CHAPTER FOUR

CHAPTER IV

PROVISIONS RELATING TO JUDICIAL REVIEW AND ITS DEVELOPMENT UNDER THE INDIAN CONSTITUTION

4.1. Judicial Review Before The Commencement Of The Indian Constitution

4.1.1. Under the Government of India Act, 1858

4.1.2. Working of Judicial Review under the Government of India Act, 1935

4.1.3. Concept of Judicial Review during the making of the Constitution

4.2. Judicial Review Under The Present Constitution (1950 and onwards)

4.2.1. Basic Constitutional principles for the exercise of judicial review power.

4.2.2. Purpose of Judicial Review power

4.2.3. Subject of Judicial Review power

4.2.4. Effect of Judicial Review power

4.2.5. Significance of the power of Judicial Review

4.2.6. Factors nourishing the doctrine of Judicial Review in India

4.3. Constitutional Provisions For The exercise Of Judicial Review Power In India

4.4 Grounds For The Exercise Of Judicial Review Power

4.4.1 Absence of legislative competency to enact a particular statute

4.4.2 Statute against the particular provision of the Constitution or contradicts the philosophy of the Constitution

4.4.3 Constitutional amendment contradicts with the basic

CHAPTER IV

Provisions Relating to Judicial Review and its Development under the Indian Constitution

4.1 Judicial Review In India Before The Commencement Of The Indian Constitution

4.1.1 Under the Government of India Act, 1858

The Indian Legislature from 1858 to the enforcement of the Government of India Act, 1935 was a subordinate and non-sovereign body and had no plenary powers of legislation but nevertheless the power of judicial review existed. The law court had power to examine constitutionality of the legislative Acts on the ground of legislative incompetence or usurpation of legislative power. Certain restrictions were put upon the law making power by the Government of India Act of 1858. Positive restrictions were imposed in the Indian Council Act, 1861. The proviso to Section 22 of the Indian Council Act, 1861 lays down constitutional restrictions in framing laws, which read as:

> "Provided always that the said Governor-General in Council shall not have the power of making any law or regulation which shall repeal or in any way affect any of the provisions of this act" [218]

[218] A.C. Benerjee, 'Indian Constitutional Document', Vol. II p. 41, Mukherjee & Co. Pvt. Ltd. 1961

In *Secretary of State v. Moment*[219] Privy Council laid down that the Government of India cannot, by legislation take away the right of the Indian subject conferred by the Government of India Act, 1858. Relying on this decision, the Madras High Court held that there was a fundamental difference between the legislative power of the Imperial Parliament and the authority of subordinate the legislature. Any enactment of the Indian legislature in excess of delegated power or violation of the limitation imposed on the Imperial Parliament is null and void.[220]

The Constitutional thinkers of India before the Indian Republic was established were of the view that in the Constitution of free India, there must be provision for the Supreme Court with the power of Judicial Review. "That the Supreme Judicial authority should be invested with the power to declare ultra virus measures which go against Constitution.[221]

4.1.2 Working of Judicial Review under the Government of India Act, 1935

Federal Court under the Government of India Act, 1935 was impliedly empowered to pronounce judicially upon the validity of statutes, though there were no specific provisions for the same. Sir Brojendra Milter, Advocate General of India in his address to the judges of the Federal Court, on the occasion of its inauguration said that the function of the Federal Court would be to expound and define the provisions of the Constitution act,

---

[219] ILR 40 Cal. 391 (1913)
[220] Annie Besant, v. Government of Madras, AIR 1918 Mad. 1210 at 1232
[221] Colonel K. N. Husker & K. M. Panniker, 'Federal India', p. 145, Martin Hopkinson Ltd., London, 1930

and as guardian of the Constitution to declare the validity or invalidity of the statutes passed by the legislatures in India.[222]

The Federal Court of India vigorously worked for more than a decade with wisdom and dignity and by various constitutional decisions it developed and brightened the constitutional atmosphere of the country from which the makers of the present Constitution received abundant inspiration and light.[223] The Federal Court treated the Constitution of India as a living organism. The Federal Court through various constitutional decisions created a congenial constitutional atmosphere in India which developed a back ground for the growth of constitutional jurisprudence in the present set up of the constitutional government.

During the span of a decade of their career as constitutional interpreters the Federal Court and the High Courts of India reviewed the constitutionality of a large number of legislative Acts with full judicial self-restraint, insight and ability. The Supreme Court of India as a successor of the Federal Court inherited the great traditions built by the Federal Court. [224] Thus, though there was no specific provision for judicial review in the Government of India Act, 1935, the Constitutional problem arising before the court necessitated the adoption of the doctrine of Judicial Review in a wider perspective.

---

[222] (1939) Federal Court Reports p. 4

[223] Dr. Chakradhar Jha, 'Judicial Review of Legislative Acts', p. 130, N. M. Tripathi, Bombay

[224] M. V. Paylee, 'The Federal Court of India', p. 325 P. C. Manaktala & Sons Pvt. Ltd. Bombay, 1966

4.1.3 Concept of 'Judicial Review' During the Making of the Constitution

According to Granville Austin, the Debate in the Constituent Assembly reveal, and the provisions of the Constitution establishes beyond doubt, that the Judiciary was contemplated and will actually work as "an extension of Rights" and an arm of social revolution.[225] The sentiment of the framers of the Constitution in this respect reflected in the following statement made by Alladi Krishna Swami Ayer:

> "While there can be no two options on need for the maintenance of judicial independence, both for safeguarding the individual liberty and the proper working of the Constitution; it is also necessary to keep in view one important principle. The doctrine of independence is not to be raised to the level of dogma, so as to enable the judiciary to function as a kind of super legislature or super executive. The judiciary is there to interpret the Constitution or adjudicate upon the rights between the parties concerned."[226]

The proper position of the judiciary and its power is to be understood only in the light of the governmental structure adopted for India by the framers of the Constitution. The Constitution makers had taken a deliberate decision to entrust review of legislation to the judiciary. The extent to which and the areas in which judicial review of legislation should be permitted is the question of high policy. The Founding Fathers knew that

---

[225] Granville Austin, 'The Indian Constitution- Cornerstone of a nation' ch.1 p. 164
[226] Constituent Assembly Debates; Vol. XI p. 837

the judiciary in India is not elected and in that sense it did not represent the will of the people. On that ground the Judiciary was expected to be independent and impartial. The judicial function in reviewing the validity of legislation is different from the legislative function of the legislature. The legislature makes the law applicable to future situation unless a particular piece of legislature is declared retrospective. On the other hand, the judiciary makes the law only in the sense that it interprets the language of the legislation. The function of the judiciary is not legislative but judicial even when it is invalidating a particular law.

The framers of the Indian Constitution were inclined towards the British principles of Parliamentary Supremacy and adopted the English model of Parliamentary government and made Parliament the focus of political power in the country and the dominant machinery to realize the goal of social revolution. They did not make a sovereign legislature in the same sense and to the same extent as the British Parliament is sovereign. They placed as much Supremacy in the hands of legislature as was possible within the bounds of a written Constitution with the federal distribution of powers and a Bill of Rights.

In its turn, the judiciary has been assigned a superior position in relation to the legislature, but only in certain respects. The Constitution endows the judiciary with the power of declaring the laws as unconstitutional, if that is beyond the competence of the legislature according to the distribution of powers provided by the Constitution or if that is in contravention of the constitution. Thus, while the basic power of review by the judiciary was recognized and clearly established. Significant

restrictions were placed on such power, especially in relation to the Fundamental Rights concerning freedom and liberty.

