'judicial reviews' are nowhere used in the Indian Constitution, but the framers intended this power to be exercised by the courts while interpreting the Constitution and deciding on the validity of a law passed by Parliament and State Legislature. Power of judicial review can be exercised by the Indian courts and they can strike down laws passed by State and central Legislature when: a) it is beyond their legislative competence as provided in Articles 245, 246, 248, and other provisions of the Constitution; or b) it violates any fundamental rights as provided in Article 13 or; c) it transgresses any other provision of the Constitution.

V. JUDICIAL RESTRAIN AND JUDICIAL ACTIVISM

Judicial decisions in India have been marked by two conflicting attitudes of 'judicial activism' and 'judicial self-restraint at different times. For the first fifteen years after independence, there was a marked tendency for 'moderation' and 'restrain' in judicial decisions. This trend was notable in Supreme Courts judgments in the Gopalan case[10], followed by Ramesh Thapar vs. the State of Madras11, M.S.M. Sharma vs. Sri Krishna (Searchlight case)[12], Dorajan vs. the

[9] C.J. Kania, in Delhi Act 1912,1951,SCR 747 at 756; AIR 1951 SC 332
[10] A.I.R 1970 SC 27, 1950 SCR 88
[11] A.I.R 1951, SC 226, 1951 SCR 525
[12] A.I.R 1959, SC 395 (1959) SCR (supp), 806

State of Madras[13], Shankari Prasad[14] and Sajjan Singh[15] case. Thus, an era of strict and literal judicial interpretation was initiated by the Gopalan cases which provided for a firm base for judicial self-restrain as a guiding principle for future judgments. Till this period there was no confrontation between the Judiciary and the Executive though tensions between the Judiciary and the Legislature and the Executive were visible. Tensions are not always 'unhealthy', especially in a political system like India which after becoming independent from the British was trying to strike a balance between social welfare and individual rights. This tension however turned into a confrontation in 1967 when the Constitutionality of the 17th Amendment was challenged in the Golaknath case. The court ruled that the Parliament had no power to amend the Constitution as embodied in part III. This judgement had the effect of overruling the court's earlier judgements in the Shankari Prasad and Sajjan Singh cases where the power to amend the Constitution was considered unlimited. The Golaknath case launched an era of assertion on the part of the Supreme Court. It was during this time that the abolition of privy purses and the nationalization of banks drew an adverse verdict from the Supreme Court. This created certain uneasiness among the political circles in the country. Mid-term polls were ordered immediately to seek the fresh mandate of the people in the first week of March 1971. In the polls, the congress was returned with a thumping majority and as a result, the 24th, 25th, 26th, and 29th Amendment acts were pushed through the Parliament. The Judiciary felt that these clauses had narrowed down the scope of judicial review. The vital question of '*fundamentalness*' of fundamental rights cropped up and the government argued that rights could not be interpreted in a static or absolute manner, they should be defined in the context of the prevailing social, economic and political conditions in the society, and therefore they should change with the changing needs of the society. From 1950-67, judicial decisions reflect more judicial restraint than judicial activism. Judicial review during this period failed to strike a happy compromise between two extremes of a legislative penchant for social reform and judicial insistence on Constitutional protection of individual liberties.

VI. Kesavananda Bharti Case

No paper on judicial review can be complete without the mention of the landmark judgement of Kesavananda Bharti vs. State of Kerela[16] (Fundamental Rights case). History may look upon Kesavananda Bharti's case as the greatest contribution of the Republic of India to Constitutional

