

Role of Indian judiciary towards implementation of judicial review in India: An evaluation

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Abstract

This paper is an attempt to study the role of Indian judiciary towards implementation of judicial review in India. Judicial review is basically an aspect of judicial power of the state which is exercised by the courts to determine the validity of a rule of law or an action of any agency of the state. It originated in English legal system and became a very important principle in the systems of government based on Rule of Law. In India, judicial review is not an event of sudden emergence but its gradual evolution depended on the constitutional ideas in different stages of Indian constitutional history. 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 definitely established, significant restrictions were placed on such a power, especially in relation to the fundamental rights concerning freedom, and liberty.

Keywords: Judiciary, Rule of Law, Judicial review, Constitution, Legislature, Executive

Introduction

“The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society”.

These words of chief justice P.N Bhagwati is worth mentioning because the role of judges is not only strictly interpreting the constitution but also is to give the true meaning to the legislation. Judicial review has generated its power from the constitution in India and the scope is very well described by the supreme court of India from time to time. If we strictly look on to the meaning of judicial review it is the check and balance of the acts or laws made by the legislation by the judiciary on account of its being contrary to the constitution.

The Supreme Court of India is no doubt the final interpreter of the constitution as we have studied and analyzed from many cases. It is playing a significant role of protector and working at its best since the commencement of the constitution. With its intellect and time our supreme court has achieved a lot more than bare rigid law interpreter made by the legislation. The Supreme Court has rendered hundreds of decisions expounding various provisions of the constitution, and, thus a distinct constitutional jurisprudence has come into existence. Now with its power of judicial review and judicial activism this court is doing a lot for the social welfare. It has become the last resort for the weak sections of the society. But on the other hand this law making power in the hands of the judiciary is posing a threat to the state constitutionalism. India is following constitution and its spirit is to establish constitutionalism in the country. But this power of the Supreme Court can lead to the country where judiciary will be the head. It is synonymous of creating a third chamber of legislation, which is against the principle of constitutionalism i.e. idea of limited government where a organ of the government can be checked on the ground of being arbitrary.

Thus this power requires a sense of causation while exercising. Court should not act arbitrarily. “Great powers bring great responsibilities this quotation of some scholar can guide the court while using its powers. But in spite of all the hurdles the doctrine of judicial review has a vibrancy of its own and has even been declared as the basic feature of the constitution.

Extent of Judicial Review in India

The initial years of the Supreme Court of India saw the adoption of an approach characterized by caution and circumspection. Being steeped in the British tradition of limited judicial review, the Court generally adopted a pro-legislature stance. This is evident from the rulings such as A.K. Gopalan, but however it did not take long for judges to break their shackles and this led to a series of right to property cases in which the judiciary was loggerhead with the parliament. The nation witnessed a series of events where a decision of the Supreme Court was followed by a legislation nullifying its effect, followed by another decision reaffirming the earlier position, and so on. The struggle between the two wings of government continued on other issues such as the power of amending the Constitution. During this era, the Legislature sought to bring forth people-oriented socialist measures which when in conflict with fundamental rights were frustrated on the upholding of the fundamental rights of individuals by the Supreme Court. At the time, an effort was made to project the Supreme Court as being concerned only with the interests of propertied classes and being insensitive to the needs of the masses. Between 1950 and 1975, the Indian Supreme Court had held a mere one hundred Union and State laws, in whole or in part, to be unconstitutional.

Doctrines of Judicial Review

Article 13 of constitution incorporates “Judicial Review of

Post constitution and Pre-Constitutional laws". This Article inherited most important doctrines of judicial review like *Doctrine of Severability*, *Doctrine of Eclipse*. Article 13 provides for the "judicial review" of all the legislations in India, past as well as future. This power has been conferred on the High Courts and the Supreme Court of India under Art. 226 and 32 which can be declare a law unconstitutional if it is inconsistent with any of the provisions of PART 3 of the Constitution. Some other doctrines are formulated by courts using the power of judicial review are *Doctrine of Pith and Substance*, *Doctrine of Colourable legislation*. These doctrines are originated by Supreme Court by using power of judicial review through interpreting various Articles. Doctrine of Prospective overruling is the doctrine to interpret the judicial decisions. These doctrines are enumerated through interpret the constitution provisions by Supreme Court. Judicial review in India is based on various dimensions like judicial review of legislative, executive and judicial acts which are explicitly provided in these doctrines:

1. *Doctrine of Severability*

Art. 13 of the Indian constitution incorporate this doctrine. In, Art. 13 the word "to the extent of contravention" are the basis of Doctrine of Severability. This doctrine enumerates that the court can separate the offending part unconstitutional of the impugned legislation from the rest of its legislation. Other parts of the legislation shall remain operative, if that is possible. This doctrine has been considerations of equity and prudence. If the valid and invalid parts are so inextricably mixed up that they cannot be separated the entire provision is to be void. This is known as "doctrine of severability".