The Constituent Assembly was evidently keen on preventing judicial review from becoming an instrument of judicial policymaking and thereby upsetting the governmental balance of power. Limitation on judicial review was thus placed in such a way that the Indian Supreme Court could never hope to equal its American counter part. It seems that, at times members were almost haunted by an imaginary ghost of judicial activism 'transplanted from the far-off America.'[227]

4.2 Judicial Review Under the Present Constitution (1950 and onwards)

The Constitution of India represents a synthesis of ideas of several Constitution of the world and an honest effort of the cream of the nation's intellect. The Constitution of India attempts to strike a wonderful harmony between idealism and realism, and to effect a convenient working synthesis of all that the democratic ideal stands for.[228] The combination of British parliamentary system with a written constitution on the American model, including bill of rights and a division of powers between the center and the constituent units, resulted in a unique constitutional position regarding judicial review in

---

[227] Renu Bhandari, 'Judicial Control of Legislation in India and USA', Vol.I p. 74, Uni. Book House Pvt. Ltd. Jaipur 2001

[228] S. N. ray, "Judicial review and Fundamental Rights" p.65, Eastern Law House, Calcutta, 1974

India.[229] This power of judicial review is explicitly provided for India in the context of the federal structure. It is based on the assumption that the laws made by the competent legislatures must be in accordance with the detailed scheme of distribution of powers embodied in the seventh schedule to the Constitution. Moreover, the incorporation of a chapter on Fundamental Rights, with guaranteed provisions for their enforcement through Supreme Court[230] and High courts[231], invites judicial review most decisively.

The Constituent assembly also favoured judicial review was as the most effective safeguards for the fundamental Rights. The Report of the Ad hoc committee of the Supreme Court pointed out that "a supreme Court, with the jurisdiction to decide upon the constitutional validity of acts and laws, can be regarded as necessary implication of any federal scheme."[232] In exercising this power, the Courts in India are not only giving effect to the real will of the people of India as has been embodied to the preamble to the constitution of India with due solemnity, but are faith fully abiding by the sacred pledge of upholding the Constitution and laws. Judicial Review, therefore, has been rightly placed in India above all controversy, but this does not mean any superiority of the judiciary over the legislature or the executive.[233] The sentiment of the framers of the Constitution in this respect was reflected in the following statement by the Alladi Krishnaswamy Ayyer: " while there can be no two opinions on the need for the maintenance of judicial independence, both for

---

[229] H. C. L. Merillat, in the University of Toronto Law Journal, Vol. 15, 1963-1964, p. 489-92

[230] Article 32 of the Constitution of India

[231] Article 226 of the Constitution of India

[232] Reports. First series, p.63

[233] Prof. D. N. Banerjee, 'Our Fundamental Rights: Their nature and extent, p.422-423

the safeguarding of individual liberty and the proper working of the Constitution, it is also necessary to keep in view one important principle. The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as kind of a super-legislature or super-executive. The judiciary is there to interpret the Constitution or adjudicate upon the rights between the parties concerned.[234]

Judicial review under the Constitution stands in a class by itself. The concept of judicial review is enshrined in a Constitution, which seeks to accommodate and compromise the foreign principles of the foreign governments, notably the U.K. and the U.S.A.; it reveals all the bewildering effects of a compromise.[235] Under the Government of India act, 1935, the absence of a formal Bill of rights in the constitutional document very effectively limited the scope of judicial review power to the interpretation of the act in the light of the division of power between the center and the state units. Under the present Constitution of India, the horizon of judicial review was, in the logic of events and things, extended appreciably beyond a formal interpretation of 'federal' principles. Members of the Constituent assembly were agreed upon one fundamental point, that Judicial Review under the new constitution of India was to have a more direct basis than in the Constitution of U.S.A.,[236] where he doctrine was more an 'inferred' than a 'conferred' power, and more 'implicit' than to 'expressed' through constitutional provisions.

---

[234] Constituent Assembly Debates, Vol. XI, p. 837

[235] S. N. Ray, 'Judicial review and Fundamental rights' p. 4, Eastern Law House, Calcutta, 1974

[236] Granville Austin, 'the Constitution-cornerstone of the nation' pp. 170-171 Oxford University Press, 1966

While studying the functioning of judicial review, a question arises as to what are the grounds on which the court can declare a statute or constitutional amendment invalid. If a statute is repugnant to the Constitution, it can be invalidated to the extent of repugnancy. In this context, Justice Roberts in *United States v. Butler*[237]observed:

> "There should be no misunderstanding as to the function of the court in such case. It is sometimes said that the court assumes the power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the Supreme law of the land and ordained and established by the people."

Under the Constitution of India, 1950, the scope of judicial review has been fairly widened. The courts in India in the present democratic set up are the most powerful organs for scrutinizing the legislative lapses. Under the impact of ancient Indian heritage the Constitution of India evolved a unique system of judicial review, having very wide field.

Judicial review is the evolution of the mature human thought. Law must be in conformity with the Constitution. If law exceeds in its limit, it is not law but a mere pretence of law. Law must be just, virtuous and capable of bringing human prosperity and not arbitrary, unjust and in violation of the Constitution. Judicial review power is the great weapon through which arbitrary, unjust and unconstitutional laws are checked. Judicial Review is

---

[237] 297 U.S. 1, 62

the cornerstone of constitutionalism, which implies limited government.[238] In this connection, Prof. K. V. Rao remarks, -"In a democracy public opinion is passive, and in India it is still worse, and this is all the reason why it is imperative that judiciary should come to our rescue. Otherwise----------the Constitution becomes ill-balanced, and leaves heavily on executive Supremacy and tyranny of majority; and that was not the intention of the makers." [239]

4.2.1 Basic constitutional principles for the exercise of judicial review power

In India the concept of judicial review has its foundation on the following constitutional principles.

- In a democracy, the government is always with limited powers, which has to take recourse to a machinery for the scrutiny of the charges of the legislative vices and constitutional disobedience, and such act of scrutiny can be done impartially and unbiasedly only by the Court.
- Each citizen in a democracy, who is aggrieved of a legislative Act on the ground of constitutional violation, has the inherent right to approach the court to declare such legislative Act unconstitutional and void.
- Where the Constitution guarantees the fundamental rights, legislative violation of the rights can be scrutinized by the court alone.

---

[238] S.C. Dash, 'The Constitution of India: A comparative studies' p.334, Chaitanya Publishing House, Allahabad, 1960

[239] K. V. Rao, 'Parliamentary Democracy in India', p.213, The World Press Pvt. Ltd. Calcutta, 1961

- The written Constitution is a fundamental law, which is Supreme to the statutory law or made by the Parliament or common law.
- The power of the various departments of the government is limited by the terms of the Constitution.
- The judges are expected to enforce various provisions of the Constitution as the superior law and to refuse to enforce any legislative Act or constitutional amendment, which is in conflict therewith.

4.2.2 Purpose of judicial review in India

I. To uphold the Supremacy of the Constitution, so that legislative acts repugnant to the Constitution are not enforced by the court of law.
II. To adjust the Constitution to new conditions and needs of time.
III. To infuse into the legislature inspiration, alertness and caution, to avoid legislative mistakes and to conform to the Constitution.
IV. To set up an effective system of checks and balances.
V. To urge the legislatures in assessing the political wisdom of each statute.
VI. To evolve healthy judicial legislation to function as a guide to the people in nation building.

4.2.3 Subject of judicial review in India

- Enactment of legislative Act in violation of the constitutional mandates regarding distribution of powers.

- Delegation of essential legislative power by the legislature to the executive or any other body.
- Violation of Fundamental Rights.
- Violation of various other constitutional restrictions embodied in the Constitution.
- Violation of implied limitation and restrictions.

4.2.4 Effect of Judicial review in India

The effect of judicial review is both Direct and Indirect.

Direct effect: -

The courts declares laws and constitutional amendments repugnant to the Constitution unconstitutional and void and refuses to enforce and apply the same and thus aggrieved party gets appropriate relief in law suit as he gets rid of the unconstitutional statute. It brings to light the reality of the things and dispels darkness.

Indirect effect: -

- Protects from legislative encroachment
- Judicial Review protects the legislature from encroachment into legislative function by the executive.
- Discourages Enactment of Unconstitutional Statutes
- Creates confidence in the people on the Legislature
- Affords powerful method of Constitutional interpretation
- Evolves judicial legislation

It is now well established that the judicial interpretations create precedent and make new laws. Such law is judicial legislation. It has not the sanction of the established legislature, but the sanction of the people itself.

