

# LEGALFOXES LAW TIMES

## CONCEPT OF JUDICIAL REVIEW AND DISTINCTION WITH APPEAL

- By Aarav jain

### INTRODUCTION

The principle of judicial review has become an essential feature of the Constitutions of many countries. H.M. Seervai in his book namely *Constitutional Law of India*, has pointed out that the principle of judicial review is a similar feature of the Constitutions of Canada, Australia and India, though the doctrine of Separation of Powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the functions of another.<sup>1</sup>

The power of judicial review contains in itself the concept of separation of powers which is an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every State action has to be tested on the basis of rule of law, and when occasion arises by the reason of a doubt raised in that behalf only then is it performed by the courts. The power of Judicial Review is contained in Articles 226 and 227 of the Constitution as far as the High Courts are concerned. In regard to the Supreme Court Articles 32 and 136 of the Constitution, the judiciary in India has come to control by judicial review every aspect of governmental and public functions.<sup>2</sup>

The system of judicial review of administrative actions has been inherited from Britain. It is on this foundation that the Indian courts have built the superstructure of control mechanism. The whole law of judicial review of administrative action has been developed by judges on a case to case basis. A thicket of technicality and inconsistency surrounds it. However, the present trend of

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<sup>1</sup> H.M. Seervai, *Constitutional Law of India*, 3rd ed., Vol. 1, N.M. Tripathi Private Ltd. Bombay, 1983, p. 237.

<sup>2</sup> P.P. Rao, "Basic Features of the Constitution", (2000) 2 SCC (Jour) 1; Justice Syed Shah Mohammed Quadri, "Judicial Review of Administrative Action", (2001) 6 SCC (Jour) 1; Soli J. Sorabjee Soli J. Sorabjee, "Decision of the Supreme Court in S.R. Bommai v. Union Of India: A Critique", (1994) 3 SCC (Jour) 1.

judicial decisions is to widen the scope of judicial review of administrative actions and to a class of cases, which relate to deployment of troops and entering into international treaties, etc.<sup>3</sup>

## **MEANING OF JUDICIAL REVIEW**

Judicial Review refers to the power of the judiciary to interpret the constitution and to declare any such law or order of the legislature and executive void, if it finds them in conflict the Constitution of India. Judicial Review is the power of the Judiciary by which:

- ❖ The court reviews the laws and rules of the legislature and executive in cases that come before them; in litigation cases.
- ❖ The court determines the constitutional validity of the laws and rules of the government; and
- ❖ The court rejects that law or any of its part which is found to be unconstitutional or against the Constitution.

## **JUDICIAL REVIEW IN INDIA**

In the celebrated case of *Keshavananda Bharati v. State of Kerala*<sup>4</sup>, the Supreme Court of India the propounded the basic structure doctrine according to which it said the legislature can amend the Constitution, but it should not change the basic structure of the Constitution, he observed that the basic features are easily discernible not only from the Preamble but also from the whole scheme of the Constitution. He added that the structure was built on the basic foundation of dignity and freedom of the individual which could not by any form of amendment be destroyed. In *S.P. Sampath Kumar v. Union of India*<sup>5</sup>, P.N. Bhagwati, C.J., relying on *Minerva Mills Ltd.*<sup>6</sup> declared that it was well settled that judicial review was a basic and essential feature of the Constitution. If the power of judicial review was absolutely taken away, the Constitution would

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<sup>3</sup> Indian Rly. Construction Co. Ltd. v. Ajay Kumar, (2003) 4 SCC 579

<sup>4</sup> (1973) 4 SCC 225

<sup>5</sup> (1987) 1 SCC 124 at 128

<sup>6</sup> (1980) 3 SCC 625

cease to be what it was. The Court further declared that if a law made under Article 323-A(1) were to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure and hence outside the constituent power of Parliament.

Subsequently, in *L. Chandra Kumar v. Union of India*<sup>7</sup> a larger Bench of seven Judges unequivocally declared:

“that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure”.