In *A.K Gopalan v. State of Madras* ^[1] case section 14 of Prevention Detention Act was found out to be in violation of Article 14 of the constitution. It was held by the Supreme Court that it is Section 14 of the Act which is to be struck down not the act as a whole. It was also held that the omission of Section 14 of the Act will not change the object of the Act and hence it is severable. Supreme Court by applying doctrine of severability invalidates the impugned law.

2. *Doctrine of Eclipse*

This doctrine applies to a case of a pre constitution statute. Under Article 13(1) of the constitution, all pre constitution statutes which are inconsistent to part 3 of the constitution become unenforceable and unconstitutional after the enactment of the constitution. Thus, when such statutes were enacted they were fully valid and operative. They become eclipsed on account of Art. 13 and lost their validity. This is called "Doctrine of Eclipse". If the constitutional ban is removed, the statute becomes free from eclipse, and becomes enforceable again.

In *Bhikaji Narain Dharkras v. State of M.P* ^[2] an existing State law authorized the State Govt to exclude all the private motor transport operators from the field of transport business. After this part of this law became void on the commencement of the constitution as it infringed the provisions of Art. 19(1) (g) and could not be justified under the provisions of Article 19 (6) of the constitution. First Amendment Act, 1951 amended the Art. 19(6) and due to this Amendment permitted the Government to monopolize any business. The Supreme Court held that after the Amendment of clause (6) of Art. 19, the constitutional impediment was removed and the impugned Act ceased to be unconstitutional and became operative and enforceable.

3. *Doctrine of Prospective Overruling*

The basic meaning of prospective overruling is to construe an earlier decision in a way so as to suit the present-day needs, but in such a way that it does not create a binding effect upon the parties to the original case or other parties bound by the precedent. The use of this doctrine overrules an earlier laid down precedent with effect limited to future cases and all the events that occurred before it are bound by the old precedent itself.

In simpler terms it means that the court is laying down a new law for the future. This doctrine was propounded in India in the case of *Golak Nath v. State of Punjab* ^[3]. In this case the court overruled the decisions laid down in *Sajjan Singh case* ^[5] and *Shankari Prasad case* ^[4] and propounded Doctrine of Prospective Overruling. The Judges of Supreme Court of India laid down its view on this doctrine in a very substantive way, by saying "The doctrine of prospective overruling is a modern doctrine suitable for a fast-moving society." The Supreme Court applied the doctrine of prospective overruling and held that this decision will have only prospective operation and therefore, the first, fourth and nineteenth Amendment will continue to be valid.

4. *Doctrine of proportionality*' is another important basis for exercising judicial review. This entails that administrative measures must not be more drastic than what is necessary for attaining the desired result. The doctrine operates both in procedural and substantive matters. This principle contemplates scrutiny of whether the power that has been conferred on an executive agency is being exercised in proportion to the purpose for which it has been conferred. Thus, any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred.

In, *Ajai Hasia v. Khalid Mujib* ^[6] the Regional Engineering College made admissions on the ground that it was arbitrary and unreasonable because high percentage marks were allocated for oral test, and candidates were interviewed for very short time duration. The Court struck down the Rule prescribing high percentage of marks for oral test because allocation of one third of total marks for oral interview was plainly arbitrary and unreasonable and violative of Article 14 of the Constitution.

In *Air India v. Nargesh Meerza* ^[7], one of the Regulation of Air India provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage, if it took place within the four years of service or on first pregnancy, whichever is occurred earlier. The Regulation did not prohibit the marriage after four years and if an Air Hostess after having fulfilled the first condition became pregnant, there was no reason why pregnancy should stand in the way of her continuing in service. The Supreme Court struck down the Air India and Indian Airlines Regulations on the retirement and pregnancy bar on the services of air hostess as unconstitutional on the ground that the condition laid down therein was entirely unreasonable and arbitrary.