4.2.5 Significance of the power of judicial review

- It strengths the democratic set up.
- It helps in maintaining the Federal nature of the Constitution.
- It fulfills the needs for a federal legitimator and arbiter.
- The nature of judicial function justifies its necessity.
- It aims to decide social, economic and political issues.
- Resolves them and establishes the concept of welfare state.
- It helps in keeping balance between different organs of the government.
- It helps in keeping balance between individual rights and collective interest.

4.2.6 Factors nourishing the doctrine of judicial review In India

- Separation of powers
- Independence of judiciary
- Supremacy of the Constitution
- Conferment of powers to Apex Court to scrutinize a law

4.3 Provisions for the exercise of Judicial review Power in India

India is a Union of States having a Constitution of a federal character in which the sovereign power is divided territorially between the center and the states and functionally between the judiciary, executive and legislature. Under the Indian constitution, the legislature and judiciary, both discharge different but complementary functions. One makes the acts and rules and the other decides on the validity of those laws. The Constitution is Supreme, and embodies the Supreme law of the land and, therefore, all other laws made should conform to it. The validity of the laws is tested by the provisions of the Constitution by the judiciary.

The constitution of India posses very elaborate and comprehensive scheme of the distribution of powers between the union and the states. This distribution makes the role of judicial review more significant. In India a major area of judicial review is provided by the laws enacted by the legislature at both the levels, viz. at central legislature and the state legislature. Also, India has a full Chapter on Fundamental rights in its Constitution, which inevitably assumed the exercise of the power of judicial review, as the Apex court has to act as a guardian of not only of fundamental rights but also of the Constitution as a whole. Not only this, the Constitution of India has also adopted and established the concept of limited government in which each wing of the state viz. the legislature, executive and judiciary have been given limited authority and they are required to function within the bound of such limited authority. The courts have to be on their toes to uphold and preserve limited government by determining the scope of power of a particular wing in question and to judge whether the act performed by it was within the

parameter of the authority conferred on it. Moreover, India is a welfare state wherein, the state has to perform multidimensional functions, has to make many laws for the effective discharge of its multifold areas of activities, which occasions courts to judicially examine and determine the constitutionality of the acts.

Unlike the Constitution of U.S.A. the Constitution of India expressly and explicitly established the doctrine of judicial review in several articles such as 13,32, 136, 226, 245,143,246 and 372, and thus, has the explicit sanction of the Constitution. These provisions can be briefly stated as follow:

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

1. All 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 right 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 any ordinance, order, by law, rule, regulation, notification, customs or usages having in the territory of India the force of law;

b. Law in force includes law made or passed 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.

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

The above text reveals that clause (1) permits judicial review to ascertain whether any law in force in the territory off India immediately before the commencement of the Constitution is consistent or inconsistent with the provisions of part III. Clause (2) permits judicial review of any future law made after the commencement of the Constitution to judge if such law takes away or abridges any fundamental right conferred by part III. Clause (4) reproduced above is to the effect that the text laid down in clause (2) shall not apply to any amendment of the Constitution made under Article 368, meaning thereby, by an amendment of the Constitution, a fundamental right may be taken away or abridged and, therefore, the courts are barred from applying the provisions of clause (2) to an amendment of the Constitution made under Article 368. However, " the inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of

the fundamental rights was infringed by any legislative enactment, to the extent it transgresses the limits, invalid."[240]

Article 32 Right to Constitutional remedies

Article 32 empowers the Supreme Court to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, co-warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by part III. The Parliament, without prejudice to these powers of the Supreme Court, may, by law empowers any other court to exercise within the local limits of its jurisdiction all or any of powers exercisable by the Supreme Court under clause (2) and thus, conferring the power of judicial review on any other court also.

Article 13: Original Jurisdiction of the Supreme Court of the Supreme Court

Article 131 provides for the Original Jurisdiction of the Supreme Court, to the exclusion of any other court in any dispute-

a. Between the Government of India and one or more states; or
b. Between the Government of India and any state or states on one side and one or more other states on the other; or
c. Between two or more states;

[240] per Kania C.J., In Gopalan v. state of Madras, AIR 1950 SC 27

> If and in so far as the dispute involves any question on which the existence or extent of a legal right depends; Provided that the said jurisdiction shall not extent to a dispute arising out of any treaty, agreement, covenant; engagement or other similar instruments, which have been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

Thus, as between the federating parties if there is any dispute in which any question, whether of law or fact, is involved on the determination of which depends the existence or extent of a legal right, the Supreme Court has the power to go for a judicial review.

Article 132: Appellate Jurisdiction of the Supreme Court

Article 132 confers appellate jurisdiction on the Supreme Court in civil, criminal or other proceeding made by the High Court certifies under Article 134A that the same case involves a substantial question of law as to the interpretation of the Constitution.

Article 133: Appeal in Civil cases

The Supreme Court has Appellate jurisdiction of appeals from High Courts in respect of civil matters involving substantial question of law of general importance.

Thus judicial review power is conferred on the Supreme Court in any civil proceedings on a certificate of high court concern. However this provision shall not apply against the judgment, decree or a final order of one judge of High court.

Article 134: Appeal in Criminal Cases

The Supreme Court has appellate jurisdiction in respect of criminal matters:

i) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceedings of the High Court in the territory of India if the High Court
ii) Has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
iii) Has withdrawn for trial before itself any case from any court subordinate to its authority has in such trial convicted the accused and sentenced him to death; or
iv) Certified under Article 134A that the case is fit for appeal to the Supreme Court.

Provided that an appeal under sub clause shall lie subject to such provision as may be made in that behalf under clause (1) of Article 145

Parliament may by law confer on the Supreme Court any further power to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law.

The above provision is a judicial review of a different of different character in as much as it is review of the function of a High Court. Thus, this provision confers power of a judicial review on the Supreme Court of a judicial act as in contrast to an executive and legislative act.

Article 135: Federal Court's Jurisdiction to be exercised by the Supreme Court

It provides jurisdiction and power to Supreme Court with respect to any matter to which the provisions of Article 133, 134 do not apply in jurisdiction and power in relation to that matter were exercisable by the federal court immediately before the commencement of this Constitution under any existing law.

Article 136: Grant of Special leave to appeal by the Supreme Court

The Supreme Court may in its discretion, grant special leave to appeal to any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Article 143: Power of the President to consult the Supreme Court

1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of a such a

nature and of such public importance that it is expedient to obtain the opinion of the supreme Court upon it, he may refer the question to the Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

2) The President may, notwithstanding proviso in Article 131 refer a dispute of the kind mentioned in the said proviso to the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon.

The above provision empowers the President to refer any question of law or fact for the opinion of the Supreme Court.

The power of judicial review, by all the above stated provisions, is conferred on the Supreme Court. However, the power of judicial review is also conferred under Article 226 on all the High Courts within the territory of India.

Article 226: Power of High Courts to issue certain Writs, Orders and Directions

Under this Article High Courts shall have the power throughout the territories of India, to issue to any person or authority, including any government, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by part III and for any other purpose.

The above power is available to High Courts for the enforcement of any Fundamental Rights conferred by art III as well as for any

other purpose i.e. vindication of any legal right other than the Fundamental Rights.

Another important provision forming foundation of the power of judicial review is Article 246, which provides for the distribution of the law making power between the Parliament and the legislatures of the States.

Article 246: Subject matter of laws made by Parliament and by the legislatures of the State

1. Notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in list I in the seventh Schedule.
2. Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the legislature of any state also, has power to make laws with respect to any of the matters enumerated in list III in the seventh Schedule.
3. Subject to clause (1) and (2), the legislature of any state has exclusive power to make laws for such state or any part thereof with respect to any of the matters enumerated in list II in the seventh Schedule.
4. Parliament has power to make laws with respect to any matter for any part of the territory of India notwithstanding that such matter is matter enumerated in the State list.