Though one does not deny that power to review is very important, at the same time one cannot also give an absolute power to review and by recognizing judicial review as a part of basic feature of the constitution Courts in India have given a different meaning to the theory of Checks and Balances this also meant that it has buried the concept of separation of powers, where the judiciary will give itself an unfettered jurisdiction to review anything everything that is done by the legislature.

It is common knowledge that while discharging executive functions, public authorities take various decisions for which they should be allowed sufficient space for a proper exercise of discretion. It is keeping this in mind that, by and large it is only the decision making process that is actually subjected to judicial review.

Legislature, executive and judiciary under the Constitution are to exercise powers with checks and balances, but not in water-tight rigid mould. In India, by basis of Article 32 and 136, the Supreme Court can exercise the power of judicial review. Similarly, under Article 226 and 227 High Courts have a power of judicial review.

### **CLASSIFICATION OF JUDICIAL REVIEW:**

1. Legislative review: The court in this reviews constitutionality of the law passed by the legislature or rules framed by the administrative authorities.
2. Judicial review: In judicial review, the court reviews the judicial decisions of the lower courts as well as its own decisions.

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<sup>7</sup> (1997) 3 SCC 261

3. Constitutional review: The court here reviews the constitutionality of a constitutional amendment.
4. Administrative action review: In this the court reviews the constitutionality of administrative action as well as examines the fairness, reasonableness, and justness.

### **SCOPE OF JUDICIAL REVIEW**

In *Keshavananda Bharti v. State of Tamil Nadu*, the honorable court has also interpreted the scope and meaning of judicial review. The power of judicial review is, however, confined not merely to deciding whether in making the impugned laws the Central or state legislatures have acted within the four corners of the legislative lists earmarked for them; the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the other provisions of the Constitution.

As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened. Review has thus become an integral part of our constitutional system and a power has been vested in the high courts and the Supreme Court to decide about the constitutional validity of provisions of statutes. The conclusion is that the power of judicial review is a part of the basic structure of the Constitution, permanent even by a constitutional amendment as affirmed by the Supreme Court in *Keshavananda Bharti*. And, representative democracy as an expression of the people's will, speaking through their elected representatives is a non-negotiable principle of our republican agreement which itself is the product of an exercise of the unbroken sovereign power.

The Supreme Court of India as the guardian of democratic morality will without a doubt remember that the exercise of constitutional power is persistent in the final analysis by the intellectual integrity, independence and fearlessness of judges.

### **POWERS OF JUDICIAL REVIEW OF SUPREME COURT UNDER ARTICLE 32 & 136**

India has a hierarchical judicial system in which the Indian Supreme court is the apex court. It is the final interpreter of law and the ultimate court of appeal in all civil, criminal and constitutional matters. It is also the final protector of people's fundamental rights. Judicial review is thus not

only an integral part but also constitutes the basic structure of the constitution. Bold lines of the Constitution bind the judiciary and provided restraint to the excessive use of power. The Supreme Court is thus invested with the power of judicial review under Article 32 of the constitution. Art. 32(1) deals with moving to the Supreme Court for enforcement of fundamental rights and Article 32(2) deals with the power of the court to issue directions, orders, writs for the enforcement of these fundamental rights. It is not only the right and power but also the duty of the Apex court to protect and provide a safeguard to the fundamental rights of the individuals.<sup>8</sup> The nature of judicial review and its purpose is not to review the decision of administrative authority but of the decision making process.

Though the jurisdiction under Article 32 is restricted to fundamental rights but in case there is clear abuse of process of court, a petition is maintainable even if a violation of any fundamental right is not there. Existence of alternative remedy does not affect the jurisdiction of the writ court, but it would be a good ground for not entertaining the petition.<sup>9</sup>

Petitions under Article 32 may even be a review petition or a recall petition. Review petition is decided after hearing the parties, but the court may grant recall without hearing all the affected parties. In such case the recall will be in violation of the principles of natural justice and hence, untenable.<sup>10</sup>