5. *Doctrine of basic structure*

The basic structure doctrine is a judicial principle that the Constitution has certain basic features that cannot be

altered or destroyed through amendments by the Parliament. Key among these "basic features", are the fundamental rights granted to individuals by the constitution. The doctrine thus forms the basis of a limited power of the Supreme Court to review and strike down constitutional amendments enacted by the Parliament which conflict with or seek to alter this "basic structure" of the Constitution. The basic structure doctrine applies only to constitutional amendments. The basic features of the Constitution have not been explicitly defined by the Judiciary, and the claim of any particular feature of the Constitution to be a "basic" feature is determined by the Court in each case that comes before it. The basic structure doctrine does not apply to ordinary Acts of Parliament, which must itself be in conformity with the Constitution.

By 1973, the basic structure doctrine triumphed in Justice Khanna's judgment in the decision of *Keshavananda Bharati v. State of Kerala* [8]. Previously, the Supreme Court had held that the power of Parliament to amend the Constitution was unfettered. However, in this landmark ruling, the Court adjudicated that while Parliament has "wide" powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution. Although *Kesavananda* was decided by a narrow margin of 7-6, the basic structure doctrine has since gained widespread acceptance and legitimacy due to subsequent cases and judgments. Primary among these was the imposition of a state of emergency by Indira Gandhi in 1975, and her subsequent attempt to suppress her prosecution through the 39th Amendment. When the *Kesavananda* case was decided, the underlying apprehension of the majority bench that elected representatives could not be trusted to act responsibly was perceived as unprecedented. However, the passage of the 39th Amendment by the Indian National Congress majority in central and state legislatures proved that in fact such apprehension was well-founded. In *Indira Nehru Gandhi v. Raj Narain* [9] and *Minerva Mills v. Union of India* [10], Constitution Benches of the Supreme Court used the basic structure doctrine to strike down the 39th Amendment and parts of the 42nd Amendment respectively, and paved the way for restoration of Indian democracy.

Role of Supreme Court to Disbanded Social Inequality of Woman by Judicial Review

The constitution has tried to establish social equality. The court is the best organ for realization of social equality and human dignity. The social equality of woman has been greatly strengthened through judicial review and equality of woman is one of the predominant features of the Indian democracy.

In *Air India v. Nargesh Meerza* [11], a regulation framed by Air India authorizing the employer to terminate services of an air Hostess on her first pregnancy was held to be extremely arbitrary, unreasonable abhorrent to notions of civilized society and interfering with the ordinary cause of human nature. In *Githa Hariharan v. Reserve Bank of India* [12], the rules of Reserve Bank of India, that mother will become natural guardian after father was struck down as unconstitutional. In *Randhir Singh v. Union of India* [60] the Apex Court held that although the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right, but it is certainly a constitutional goal under Article 14, 16 and 39(c) of the Constitution.

In a landmark judgment in *Vishaka v. State of Rajasthan* [13]

the Supreme Court has shown a class example of judicial activism. It was laid down exhaustive guidelines to prevent sexual harassment of working women in places of their work until Legislation is enacted for this purpose. The judiciary criticized the Legislature for not creating legislation in that area and give effect to International Convention on the elimination of All Forms of Discrimination against women. In *Chairman Railway board v. Chandrima Das* [14] the Supreme Court has held that where a foreign national was gang raped, compensation can be granted under constitution for violation of fundamental rights. It was argued on the behalf of state that the railway was not liable to pay compensation to the victim as she was a foreign national and not an Indian national. It was also contended that for claiming damages for the offence perpetrated on the victim, the remedy lay in the domain of private law and not under the public law.