The above provision is the corner stone of the federal structure of the Constitution and provides for the exercise of limited

authority by the two legislatures. One at the national level and the other is at the regional level. The legislatures are answerable to the courts for any transgression of their authority conferred on them under this article. Thus, by and far, this is the most important provision of judicial review.

The above concrete provisions constitute the foundation of the judicial review power. However, the power of judicial review is not strictly confined only to above specific provisions but is generally available to the Courts in India because India has a written Constitution. In any set up having a written Constitution, the power of judicial review is sine qua non.

In India when the framers of our Constitution set about their monumental task, they were all aware of the principle that the Courts posses power. To invalidate duly enacted legislation, had already acquired history of nearly century and a half in the United States.[241] Therefore, with the birth of the Supreme Court, in its early years when there was a doubt expressed on the exercise of the power of judicial review, Patanjali shastri C.J., laying down the foundation of judicial review held:

> "Our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed existing powers of the review of legislative acts under cover of the widely interpreted 'due

[241] Dr. K L Sharma, Application of the doctrine of judicial review in India, Journal of Legal Studies, p. 96

process' clause in the Fifth and the Fourteenth Amendments. If, when, the court in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit but in discharge of a duty plainly laid down on them by the constitution. This is especially true as regards the 'fundamental Rights', as to which this court has been assigned the role of sentinel on the quo vive. While the Court naturally attaches great weight to the legislative judgment, it cannot deserts its own duty to determine finally the constitutionality of an impugned statute."[242]

4.4 Grounds for the exercise of Judicial Review Power

After considering the bases of judicial review, a question arises as to what are the grounds on which court can declare a statute or constitutional amendment as invalid or repugnant to the Constitution. Explaining this, Justice Roberts of the U. S. Supreme Court said in *United States v. Butler*,[243] as under:

> "There should be no misunderstanding as to the function of this court in such a case, it is sometimes said that the court assumes a power to overrule or control the actions of the people's representatives. This is a misconception. The constitution is the supreme law of the land ordained and established by the people. All legislations must conform to the principles it lays down. When an Act of Congress is

[242] State of Madras v. V. G. Row, AIR 1952 SC 196-199
[243] 297 U.S. 1, 62

appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty, -to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the courts does, or can do, is to announce its considered judgment upon its question. The only power it has, if such, it may be called, the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or in contravention of the provisions of the Constitution; and having done that, its duty ends."

The Supreme Court, over the years has had many opportunities to express its views on the power of judicial review of legislative action.

In *Bidi Supply Co. v. Union of India*, Bose J., made following observations regarding the importance of judicial review.

"Heart and core of democracy lies in judicial process and that means independent and fearless judges free from executive control brought up in judicial traditions and training to judicial ways of working and thinking. The main bull-works of liberty and freedom lie there and it is clear to me that uncontrolled power of discrimination in matters that seriously affect the lives and properties of people cannot be left to executive or quasi-executive bodies even if they exercise quasi-judicial function because they are then invested with an authority that even Parliament

does not possess. Under the Constitution, acts of Parliament are subject to judicial review, particularly when they are said to infringe the Fundamental Rights. Therefore, if under the Constitution, Parliament itself has not uncontrolled freedom of action, it is evident that it cannot invest lesser authorities with that power."

The two above mentioned statements of policy declared by the apex court clearly establish the fact that the courts in India welcomed and received the doctrine of judicial review in the same vein as the fundamental law of the country incorporated it, also recognizing this power as an inbuilt power in the federal polity. The power has been recognized as exercisable not only in respect of or to judge the validity of legislative acts and administrative acts but has also been exercised in constitutional matters adjudging the validity of Constitution Amendment Acts passed by the Parliament, not excluding the determination of the extent of power of Parliament itself to amend the Constitution. The various major areas in which the Courts have so far exercised the judicial review power may be discussed in a classified manner as under.

According to the Supreme Court of U.S.A., if the legislation is in accordance with the provisions of the Constitution, there is no other ground on which the judiciary can declare a statute invalid. If we look into the provisions of the Constitution of India, Articles 13, 245 to 254 and 372 provides causes for invalidity of statutes. Such causes fall into the following main categories:

1. Absence of legislative competence to enact a particular statute;

2. Statute against the particular provision of the Constitution or contradict with the basic philosophy of the Constitution.
3. Constitutional amendment contradicts with the basic philosophy of the Constitution
4. Misuse of the executive power

In addition to the above main grounds, the Supreme Court has added the following categories to the above list. They are as follows:

1. Delegation of essential legislative policy
2. Revival of void statutes
3. Giving extra-territorial operation to the state legislation

4.4.1 Absence of legislative competence to make particular statute

Article 245 of the Constitution of India defines the territorial limits of legislative powers of Parliament and state legislatures. Article 246 defines the jurisdiction of the Parliament and the state Legislatures as regards subjects or topics of legislation. The various matters of legislation have been enumerated in the Union list, state list and concurrent list. The Parliament has the executive power to make laws with respect to any of the matters enumerated in the Union list. The State legislature has the power to make laws in respect to any of matters enumerates in the state list and Parliament & State Legislatures have power to make laws with respect to any of the matters enumerated in the concurrent list. If the Parliament or the State Legislature

encroaches upon the exclusive spheres of the other organ as demarcated in the three lists, the Supreme Court or the High Court can declare its legislation as ultra vires the Constitution.

The power of Parliament to enact legislation within its legislative competence is plenary, unless the Constitution itself has imposed absolute or conditional prohibitions to legislate on any subject. Similarly. The State Legislature can legislate on any subject comprised within any of the entry in list II or III of the 7th schedule of the Constitution, no matter whether such enactment is contrary to any undertaking or guarantee given by the court. [244]

4.4.2 Statute is against the particular provision of the Constitution or contradicts with the basic philosophy of the Constitution

If any statute is against a provision of the Constitution, the court could declare that statute or any part of the statute void. The court exercises the power to strike out invalid provisions of any statute as per the necessity of the case. According to clause (2) of Article 13, a law made in contravention of part III of the Constitution shall, to the extent of contravention, be void. In *Bhikhaji Narain Dhakraj v. State of M.P.*[245], an existing law authorized the state government to exclude all private motor transport operators from the field of transport business since some provisions of the Act were against Article 19(1)(g) of the Constitution, the Supreme Court declared apart of the Act as

[244] Umegh singh V. State of Bombay, AIR 1955 SC 540
[245] AIR 1955 SC 123

void as that could not be justified against the provisions of clause 6 of Article 19.

In *State of Gujarat v. Shri Ambica Mills*,[246] a question arose whether a law, which takes away or abridges the fundamental right of citizens under Article 19 (1)(f) would be void and would not be applicable to the nom-citizens. The Supreme Court after reviewing the earlier decision, observed that, just as a pre-constitutional law taking away or abridging the fundamental rights under Article 19 remain operative after the Constitution came in force as in respect of non-citizen as it was not inconsistent with their fundamental right, so also as post-constitutional laws offending Article 19 remained operative as against non-citizens as it was not in contravention of any of their fundamental rights.

4.4.3 Constitutional amendment Contradicts with the basic philosophy of the Constitution

The Supreme Court of India is probably the only Court in the world, which has extended its power of Judicial Review in the area of Constitutional amendment, on the ground of violation of the basic structure of the Constitution. There is nothing in the Constitution of India, which gives any authority to the High Courts or the Supreme Court to review the amendment of the Constitution.

It is correct that the power of judicial review is a limitation on the power of popular government and is an integral and

[246] AIR 1974 SC 1300

inseparable part of the Constitutional scheme. But such a limitation is restricted up to the judicial control of the legislation and has not been extended in any other country to the review of Constitutional amendment. In fact, the first important area of exercise of judicial review power is in the interpretation and expounding of the fundamental law of this land.