Article 136 which is in nature of residuary reserve power of judicial review lays down that the Apex court may, in its discretion, grant special leave to appeal from any judgment, decree or sentence or order in any cause or matter passed or made by any court or tribunal. It does not confer the right of appeal to any party, but gives discretionary power to the Supreme Court. In today's scenario special leave has become the 'ordinary second appeal'. In exercise of powers under Article 136 the Supreme Court does not re-examine the questions the questions of fact unless the decision of the authority is patently perverse and manifestly unjust.<sup>11</sup> If the authority is neither a court nor a tribunal then in that case no special leave can be granted. It is for the Supreme Court to decide whether to entertain an appeal or not. When the point of law raised in

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<sup>8</sup> C.K. Thakker, Administrative Law (EBC 1992)

<sup>9</sup> State of Bihar v. Jain Plastics and Chemicals Ltd., (2002) 1 SCC 216

<sup>10</sup> Asit Kumar Kar v. State of W.B., (2009) 2 SCC 703

<sup>11</sup> Gian Singh v. State of Punjab, (1974) 4 SCC 305

appeal is of general public importance then the appeal cannot be dismissed on the ground that no appeal was preferred against the earlier decisions of the High Court.<sup>12</sup>

The Supreme Court has itself suggested to curtail its jurisdiction of special leave to appeal keeping into mind the congestion and load of cases. In February 2016, a PIL was filed after which it was concluded that the Supreme Court would confine itself with writ jurisdiction only.

## **POWERS OF JUDICIAL REVIEW OF HIGH COURT UNDER ARTICLE 226 & 227**

Article 226 empowers the HC to issue directions, orders or writs for the enforcement of fundamental rights including other purposes as well. The power available to High courts is wider as compared to the Supreme Court which is confined only to writs. The jurisdiction of High courts under Article 226 for the enforcement is mandatory whereas for the enforcement of ordinary legal rights is discretionary.<sup>13</sup> A High court can issue a writ even if the person or authority is located outside its territorial jurisdiction. The power of the High court under Article 226 is discretionary,<sup>14</sup> and the power cannot be exercised as a court of appeal.<sup>15</sup> The jurisdiction is supervisory in nature. It can strike down an impugned rule and direct the authorities to reframe it, but cannot itself frame it.<sup>16</sup> This power is not directed against the decisions and is confined to the decision making process. There is no limitation other than self imposed limitation on the High Court.

Under 226 there is nothing that precludes the court from reviewing its own decisions because such power in every court having plenary jurisdiction. This power is however to be exercised only in the case where there is error apparent on record or evidence. The Supreme court has stated that Art 227 does not invest the HC with unlimited powers to interfere with the administrative adjudicatory process. In justifiable area the judicial review is of the process of action and not the administrative action. The authority may be compelled to act and this authority must act in good faith. While exercising writ jurisdiction, the courts act not merely as a court of law but also as a court of equity.

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<sup>12</sup> STO v. Shree Durga Oil Mills, (1998) 1 SCC 572

<sup>13</sup> Manjula Manjari Dei v. Director of Public Instruction, AIR 1952 Ori 344

<sup>14</sup> State of Maharashtra v. Manubhai Vashi, (1995) 5 SCC 730.

<sup>15</sup> State of UP v. S.K.M. Inter College 1995 Supp (2) SCC 535

<sup>16</sup> Swapan Kumar v. Tapas Chakravorty, (1995) 4 SCC 535

**Against whom a writ may be issued:**

The SC and the HCs have the power to issue writs in the nature of habeas corpus, mandamus, certiorari, prohibition and quo warranto under Art 32 and 226 respectively.

**Authorities amenable to writ jurisdiction of the Supreme Court:**

The main purpose of Art 32 is to protect an individual against infringement of his fundamental rights. A threat may arise from the following:

1. Govt. and Parliament of India, govt. and legislatures of states and local govt.
2. Govt. departmental undertakings.
3. Agencies incorporated by statutes.
4. Agencies registered under statutes.
5. Courts
6. Private individual and bodies.

The approach should be that every authority or person who poses a threat to fundamental right should be amenable to jurisdiction of court.

**Authorities amenable to writ jurisdiction of HCs:**

The HCs have a wider power to issue writs for the enforcement of fundamental rights and other legal rights. There is no controversy about the writ of habeas corpus and quo warranto which can be issued against private individuals and public officers respectively.