The Role Played by the Supreme Court to Implement the Obligation of the State for Social Safety

The obligation of the state for social safety is the mandate of the sovereign people. Such responsibility and obligation are not merely moral, but are enjoined by the constitution. The people cannot lead a peaceful life if there be no social safety. The Supreme Court has played a very important role by interpreting the legislations and has not hesitated to strike down if it is going unconstitutional. For instances section 63 of the Madhya Bharat Panchayat Act of 1949 provided that no legal practitioner had right to defend any party in the dispute, case or proceeding pending before the Nyaya Panchayat. The constitutionality of this provision of law was challenged under Article 22(1) and it was declared unconstitutional by the majority decision of the Supreme Court. Again, in *UP Police Regulations under 236(b)* which authorized "domiciliary visits" was declared unconstitutional by the Supreme Court as violative of Article 21 of the constitution. By "Domiciliary Visits", the police Authorities were authorized to enter the premises of the suspect, knock the door and have it opened and search it for the purpose of ascertaining his presence in the house. Regulation 236(b) was struck down by the majority decision. The Supreme Court held that the entire police Regulation 236 was unconstitutional as it violated article 19 (i) d of the constitution.

In *Jalan Trading Co. v. Mill Mazdoor Sabha* [15] the validity of Payment of Bonus act, 1965 was challenged by the plaintiff companion the ground that the Act is fraud on the Constitution or is a colourable exercise of the legislative power. The Supreme Court upheld the validity of the Act and ruled that the validity of the law authorizing deprivation of the property can be challenged on following three grounds.

1. Incompetence of the Legislature to frame the law.
2. Infringement of Fundamental Rights guaranteed in part III of the Constitution and
3. Violation of any other express provision of the Constitution.

An Invisible Amendment to the Constitution

Since 1951, questions have been raised about the scope of the constitutional amending process contained in Article 368. The basic question raised has been whether the Fundamental Rights were amendable so as to dilute or take away any fundamental right through constitutional amendment? Since 1951, a number of amendments have been effectuated in the

Fundamental rights. The constitutionality of these has been challenged for number of times before the Supreme Court.

In *Shankari Prasad v. Union of India* ^[16] the 1st amendment which inserted Article 31-A and 31-b of the constitution challenged. The amendment was challenged on the ground that it takes away the rights conferred in Part III of the constitution. However the Supreme Court held that the power to amend the constitution including the fundamental right contained in article 368 of the constitution. Again in *Sajjan Singh v. state of Rajasthan* ^[17], the validity of the constitution 17th amendment was challenged. The Supreme Court approved the majority judgment given in *Shankari Prasad's* case and held that the words 'amendments to the constitution' means amendment of all the provisions of the constitution. But these two landmarks decisions were overruled by the Supreme Court in *Golaknath v. State of Punjab* ^[18] where certain state acts in Ninth schedule were again challenged. The Supreme Court by a majority decision prospectively overruled its earlier decisions of *Shankari Prasad* and *Sajjan Singh* cases and held that Parliament have no power from this date of the decision to amend Part III of the Constitution so as to take away the fundamental rights.

In *Keshvananda Bharati v. State of Kerala* ^[19], the Supreme Court overruled the *Golaknath* case, which denied parliament the power to amend fundamental rights of citizens. The Court observed that 24th amendment does not enlarge the amending power of the Parliament. The parliament is having unlimited power to amend the constitution but it should not destroy the basic structure of the Constitution. In *Indira Gandhi v. Rajnarayan* ^[20] the Supreme Court struck down the clause inserted by the amendment which said once elected Prime Minister and Speaker of Lok Sabha are not answerable to any court against violation of Right to equality in the Constitution. In *Waman Rao v. Union of India* ^[21] the Supreme Court held that all amendment to the Constitution which was made before *Keshvananda Bharati's* case including those by which the Ninth Schedule to the Constitution was amended from time to time were valid and constitutional. But amendments to the Constitution made on or after that date by which the Ninth Schedule was amended were left open to challenge on the ground that they were beyond the Constituent power of parliament because they damaged the basic structure of the Constitution. Since *A K Gopalan* case up to this date and has brought out the development of judicial construction of the Constitution and the Doctrine of Basic Structure. 24th April 1973, the date of Judgment of *Keshvananda Bharati* is made the cutoff date to test the legislative action on the touch stone of Basic Structure Theory. All Laws passed; even if they are kept in IX Schedule of the Constitution has to pass through the Basic Structure Doctrine. By making 24th April 1973 as the cutoff date, the Supreme Court has admitted that they have propounded the said Doctrine of Basic Structure from the said date. Its impact and its repercussions are very serious to the Nation and it tells a lot on the amending powers of the Constitution by the Judiciary itself. We find no written letters Basic Structure in the whole of the Constitution and it is undoubtedly a judicial invention.