At the very outset, one might ask why an amendment of the Constitution itself should be put to a judicial scrutiny when 'judicial review' has been explained as the power of a court to test the validity of a law made by the Legislature with reference to provisions of the Constitution. In India, a definite and special procedure has been laid down by the Constitution itself for, its amendment, the judges who are oath bound "to uphold the Constitution" are necessarily bound to invalidate a Constitution Amendment Act if the procedure prescribed by Article 368 is not complied with.[247] Article 368 of the Indian Constitution deals with the power and procedure for the amendment of the Constitution.

Judicial review power has been exercised in India in relation to amendments of the Constitution, which are made by Parliament and ratification by the Legislatures of one half of the state Legislatures. Judicial review has been exercise with regard to –

a. Procedural infirmity;
b. Extent of amending power; and
c. Constitutionality of the Constitution Amendment Acts.
d. Procedural infirmity

[247] D. D. Basu, 'Limited Government and Judicial Review' p. 549, S. C. Sarkar * Sons Pvt. Ltd. 1972

A Constitution Amendment Act is to be reviewed in two aspects viz. the procedural requirements and the substantive aspect. If the Parliament passes an Amendment Act without satisfying requirements laid down under Article 368, the Court may declare such Amendment Act unconstitutional. The Parliament passed the Constitution (Fifty second Amendments) Act, 1985 and inserted tenth Schedule affecting minor changes in articles 102(2) and 191(2) making the provisions as to disqualifications of members of legislatures on the ground of defection. In Para 7 of the Tenth Schedule, bar on jurisdiction of Courts, was enacted as follows:

"Notwithstanding anything in this Constitution, no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."

In Kihota Hollohon v. Zachichu,[248] the constitutional validity of Fifty second Amendment was challenged on the ground of procedural infirmity in as much as it was alleged that according to clause (2) of article 368, there is an additional requirement for a Constitution Amendment Bill of sending it for obtaining ratification by not less than of one half of the State Legislatures before it is submitted for assent of the President. This requirement, it is obvious, is a mandatory requirement if the amendment seeks to affect any change in-

a. Article 54, 55, 73 162 and 241, or
b. Chapter IV of part V, Chapter V of Part IV or Chapter I of Part XI, or

[248] AIR 1993 SC 412

c. Any of the list in the seventh Schedule, or
d. The representative of States in Parliament, or
e. Article 368 itself

In view of the above procedural requirements, the Court held that Para 7 of the Tenth Schedule which sought to make change in Article 136, which is a part of Chapter IV of Part V and Article 226 & 227 which form part of chapter V of Part VI of the Constitution had not been enacted in the manner prescribed by clause (2) read with proviso of Article 368. The Court by applying the doctrine of Severability, held Para 7 of the Tenth Schedule unconstitutional and also held that to the extent the Constitution did not stand amended in accordance with the Bill. The Court struck down Para 7 on the ground that this Para abrogated Judicial Review power and violated the basic structure of the Constitution as propounded in Keshavananda Bharati case[249] and reaffirmed in Minerva Mils case.[250]

Extent of amending power

The question of extent of amending power has been in controversy since the commencement of the Constitution. Immediately after the commencement of the Constitution, the power of Parliament to amend the Constitution was questioned in *Sankari Prasad v. Union of India*,[251] in which it was alleged that the Parliament has no right to abrogate the fundamental rights in the exercise of its amending power. The contention raised was that the amendment is also law under article 13(2)

[249] AIR 1973 SC 1461
[250] AIR 1980 SC 1789
[251] AIR 1951 SC 458

and, therefore, the inhibition enacted there under applied equally to an amendment of the Constitution. The Supreme Court unanimously rejected the contention and held that 'amendment' is not 'law' within the meaning of Article 13(2) and, therefore, the Parliament could, by amending the Constitution, take away or abridge any Fundamental Right contained in Part III of the Constitution. The same issue was again raised in *Sajjan Singh v. State of Rajasthasn.*[252]

The Court reiterating the decision of the *Shankari Prasad* held that amendment is not a law within the meaning of Article 13(2) and word 'amendment of the Constitution' means amendments of all the provisions of the Constitution. Gajendragadakar, C.J. said that if the Constitution makers intended to exclude the fundamental rights from the scope of the amending power they would have made a clear provision in that behalf. Not being satisfied with the verdict given by the Supreme Court in *Shankari Prasad* and *Sajjan sigh*, the same issue was raised before the same Court in *L. C. Golaknath v. state of Punjab.*[253] This time, the Court genuinely felt that the Parliament should no more be permitted to abridge or take away any Fundamental Right and, therefore, overruling its two previous decisions, held that 'amendment' is a 'law' within the meaning of Article 13(2), and, therefore, the inhibition contained therein applied to an amendment of the constitution as well as in the like manner in which it applied to its ordinary legislation enacted by the Parliament.

---

[252] AIR 1965 SC 854
[253] AIR 1967 SC 1643

Thus, till the judgment of the *Golaknath case*, the power of Parliament to amend the Constitution remained unlimited or unrestricted. But from the date of the judgment of *Golaknath*, the amending power could be exercised only in a manner so as no to abridge or take away any of the fundamental rights.

The judgment of *Golaknath* raised acute controversy in the corridors of Parliament, as it was not palatable to the Parliament. To nullify the effect of the judgment, Constitution (Twenty forth Amendment) Act, 1971 was enacted to make the amending power of the Parliament unlimited and vested specifically in the Parliament by expressed intendment and enacted a new subsection (1) of Article 368 which provides that "notwithstanding in this Constitution, Parliament may, in exercise of its constituent power amend by way of addition, variation, or repeal any provision of this Constitution in accordance by the procedure laid down in this article." Thus, the 24th amendment restored the amending power of the Parliament and also extended its scope of amending power.

The validity of the Twenty-fourth Amendment was challenged in Keshavananda Bharati v. State of Kerala.[254] The question involved was as to what was the extent of amending power conferred by Article 368 of the constitution. On behalf of the Union of India it was contended that the power of amendment was unlimited. On the other hand, petitioner contended that the amending power was wide but not unlimited. Under article 368 Parliament cannot destroy the 'Basic Feature' of the constitution. A special bench of 13 judges constituted in this case and the

[254] AIR 1973 SC 1461

majority overruled its earlier decision in *Golaknath case*, which denied Parliament the power to amend fundamental rights of the citizens. The Court held that under article 368 the parliament is not empowered to amend the Basic structure or framework of the constitution. The Court apprehended the complete abrogation or emasculation of the fundamental law itself at the hands of Parliament and hence, devised a new limitation on the amending power. The new doctrine devised the doctrine of Basic Structure. The Court has held in a sense that the power of Parliament to amend the Constitution under Article 368, is unlimited, but in exercise of this power, the Parliament cannot violate the Basic structure of the Constitution. Since that day, i.e. April 24, 1973, the limitation of not violating the Basic structure of the Constitution has become the law of the land with regard to the amending power of the Parliament in the exercise of its constituent power under Article 368.

The doctrine Basic Structure has been judicially confirmed in *Smt. Indira Nehru Gandhi v. Raj Narain*,[255] by holding that democracy, and in turn, free and fair elections are an essential feature of the Indian Constitution. In this case the Thirty ninth Amendment Act was declared unconstitutional. The judgment in *Indira Nehru Gandhi case* again irked the Parliament and it retaliated in 1976 by enacting the Constitution (Forty second Amendment) Act, by which it sought to declare the power unlimited and bar any judicial review of the exercise of this power by insertion clause (4) & (5) under Article 368. The Supreme Court, in *Minerva Mills v. Union of India*,[256]struck down clauses (4) & (5) of article 368 inserted by the 42nd Amendment,

[255] AIR 1975 SC 2299
[256] AIR 1980 sc 1789

on the ground that these clauses destroyed the essential feature of the Basic Structure of the Constitution. In this case the Supreme Court held that 'Limited amending power' and 'judicial review' are the basic features of the Indian constitution.

Thus, the extent of amending power of the Parliament has been finally determined by the judiciary in the exercise of the power of judicial review and the limitation of non-violation of the Basic structure has, therefore, come to stay as a permanent limitation on the amending power of Parliament.