Now in the case of private bodies the Supreme Court in the case of *BCCI v. Cricket Assn. of Bihar*<sup>17</sup> realizing the new economic policy imperatives has held that a private entity exercising public functions though may not be a “State” within Art 12, it will be within the writ jurisdiction of HCs under Art 226.

**DIFFERENCE BETWEEN JUDICIAL REVIEW AND APPEAL**

The following points will clearly illustrate the difference between Judicial Review & Appeal: -

1. Review is mostly concerned with the correctness of the legal matters of the decision whereas an appeal is mostly concerned with the correctness of the decision itself.
2. Review is filed in the same court whereas appeal is filed at a higher court.
3. Appeal is statutory right of the individual whereas review is a discretionary right of the court.

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<sup>17</sup> (2015) 3 SCC 251

4. Procedural irregularity, impropriety, irrationality and illegality form the basis of a review whereas there can be grounds of dissatisfaction or disappointment for filing an appeal.
5. An appeal is a request to change or modify the decision or verdict whereas review is a request to look into the legality of the ruling.

In *Tata Cellular v. Union of India*<sup>18</sup>, the Supreme Court observed as follows: -

“Judicial Review is different from an appeal; while hearing an appeal the court is concerned with the merits of the decision but in judicial review the court is basically concerned with the decision-making process because even otherwise the court is hardly equipped to review the merits of the decision. It is not the function of the court to act as a super board or with the zeal of a pedantic schoolmaster substituting its judgment for that of the Administrator.

## **CONCLUSION**

The Constitution framers of India made facility for the judicial assessment, on the foundation of the America's Constitution. The controls of the parliament under the Indian Constitution are divided between Centre and States. The Supreme Court of India has influence to assessment the legislations, which were endorsed by the assemblies of states or by the Indian parliament. The judicial review has been decided by the Indian Constitution to the state's higher courts and to the Supreme Court of India, *Article 13 (2)* of the Indian Constitution believed that country wide shall not create any regulation, those abbreviates or take absent the right as deliberated in its Part three, in respect of important rights of the inhabitants of India. If any rule was created against this clause of the Constitution, it will come within the purview of infringement and will be declared as void. The clause denoted meaning of law; it has included usage or custom, ordinance, bye-law, order, notification, regulation and rule, which is enforced in the domain of India. The meaning of law in force represents that the law made or passed by legislature or authority competent inside the province of India beforehand the Indian Constitution come in force. Such law or any part thereof was not cancelled earlier in all or in a particular location is not in operation, it may be called laws in force.

The facilities of rights of legitimate remedies have been provided in the *Article 32* of the Constitution. The injured somebody can travel to the Indian Supreme Court, for a suitable proceeding for execution of the rights deliberated and guaranteed as essential right under Part

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<sup>18</sup> (1994) 6 SCC 651



three of the Constitution. The Supreme Court of India has the influence to production of writs, order and direction, which might be suitable for the implementation of essential rights by method of any of the writs. It is the power to issue order, direction and/or writ whichever is suitable for execution of any rights amalgamated in Part three of the Indian Constitution. The Parliament has been capitalized with control or powers to a little additional judiciary, for working out inside their confined parameters, of this one dominion under clause (1) and (2) of Article 32. However, such power given to the Supreme Court of India under Article 32 shall not be suspended, separately from as otherwise obtainable for, under the Indian Constitution.

The High Court may issue injunction, interim order, stay order against any party, while such party has not furnished all document in support of plea, copy of petition for the interim judgment beforehand the High Court. Nevertheless, the High Court will provide chance of hearing to such party. The party may make application before the High Court for vacating the order and one copy of application may be furnished to the party in kindness of whom the judgment was completed. The Higher Courts of states, after receiving the application shall arrange of in the least such submission, surrounded by a time of two weeks. In case, if the application is not disposed of within the prescribed period of two weeks, the interim order is automatically cancelled and the order stands vacated. The powers described in *Article 226* of the High Courts shall not be derogative through the gear stick of the S.C.I., under Article 32 (2).