Article 32 of the Constitution confers the power on the Supreme Court, for the enforcement of any of the rights conferred by this part viz. Part III of the Constitution and not beyond the same. No doubt, the said power is apart from the powers conferred under Part V, chapter IV of the Constitution. If there is a violation of fundamental rights in

state action, including legislative action, the same can be struck down under Article 32 of the Constitution. The touchstone could only be the Constitution and more specifically Part III of the same. Fundamental rights are enshrined in the Constitution at the time of its adoption itself. By making 24th April 1973 as cutoff date, judiciary admits introduction of a new Chapter called Basic Structure to the Constitution, to be a touchstone, to test the state action and it is in the nature of an invisible amendment without inserting any letter to the Constitution. Certainly, judiciary does not have powers to amend the Constitution, but by propounding the Basic structure doctrine as touchstone to test the legislative actions and by evolving the same from *Keshvananda Bharati* case to the present case and making the same as an enforceable doctrine, the judiciary had exceeded its delineated powers. While holding on one hand that the Parliament, while exercising constitutional amending power under Article 368, cannot amend the Basic structure of the Constitution, the judiciary has exactly done the same by usurping to amend the Constitution by inserting the Basic Structure Doctrine in the Constitutional Arena, without having even semblance of power to amend the Constitution. Basic Structure Doctrine is certainly an invisible amendment to the Constitution or otherwise the date 24th April 1973 is irrelevant. The Judiciary can have the Constitution as touchstone and not the doctrines, theories, propounded later by the judiciary. The doctrines and theories can only serve as tools to understand or to interpret the constitution. But they themselves cannot be touchstones and replace the constitution. The judiciary possibly, unconsciously made a theory, laid it as a touchstone and put a cutoff date, everything without introducing a word in the constitution. Again, the big question is who can review the power of judiciary to make such invisible amendments to the constitution. There is no provision or mechanism spelt out in the Constitution to review the judicial action by any independent organ, similar to judicial review of legislative action read into Article 32 of the Constitution. At times, legislature and the executive could only be helpless spectators of judicial action. If the Supreme Court in the present case does not restrict the date as 24th April 1973 things could have been possibly different. The Supreme Court should have continued to have part III of the Constitution as touchstone and not beyond. Supreme Court in the present case has proclaimed at Para 78 that this Court being bound by all the provisions of the Constitution and also by the Basic Structure doctrine has necessarily to scrutinize the Ninth Schedule Laws. By such assertion, the Supreme Court openly admitted that they are bound by not only provisions of the Constitution but also Basic Structure Doctrine and it evidences that Basic Structure Doctrine is apart from the Constitution and not part of the Constitution.

Exclusion of Judicial Review in India

After independence when Congress was in power at centre it decided to launch the abolition of Zamindari Programme in which it abolished the Zamindari system and acquired the lands of Zamindars. But the main difficulty before the government was of paying compensation. In Article 31(2) the word compensation was used without any adjective like just or reasonable. Thus, Supreme Court interpreted its meaning as 'just compensation'. Various land legislations were declared invalid and were challenged under Article 14 and 19(1) (f).

In *Kameshwar Singh v. State of Bihar* ^[22], the Bihar Land

Reforms Act, 1950 was held invalid under Article 14 for it classified the zamindars in a discriminatory manner for the purpose of compensation. Therefore, finding Zamindari Abolition Programme in danger because of these judicial pronouncements, the central government amended the Constitution and a new provision Article 31A was added. This new article laid down that no law providing for the acquisition by the state of any estate or of any rights therein, or for the extinguishing or modifying any such rights, would be void on the ground of any inconsistency with any of the fundamental rights contained in Article 14, 19 and 31. As Article 31 was the only Constitutional Provision providing for compensation, which means an estate can be acquired or rights can be modified without paying compensation. The only exception was that such law should receive the assent of the President.

After the 44th Amendment Act in which Article 31 was repealed, consequently Article 31 was removed from Article 31A (1). The word estate in sub clause (a) of Article 31A (1) is defined in clause 2(a) to have the same meaning as that expression or its local equivalent has in the existing law relating to the land tenures in force in that area, and by inclusive definition it takes in any jagir, inam or muafi or other similar grants and in the states of Tamil Nadu and Kerala any Janman rights. The object of Article 31A (1)(a) is to bring a change in the agricultural economy and facilitate agrarian reforms and it is applied to legislations affecting the rights of landlords and tenants.