Constitutionality of the Constitution Amendment Acts

Judicial review power has been exercised by the courts to determine the constitutional validity of the Constitution amendment acts also. The general presumption regarding the Acts of Legislature is that they are all valid and the onus of proving otherwise heavily lies on the shoulders of one who alleges so. The same presumption equally applies to Constitution Amendment Acts and, therefore, it is apt to take up only two illustrations in which a Constitution Amendment Act has been declared ultra vires the Constitution.

The Constitution (Thirty ninth Amendment) Act, 1975

On the petition of Raj Narain, the election of Prime Minister Smt. Indira Gandhi to Lok sabha was declared void by the Allahabad High Court. To overcome the effect of this decision, the Parliament enacted Thirty- ninth amendment Act which introduced change in the method of deciding election disputes

relating to four high officials- viz. the president, Vice president, Prime Minister and the Speaker.

In this process Article 329 A was inserted to the Constitution of India which has withdrawn the jurisdiction of all courts over election disputes involving the Prime Minister, which was challenged in *Smt. Indira Nehru v. Union of India* as destroying the basic feature of the constitution in so far as it constituted a gross interference with the judicial process. The Supreme Court unanimously held that the exclusion of judicial review in this manner damaged the basic structure of the Constitution, and, hence, the constitutional amendment was unconstitutional. A constitutional bench consisting of Chief Justice and four other senior most judges held that clause (4) of Article 329 A was constitutionally invalid on the ground that it violated the basic framework of the Constitution. Khanna, J. held that "clause (4) violated the principle of free and free elections which is an essential postulate of the democracy and which in its turn, is a part of the basic structure of the Constitution"

Judgment in Indira Nehru was not liked by the parliament and immediately it enacted the Constitution (Forty-second Amendment) Act, 1976 to negate the basic structure limitation on the amending powers as also the constant threat in the form of judicial review power.

The Constitution (Forty-second Amendment) Act, 1976

This Amendment was omnibus measure introducing modifications in a number of constitutional provisions. The principal object against this Amendment Act was that it was

undertaken during the proclamation of emergency period when most of the leaders of the opposition were in preventive detention and when a free, frank and fair discussion of the arguments for an against the modifications was not possible. So, it became more or less a party affair rather than a product of national consensus. The dominant thrust of the Amendment Act was to reduce the role of the courts in the country's judicial and constitutional process. It also sought to assert the Supremacy of the Parliament in respect of its constituent power under Article 368 by inserting clause (4) and (5) under that Article,[257] which made the power uncontrolled and not subject to judicial review.

The constitutionality of the Forty-second Amendment was challenged in Minerva Mills v. Union of India.[258] In this case the Supreme Court held that newly introduced clause (4) of Article 368 deprives the courts of their power to call in question any amendment of the Constitution and is interlinked to clause (5) which seeks to make the amending power unlimited. The donee[259] of a limited power cannot make the power unlimited. The limited amending power being an essential feature of the basic structure has been violated by clause (5) and, therefore clause (5) is held unconstitutional for transgressing the limitations on the amending power. Regarding clause (4), the Court held that barring of judicial review power violated an

---

[257] Section 55 of the Forty-second Amendment Act inserted clause (4) & (5) to Article 368 which reads as:
"(4) No amendment of this constitution (including the provisions of part III) made or purporting to have been made under that article shall be called in question in any court on any ground.
(5) For the removal of the doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition."

[258] AIR 1980 SC 1789

[259] ibid vide Chandrachud C.J., 1789 (Para 22)

essential feature of the Constitution. Thus, clause (4) and (5) today are a dead provision, devoid of any effect and force.

4.4.4 Misuse of executive power

Judicial review of Presidential power

Pardoning power

Article 72 of the Constitution of India gives power to the President to grant pardons, reprieves or remission of punishment and to suspend remit or commute the sentence of any person convicted of any offence. In *Keharsingh v. Union of India*[260] the Supreme Court held that the president's power under Article 72 is of executive character and the petitioner has no right to insist on an oral hearing before the President. In this case the Supreme Court reiterated that the scope of Article 72 is judicially determinable and the President was not right in rejecting Keharsingh's petition on the ground that he could not go into the merit of his conviction by the courts. Pathak C.J. further said:

> "We are of the opinion that the President is entitled to go into the merits of the case notwithstanding that it have been judicially concluded by the consideration given to it by this Court. Further, the order of the President cannot be subjected to judicial review on its merits, except within

[260](1989) 1 SCC 204

the strict limitation defined in *Maru ram v. Union of India.*[261]"

In *Minerva Mills v. Union of India*[262] Bhagwati J. said

"The question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the state and whether such limits are transgressed and exceeded.... The Constitution has, therefore, created independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review."

In *Jumman Khan v. State of U.P.*[263] involving death sentence for the offence of rape and murder, the Supreme Court was called upon to exercise judicial review of presidential rejection of clemency power for sentence of death on accused. Following the decision in *Keharsingh v. Union of India*, which required judicial reconsideration on the rejection of mercy petitions, the Supreme Court called for the 'entire file from the Ministry of Home affairs and waded through it very carefully'. On such examination the Court was satisfied that there was no bias to grant mercy petition commuting death sentence to one of life imprisonment.

Presidential proclamation under Article 356

Article 356(1) provides that the President may issue a proclamation if he is satisfied that a situation has arisen in

---

[261] (1981) 1 SCR 1196
[262] AIR 1980 SC 1789
[263] (1991) 1 SCC 752

which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The President's proclamation under Article 356 was out of the purview of judicial review till the decision of the Supreme Court in *state of Rajastan v. Union of India.*[264] In this case the Supreme Court recognized that the satisfaction of the President was a subjective one. Such a satisfaction could be guided by political factors but the political colour of the question would not cause the court to declare a "judicial hands off". The scope of judicial review, which was narrowly interpreted in State of Rajasthan v. Union of India, was expanded in *S. R. Bombai v. Union of India.*[265] In that case, the nine-judge bench unanimously held that the Presidential power under Article 356 was amenable to judicial review. The majority opinion consisting of Ahmadi, Verma, Dayal and K. Ramaswamy JJ was of the opinion that the power of the President would be based on political judgment, evaluation of which would not be amenable to judicially manageable standards. The minority restricted the scope of judicial review to cases where the action was mala fide or plainly ultra vires. The majority opinion was that the Presidential proclamation could be struck down if found to be mala fide or based on wholly irrelevant or extraneous grounds.

Judicial review of the removal of the judge of the Supreme Court

Article 124(4) provides that a judge of the Supreme Court shall not be removed from his office except by an order of the President passed by an address by each House of Parliament supported by a majority of a total membership of the House and

[264] (1977) 3 SCC 592
[265] (1994) 3 SCC 1

by a majority of not less than two-third of the members of that House present in voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. The only case in which this provision was invoked was against Justice V. Ramaswamy, a judge of the Supreme Court on the ground of financial irregularities committed by him during his tenure as the Chief Justice of Punjab and Haryana High Court.

The motion was admitted by the Speaker of the Lok Sabha, who constituted a committee to investigate the charge in terms of section 3(2) of the Judges (Inquiry) Act, 1968. Soon after that the Ninth Lok sabha was dissolved. After election when the Tenth Lok Sabha was constituted, the new government declined to take necessary steps on the decision of the previous Speaker. This decision of the Government was challenged in the Supreme Court. The Court decided that the motion once admitted did not lapse on the dissolution of the Lok sabha.[266] The Constitution bench had held that a motion under section 3(2) of the Judges (Inquiry) Act did not lapse on the dissolution of the House. Moreover, the entire proceedings of the inquiry committee set up under the Act were statutory in nature and, consequently, subject to judicial review.

On the issue of timing of judicial review, the majority held that as the final decision is to be taken only by Parliament on the finding of "guilty", and the committee's finding remained inchoate till its adoption by Parliament, the appropriate stage of exercise of judicial review had to be only after the stage of the

[266] Sub Committee on Judicial accountability v. Union of India, (1991) 4 SCC 699

judge's 'proved misbehaviour' on adoption of motion by Parliament leading to the order of removal by the President.