[13] A.I.R 1951, SC 226, 1951 SCR 525
[14] A.I.R 1951, SC 458; 1952 SCR 89
[15] A.I.R 1965 SC 845
[16] A.I.R 1973 SC 1461

jurisprudence. At the outset it is important to note the true effects of the Kesavananda's case. In that case it has been expressly held that the right to property is not a part of the basic structure of the Constitution. It was held in Kesavananda Bharati's case that while the Parliament has the power under Article 368 to amend any part of the Constitution (including the chapter on fundamental rights), the power cannot be so exercised so as to destroy the basic structure and framework of the Constitution and this ratio was reaffirmed and applied in Mrs. Gandhi's case[17] in which a Constitutional Amendment to make the Prime Minister's election to the Parliament unassailable in a court of law was declared void. The rationale of the Supreme Court's judgement in the fundamental rights case was simple and cogent. Parliament is only a creature of the Constitution. Periodically the Lok Sabha is dissolved and the Rajya Sabha retires, while the Constitution continues to reign supreme. If Parliament had the power to destroy the basic structure of the Constitution then it would cease to be a creature of the Constitution and become its master.[18] On behalf of the citizens three points were urged in the Kesavananda case:

a) Golaknath's case was rightly decided and the Parliament should not have the right to abridge any fundamental right, having regard to Article 13 as it stood before the Amendment. The 24th Amendment, which made Article 13 subject to the provisions of Article 368, is invalid.

b) The whole Article 31C, which abrogates for certain purposes the fundamental rights, is invalid.

c) The Parliament cannot exercise its amending power to alter or destroy the basic structure of the Constitution so as to make the Constitution lose its identity, and the latter part of Article 31C which excluded judicial scrutiny is invalid. In the kesavananda case the Supreme Court ruled against the first two submissions but accepted the third.

It was with the view of superseding the above judgement in Kesavananda case and conferring absolute and unlimited amending power on the Parliament, that section 55 of the 42nd Amendment act was introduced during the emergency inserted clause (4) and (5) in Article 368. The clauses were as follows:

a) " There shall be no limitation whatever" on the Parliament amending power.

b) The court's jurisdiction to consider the validity of any Constitutional Amendment is ousted and it was expressly provided that no Amendment whether made 'before' or 'after' the enforcement of the 42nd Amendment, " shall be called in question in any court of law". A study

[17] A.I.R. 1975 SC 2299
[18] Nani A. Palkhivala, We, The People; p.208

of political science leaves no doubt that the philosophy the 42nd Amendment is the very quintessence of authoritarianism. The Supreme Court had no option but to strike down section 4 and 55 of the Constitution 42nd Amendment Act 1976 in the case of Minerva Mills Ltd vs. Union of India[19]. It replenished the faith of those who see the Supreme Court as the watchdog of the Constitution.[20]

VII. CONCLUSION

Good laws are products of good civilizations, they are the outward manifestation of inward value. Where a system of judicial review prevails, it has contributed greatly to the Constitutional development of the country. The Legislature is not the sole judge of its lawmaking. All legislative acts are liable to be tested on the touchstone of the Constitution. Judicial review is a great weapon, not only for the enforcement of rule of law but also for establishing and strengthening the reign of law. Curbing the court regarding the judicial review is a prominent issue in the present political atmosphere in India. In India, political ideology is fast-changing and shifting towards stronger judicial supremacy. With coalition politics being the order of the day and political parties looking at myopic policies aimed at short-term gains that secure votes until the next general elections, the burden of dispensing justice only grows heavier on the Judiciary and it is the only stabilizing factor amongst the three organs of the government. The controversy regarding judicial supremacy and legislative supremacy is merely a colourable and pretentious fight. The court's power of judicial review is founded on its wider experience of life and impartial vision. Politicians and legislators generally have to fathom in its perspective the impact of particular legislative enactment. The legislative lapses and Constitutional vices of legislative enactments are easily removed by judicial checkups. Judicial review unshakably fosters balance between individual rights and liberties and legislative aspiration, especially in considering the fact that the Republic of India consists of diverse political units and religions and various shades of people having conflicting economic and linguistic interests.

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[19] A.I.R 1980 SC 1789
[20] Nani A. Palkhivala, We, The People; p.207

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