In *K.K. Kochuni v. State of Madras* [23], it was held that the protection of this clause is not applicable to a law which seeks to modify the rights of the owner without any reference to agrarian reforms. In *State of Kerala v. Gwalior Rayon Silk Mfg. Co. Ltd.*, the court held that there has to be a direct nexus between the subject matter acquired and its utilisation for agrarian reforms.

The second proviso to Article 31A (1) refers to ceiling limits. This proviso says that the land exempted from acquisition should be within the ceiling limit and must be under personal cultivation. The Supreme Court in the case of *Bhagat Ram v. State of Punjab* [24], interpreted the object of this proviso. The Court said that a person who is cultivating land personally and it is his source of livelihood, should not be deprived of that land under any law protected by Article 31A unless the compensation at market rate is given.

Constitutionality of Article 31A

In *Ambika Mishra v. State of U.P.* case [25], the Supreme Court upheld the constitutionality of clause (a) of Article 31A (1) on the test of basic structure. In *Minerva Mills v. Union of India* [26], the Court held that the whole of Article 31A is unassailable on the basis of stare decisis, a quietus that should not allowed to be disturbed. In *Waman Rao case* [27] and *I R Coelho case* [28], the First Amendment in which the Article 31A was introduced and Fourth Amendment which substituted new clauses to this Article has been held constitutional. Therefore, relying on the judgments of *Minerva Mills*, *Waman Rao* and *Coelho case* Article 31A can be stated as constitutionally valid.

Emergence of Article 31 B: Validation of certain Laws

Article 31A was added to the Constitution by the Constitution (First Amendment) Act, 1951. It was added as a constitutional device to protect the specified statutes from any attack on the ground that they infringe Part III of the

Constitution. It has retrospective effect which is clear from the words “ever to have become void”. The introduction of this provision has cure the defects in various acts of the Ninth schedule as regards to the unconstitutionality alleged on the grounds of infringement of Part III of the Constitution, these acts even if void or inoperative at the time, they were inactive by reason of infringement of Article 13(2) of the constitution assumes full force from the respective dates of their enactment after their inclusion in the Ninth schedule read with Article 31B of the Constitution. The Ninth schedule consists of 284 legislations until the constitution (78th amendment) act, 1995 but article 31B did not empower the legislatures to amend these acts inconsistently with the provisions of the constitution or to take away the rights conferred by the Constitution. The amendments must be consistent with the provision of the Constitution or be saved under Article 31A of the Constitution, if not they must be held void. A question was raised in *Prag Ice And Oil Mills v. Union Of India* [29] whether article 31B saved the orders and notifications issued under Section 3 of the Essential Commodities Act 1955 which was already included in the Ninth schedule but as was already decided in *Godavari Sugar Mills Ltd. v. S.B Kamble* [30] that the amendments to an act subsequent to an inclusion of an act in the Ninth schedule were not entitled to the protection of Article 31B. The Supreme Court dismissed the petition as the act did not violate the petitioner’s rights under Article 14 and 19, it was explained by the court that when a particular act or regulation is placed in the Ninth schedule, the parliament may be assumed to have applied its mind to the provisions of the particular act and the desirability, propriety or necessity of placing it in the Ninth schedule and such an assumption cannot in the very nature of things be made in the case of an order issued under an Act or Regulation placed in the Ninth schedule.

Constitutional Validity of Article 31B

In *Waman Rao v. Union of India* [31], the court held that amendments in the Ninth schedule made before the decision of *Keshavananda Bharti v. State of Kerala* [32] that is before 24.04.1973 were beyond challenge but the amendments made afterwards could be tested on the grounds of amendment of basic structure. Similar views were given by the court in *Minerva Mills v. Union of India* [33]. In *I.R. Coelho v. State of Tamil Nadu* [34] the nine judge bench of the Supreme Court unanimously decided that as held in *Keshavananda Bharti case* and later clarified in *Waman Rao case* while the laws included in the Ninth schedule before the decision in *Keshavananda Bharti case* are immune from any challenge on the grounds of violation of fundamental rights or basic structure and the Acts included after the decision shall be open to challenge. The Court reaffirmed that Article 31B did not destroy or damage the basic structure of the Constitution.