The majority view on timing of judicial review by the aggrieved judge as after the Presidential order of removal seems to be in consonance with the constitutional and statutory schemes of impeachment process.

Judicial review of Governor's order

Article 192(1) of the Constitution of India provides that if any question arises as to whether a member of House of the legislature of a state has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final. In *A. K. Sabbiah v. Ramkrishna Hegde*[267] the question was whether the order of the Governor under Article 192(1) disqualifying the member of the legislative assembly for holding an "office of profit" was final or could be made subject to judicial review. The High Court relying on the decision of the Supreme Court in Union of India v. Jyoti Prasad[268] held that Governor's decision under Article 192 was subject to judicial review, if it was found to be perverse or not based on any evidence.

Judicial review of the order of the Speaker

Article 191(2) of the Constitution of India provides that a person shall be disqualified for being a member of legislative assembly

[267] AIR 1994 Kant. 34
[268] AIR 1971 SC 1093

or legislative council of a State if he is so disqualified under the tenth Schedule. Para seven of the tenth Schedule deals with "Bar of jurisdiction of Courts" which provides that "notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule." In *Kihoto Hollohan v. Zachillu,*[269]a question of grave constitutional importance was raised. It involved the challenge to the constitutionality of the tenth schedule. The case was related to the disqualification of some members of the Nagaland legislative Assembly on the ground of their defection. The tenth schedule was incorporated in the Constitution by the Constitution (Fifty second Amendment) Act, 1985. The constitutional validity of the tenth Schedule was challenged, inter alia, on the ground that Para seven of the tenth Schedule was unconstitutional as it had ousted the jurisdiction of the Supreme Court and the High Courts under Articles 136, 226 and 227 in adjudicating on the disqualification of defected members. The majority held that Para seven "in effect" changed the scope of Article 136,226 and 227 which attracted the necessity of ratification requirement and consequently void.

The majority applied the doctrine of Severability to uphold the validity of the Amending Act minus Para seven, which enables the Court to separate the valid part of a statute from the invalid part. The majority further held that the Speaker, while exercising his power under the tenth schedule, functioned as a judicial tribunal exercising judicial power of the State and thus amenable to judicial review. Relying on this decision of the

---

[269] (1992) SCC 651

Supreme Court in *Ravi S Nayak v. Union of India*[270], where the Speaker's order regarding disqualification of a member of a state legislative assembly under Article 191(2) read with tenth schedule was subjected to judicial review, where Para seven of the tenth Schedule which ousted judicial review of the Speaker's order was held to be unconstitutional. Thus, the Supreme Court has established the expanding frontiers of its judicial review power.

4.4.5 Delegation of essential legislative policy

The Parliament or State legislature can delegate legislative power by laying down the essential legislative policy or without laying down guidelines to the executive or some other body. The Constitution of India speaks only of executive power, which is vested in the President and that of the state in the Governor. It does not speak of any legislative power or judicial power and did not vest these two powers in any particular authority or authorities. The Indian Constitution does not say that the legislative power shall vest in the Parliament or the State legislatures only. As the legislative power has not been vested in the Parliament or the State legislature alone in India, legislation by Parliament and State legislatures conferring legislative powers on other bodies can hardly be called into question on the ground that the power to make essential legislative policy has been given away by Parliament to some other body. However, the Supreme Court took the view in re Delhi Laws Act case[271], that the essential legislative policy cannot be delegated by Parliament or State legislature to any other body. A statute empowering the

[270] (1994) SCC 641
[271] 1951 SCR 747

government to repeal or amend a statute was, therefore, held to be void in Delhi Laws Act case. In the subsequent decision in *Municipal Corporation of Delhi v. Birla Cotton Mills*,[272] the Supreme Court decided that the legislature must lay down guidelines before conferring legislative power on any other body so that such body may not act arbitrarily.

4.4.6 Revival of void statutes

If a statute comes in conflict with any provision of part III of the Constitution then it would be void Under Article 13(2) of the Constitution. The word "void" has been used in the sense of " being contrary to the Constitution and, therefore, invalid and unenforceable." In USA the term "void" was first used by the Chief Justice Marshall in *Marbury v. Madison.*[273] The Supreme Court of India also said in *Mahendralal Jani v. State of Uttar Pradesh*[274] that the meaning of word "void" in Article 13 clauses (1) & (2) is "ineffectual, nugatory and devoid of any legal force or any binding effect." The Supreme Court has also held in many cases that a void statute cannot be revived by subsequent amendment as amending statute had nothing to operate upon.[275]

4.4.7 Giving extra territorial operation to the legislation

The power to make a law having extra territorial operation is conferred only on Parliament and not on State legislature. Therefore, if any, Act passed by the state legislature gives extra

---

[272] 1968 3 SCR 251
[273] 1803 1 Cranch 137
[274] 1963 1 SCR 912
[275] B. Shama Rao v. Union Territory of Pondichery, (1967) 2 SCR 650

territorial operation to its provisions, it could be challenged in the court, unless the extra territorial operation could be sustained on the ground of territorial nexus.[276] But such a connection must be sufficient which involves two elements, namely,

a. The connection must be real and not illusory
b. The liability sought to be imposed must be pertinent to that connection[277]

Thus, the power of Parliament to make laws with extra territorial operation must respect the sovereignty of the other states also and therefore, provocation for the law must be found within India itself.

4.5 Limitations or Restrictions On The Exercise Of Judicial Review Power In India

The exercise of judicial review power In India is not untrammeled but several limitations have been imposed on it. Even in the U.S.A., the land of the origin and systemic development of judicial review power, several limitations were imposed. However, these limitations are mostly self-imposed, i.e. they have been evolved by the U.S. Supreme Court itself as a concomitant of its notion of judicial self-restraint. In India the limitations and restrictions have mostly been specifically incorporated in the Constitution itself. These limitations can be divided into three categories.

---

[276] Kochuni v. State of Madras and Kerala, AIR 1916 SC 1080
[277] State of Bombay v. R.M.D.S. Chamarbaugwala, AIR 1957 SC 699

1. Constitutional limitations
2. Intrinsic limitations
3. Self imposed limitations[278]

4.5.1 Constitutional limitations

There is exclusion of many acts from judicial review under the Indian constitution. Article 32 of the Indian constitution gives very wide discretion to the Supreme Court in matter of framing writs to suit the exigencies of particular cases, while under article 32(2) the power of Supreme Court is limited to the enforcement of fundamental rights. There are many provisions of the Indian Constitution, which categorically exclude judicial review. For e.g. under article 77(2) the validity of an order or instrument made or executed in the name of the President and duly authenticated shall not be called in question on the ground that it is not an order executed by the President. Article 74(2) says that "the question whether any, and if so what" aid and advise was given by the Council of Ministers to the President in terms of article 74(1) " shall not be inquired into in any court." Article 166 and 163 place corresponding restrictions on the judiciary in the sphere of the state executive. Article 122(1) and article 212(1) preclude courts from inquiring into the proceeding of the Parliament and the State Legislature respectively. Also, under Article 122(2) and article 212(2), the exercise of power vested in an officer or member of a legislature for regulating procedure or is not subject to the order of the court. Article 105 relating to powers, privileges, etc. of the Houses of Parliament

[278] D. D. Basu, " Commentary on the Constitution of India", 5th edition, Vol. I, p. 170

and of the members and committee thereof, and Article 194 on the same subject in the case of State Legislatures; contain express limitation to the courts power of review. Under article 105(2), no Member of Parliament shall be liable o any proceedings in any court in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

In *M. S. M. Sharma v. Shri Krishna Sinha*,[279] the Supreme Court had held that since the privileges of the House of Commons have a force of a provision of the Constitution, anything done by virtue of them would not be subject of judicial review as violative of a Fundamental Right.