Emergence of Article 31 C

Article 31-C was inserted in the constitution by the Twenty-Fifth Amendment. It reads as follows

Article 31-C “Notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing [all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by [Article 14 or Article 19] and [no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect

to such policy].

Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent Right to Constitutional Remedies”.

The insertion of this article made A. 14, 19 and 31 inapplicable to certain laws made by Parliament or any legislature. Along with this it was also added that a declaration in the law that is to implement the directive principles enshrined in A. 39(b) and (c) cannot be questioned in a court of law. Therefore, the insertion of this article granted complete immunity to a law from judicial scrutiny if the President certified that it was enacted to promote the policy laid down in A. 39(a) and (b). The provisions of this Article would apply only if the law had received the assent of the President.

History behind Article 31C

This article was inserted by the 25th Constitutional Amendment to get over the difficulties placed by judicial decisions in the way of giving effect to the Directive Principles in Part IV. It provided immunity from any challenge on the grounds of violation of Article 14, 19 and 31 any law enacted for implementing the directives in clause (b) and (c) of Article 39. In the 25th amendment it was further provided that such law made to give effect to the policy under Article 39(b) and (c), would not be open to judicial review. However, this second part was struck down in *Keshavananda Bharti v. State of Kerala* [35], but rest of the Article was held valid. After this amendment 42nd Constitutional Amendment Act was passed by the Parliament which replaced Article 39(b)-(c) by all Directives contained in Part IV of the Constitution. The part which was held unconstitutional in the *Keshavananda Case* was not omitted from the official text of the Constitution, since later cases seem to restrict the scope of judicial review of the statutory declaration only to the narrow question whether there is a reasonable nexus between the act passed and the objects of the directive it seeks to implement. But in the *Minerva Mills v. Union of India* [36], it was held that extending the immunity of Article 31C to all the Directives of Part IV by the 42nd amendment was unconstitutional, thus, Article 31C is confined to its pre 1976 position, which has not been overruled by any larger bench yet.

Decisions given by court on the constitutionality of Article 31C

The validity of the 25th Constitutional Amendment was questioned in *Keshavananda Bharti v. State of Kerala* [37], Sikri C.J. held that since Parliament cannot under article 368 abrogate fundamental rights; equally it cannot enable the legislature to abrogate them. Therefore, article 31C must be declared unconstitutional. The second part of Article 31C was held unconstitutional on the ground that it ousted the jurisdiction of the Courts which is a basic feature of the constitution and which cannot be done away with a amendment under Article 368. In *Minerva Mills Ltd. v. Union of India* [38], the extended version of article 31C was struck down by the Supreme Court. The Court ruled that the extension of the shield of article 31C to all the Directive Principles was beyond the amending power of Parliament under article 368 because by giving primacy to all Directive Principles over the Fundamental Rights in articles 14 and 19,

the basic or essential features of the constitution viz., judicial review has been destroyed.

In *Waman Rao v. Union of India* [39], the Supreme Court maintained that article 31C as it stood prior to the 42nd Amendment Act made in 1978, was valid as its constitutionality had been upheld in *Keshavananda Bharti* case. In *Sanjeev Coke Manufacturing Company v. M/s. Bharat Coking Coal Ltd* [40], The Supreme Court struck down article 31C as unconstitutional (Amended portion in 42nd Amendment Act) on the ground that it destroys the "basic features" of the Constitution. The goal set out in Part IV has to be achieved without abrogating the means provided for by Part III. Thus, there is no conflict between the directive principles and the fundamental rights. These are meant to supplement one another. The Court held that article 31C as originally introduced by the 25th Amendment is constitutionally valid.

In *I.R. Coelho v. State of Tamil Nadu* [41], the Supreme Court held that any law which infringes basic structure of the Constitution can be struck down. Parliament has power to amend Part III so as to abridge or take away fundamental rights but that power is subject to the limitation of basic structure doctrine. There should be a balance between fundamental rights and Directive Principles of State Policy.

Conditions for applicability of Article 31C

There are two conditions which must be fulfilled for the application of Article 31 C

1. A law for giving effect to the policy of the state to implement a Directive Principle in Article 39(b) or (c).
2. The Legislature making a declaration to that effect.
3. But the question that whether the act is intended to secure the object contained in Article 39(b)-(c) does not depend upon the declaration made by the legislature but upon the contents of the act as found by the court.