However, in special reference no.1 of 1964 under Article 143 of the Constitution,[280] the court ruled that the privileges of Parliament would be subject to Fundamental Rights, especially, Article 19. Also, judicial review does not apply in the case of nomination of a limited number of persons to the upper Houses of the Parliament and the State Legislatures in the terms of Articles 80 and 172, and in such cases, the Presidents and Governors are immune from answering in any court for acts done in their official capacity under article 361.

These immunities will exclude judicial review of all official acts of the President and Governors. Article 329(a) also precludes judicial review of any law relating to election or delimitation of constituencies. Apart from these limitations, there are also certain legislative restrictions on judicial review in India. For

[279] AIR 1959 SC 395
[280] AIR `1965 SC 745

e.g., the jurisdiction and powers of the Supreme Court may be enlarged by the Parliament under article 138-140.

4.5.2 Intrinsic limitations

The intrinsic limitation arises from the nature of the process in which only judicial pronouncement take place, as distinguished from executive or legislative action. They are based on certain norms, like,

- That judges do not legislate, but only decide 'cases' or disputes existing between adversaries, presented as such before them.
- That every question is not fit for the judicial determination and questions which are 'political' or 'non-justiciable' are excluded from the purview of judicial scrutiny, for e.g. part IV of the Indian Constitution and articles 362,363, 329(a), 81(2) and 82.
- That it is the business of the court to ascertain and apply the proper law applicable to the facts of each case coming before it and also interpret it but never to make a new rule for the future or to change the existing law.
- That a court can decide a question only upon a proper pleading and on facts on the record.

4.5.3 Self imposed limitations

In the 'self-imposed' limitation, the Indian supreme Court is following the line of its American counter part and has sought to adopt the more important of them in its task of deciding upon

the constitutionality of laws.[281] This may be discussed in the following heads.

Actual 'case' or 'controversy'

The Court will not exercise its power of examining the validity of a law unless the question is raised in adversary litigation. This limitation seems to have been accepted by the Indian judiciary as an incident of the very nature of the judicial function itself. The Court has itself pronounced that it will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.[282]

Controversy must be real, not hypothetical

The question involved in the case must not be hypothetical, and controversy must be real. The only exception is article 143 dealing with the advisory jurisdiction of the Supreme Court. In a federal system of government, where multitudinous political conflicts arise involving diverse interests at conflicting national and state levels, the mischief of premature judicial intervention would surely outweigh the cost of uncertainty in result through postponement of constitutional adjudication until such decision is unavoidable.[283] S far, there have been four important references to the highest court of India for its advisory opinion, namely, In re Delhi laws Act,[284] In re Kerala Education Bill,[285] In *re Berubari Union*,[286] and Special reference no.1 of 1964.[287]

---

[281] D. D. Basu
[282] Hans Muller Nurenbery v. Superintendent, presidency jail Calcutta A.I.R. 1955 SC 367
[283] S. N. Ray, 'Judicial review and Fundamental Rights' p. 78 Eastern law House, Calcutta, 1974
[284] A.I.R. 1951 SC 332

Substantial constitutional question must be involved

The Court will not entertain a challenge to constitutionality of law unless the constitutional question involved is 'substantial'. This expressly provided under article 132(1) of the Indian Constitution which declares: "An appeal shall lie to the supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in civil, criminal or other proceedings, if the High court certifies that the case involves the substantial question of law as to the interpretation of the Constitution.

Constitutionality to be decided as the last resort.

The Court will determine a question of constitutionality only in a last resort, when it is absolutely necessary, or unavoidable, for the ascertainment of the rights of the parties before it, and not when it is capable of being decided on other grounds. In the case of *State of Bihar v. Hurdut Mills*[288], Gajendragadkar J. said,

> " in cases where vires of statutory provisions are challenged on constitutional grounds, it is essential that material facts should first be clarified and ascertained with a view to determine whether the impugned provisions attracted; if they are, the constitutional challenge to its validity must be examined and decided."

---

[285] A.I.R. 1958 SC 956
[286] A.I.R. 1960 SC 845
[287] A.I.R. 1965 SC 745
[288] AIR 1960 SC 378

Adjudication within the narrow limits of controversy

The Court will not pass upon a constitutional question further than what is necessary for the disposal of the particular case before it. In *Attiabari Tea Co. v. state of Assam*,[289] Gajendragadkar J. observed, "in dealing with Constitutional questions courts should slow o embark upon an unnecessary wide or general enquiry and should confine their decision as far as may be reasonably practicable within the narrow meaning of controversy arising between the parties in the particular case."

Petitioner standing to challenge the constitutionality of law

The petitioner must have standing to challenge the constitutionality of the law. So far as an application under Article 32 is concerned, a person has no standing unless he shows that

i. he has a fundamental right, and
ii. such right has been infringed by the state.

In *Dwarkadas v. Sholapur Spinning & Weaving Co.*,[290] the Supreme Court observed that a person who challenge the constitutionality of a statute must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of enforcement of the statute and the injury complained of is justiciable.

Injury must be to the petitioner himself

[289] AIR 1961 SC 232 at pp. 251
[290] AIR 1954 SC 199

The injury that the plaintiff complains of must be to an injury to him individually. The Court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it. A person may lose his standing to challenge the constitutionality of the statute by the operation of 'estoppel' or 'waiver'.

Issue must be 'justiciable' not 'political'

The question must be justiciable and not political. However in India, the Supreme Court has not properly evolved the code of self-abnegation on the so-called political questions. In the U.S.A., the wisdom of judiciary will determine whether an issue is justiciable or non-justiciable, i.e. political, while in India constitution itself declares some of its provisions as non-justiciable.

Presumption in favour of constitutionality of legislation

There shall be presumption in favour of the constitutionality of the legislation. A law will not be declared unconstitutional unless the case is so clear as to free from doubt. In *Chiranjit lal v. Union of India*,[291] Fazal Ali J. declared:

> "The presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks to show that there has been a clear transgression of the constitutional principles".

[291] AIR 1950 SC 41

Respect for legislative determination

There shall be respect for legislative determination. This principle has been recognized by the Indian Supreme Court not only by way of self-restraint, but also as a corollary of the constitutional provisions in India. In *R. K. Dalmia v. Justice Tendulkar*,[292] the Court laid down that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems manifest by experience and that its determinations are based on adequate grounds.

Doctrine of stare of decisis

Another salutary principle of self-limitation is what is known in legal phraseology as the doctrine of stare decisis, which is literally means 'stand by its decision'. This principle requires that, since the supreme Court is the highest Court of the country and laws declares by it is binding on all courts by virtue of Article 141, and since, its decision have also the effect of determining a law, there is very great need of finality and continuity of judicial decision, so that the certainty of law is ensured to the advantage of individual citizens and the sanctity of the Constitution maintained. However, this cannot be universal principle, and the Indian Supreme Court in this respect is in favour of balanced approach.

[292] AIR 1952 SC 1821

Doctrine of Severability

The Supreme Court has also imposed on itself another guiding principle of interpretation known as the doctrine Severability, which in simple language, means that if an invalid part or section of a statute can be separated or severed from the other parts or sections which are not open to challenge, then the latter remains, whereas only invalid part or section will be treated as void. The Court has generally accepted the position that the doctrine of Severability should be taken as resort to so as to avoid unnecessary and undesirable invalidation of an entire enactment. In *R.M.D.C. v. Union of India*,[293] the Court considered the doctrine exclusively and observed that when the statute is void it will be enforced as regards the rest irrespective of the fact that the invalidity arise by reason of the subject being outside the competence of the legislatures or by reason of its provisions contravening the constitutional prohibitions. In this case the Court laid down the rules of construction on the lines of those adopted by the Courts in U.S.A.

It is a matter of great satisfaction that the Supreme Court of India has taken cognizance of these limitations and restrictions-Constitutional, intrinsic and self-imposed-ever since it started working.[294]

---

[293] AIR 1957 SC 628

[294] S. N. Ray, 'Judicial review and Fundamental Rights' p.89, Eastern Law House, Calcutta, 1974