Current Position of Judicial Review in India

The Supreme Court of India since the era AK Gopalan's case to the historic judgment in *I.R. Coelho's* case magnified the concept of Doctrine of Judicial Review. In the present scenario, Supreme Court plays a very crucial role to interpret the constitutional provisions and now the concept of Judicial Review became a fundamental feature of the Constitutional Jurisprudence.

In its recent judgment in *Madras Bar Association v. Union of India* [42] the Supreme Court scrutinized the provisions of Companies Act, 1956 and declared some provisions ultra vires. In this case, the petitioner challenges the constitution of NCLT and NCALT and also challenges the formation of the Committee, the appointment of the judicial members as well as the technical members. Sec 409(3)(a), 409(3)(c), and Sec. 411(3). 412(2) are the provision which incorporates Constitution of Board of company law administration. The Supreme Court upheld the validity of NCLT and NCALT, but declared the above mentioned provisions ultravires and held that these provisions are unconstitutional in nature on the ground that any institution performing a judicial function should be constituted of members having judicial experience and expertise and thus Judicial member were to exceed the technical members so as to maintain the essential feature of that constitution.

Conclusion

The Indian Judiciary has played a remarkable role by the way

of Judicial Review to maintain the supremacy of the Constitution. As said by Holmes that life of law is not logic but experience. Hamilton, one of the framers of the constitution of United States of America says that if there is conflict between constitution and the law the judges should prefer constitution. In India it is reflected 100%. After the decision of Keshavananda Bharti's case^{42nd} amendment was made to the Constitution which inserted Clause 4 and 5 which declared that there will be no limitation on the amending power of the parliament of what so ever. But In *Minerva Mills v. Union of India*,^[43] The Supreme Court struck down Clauses (4) and (5) of Article 368 inserted by the 42nd Amendment, on the ground that these clauses destroyed the essential feature of the basic structure of the Constitution. The Judgment of the Supreme Court thus makes it clear that "the Constitution not the parliament is supreme in India."

To conclude this, in our point of view, the impact of judicial review strengthens the power of Courts in the present scenario like in UK. There was absence of judicial review in UK, but after the expansion of this doctrine, it's now becomes exist very broadly. *Parliamentary Sovereignty* is still in existence in UK, but judicial review also makes their place in the present scenario. Doctrine of judicial review is now become very dynamic concept in present scenario. In various countries Judiciary is performing as the guardian of Constitution by using the power of judicial review. In India, courts are very strictly scrutinized the validity of law or any administrative actions if they inconsistent and illegal in nature.

References

1. AIR SC 27, 1950.
2. AIR 781, 1955.
3. AIR SC 1643, 1967.
4. AIR SC 845, 1965.
5. AIR 1951 SC 455
6. AIR 487, 1981.
7. AIR SC 1829, 1981.
8. AIR SC 1461, 1973.
9. AIR SC 2299, 1975.
10. AIR SC 1789, 1980.
11. AIR SC 1829, 1981.
12. AIR SC 1149, 1999.
13. AIR SC 3011, 1997.
14. AIR SC 988, 2000.
15. (AIR SC 691), 1967.
16. AIR SC 455, 1951.
17. AIR SC 845, 1965.
18. AIR SC1643, 1971.
19. AIR SC 1461, 1973.
20. AIR SC 2299, 1975.
21. AIR SC 271, 1981.
22. 1 SCR 889, 1952.
23. AIR SC 1080, 1960.
24. AIR SC 621, 1954.
25. AIR 762, 1980.
26. AIR SC 1789, 1980.
27. AIR SC 271, 1981.
28. AIR SC 861, 2007.
29. AIR 1296, 1978.
30. AIR 1193, 1975.
31. AIR SC 271, 1981.
32. AIR SC 1461, 1973.
33. AIR SC 1789, 1980.
34. AIR SC 861, 2007.
35. AIR SC 1461, 1973.
36. AIR SC 1789, 1980.
37. AIR SC 1461, 1973.
38. AIR SC 1789, 1980.
39. AIR SC 271, 1981.
40. AIR 239, 1983.
41. AIR SC 861, 2007.
42. SCC 484, 2015.
43. AIR SC 1789, 1980.