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Doctrine of Judicial Review in Indian Constitution

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ABSTRACT

The final judicial power to review and determine the application of a law or order may be defined as the power of the "Judicial Review". In India we follow the rule of law which means that the Constitution is the supreme law of the land and any law that goes against it shall not apply. Judicial review means "the power of the court to inquire whether the law governing it or any other legal act is contrary to the written Constitution and if the court concludes that it does so, it means that it is unconstitutional and ineffective." It is the power found in the national courts to scrutinize the legislatures, administrative and administrative arms of government and to ensure that such actions are in accordance with the provisions of the Constitution of the country. Judicial review Refers to the judiciary's ability to interpret the Constitution and promulgate any such law or order of the legislature or executive. Legal review has two important functions, such as legalizing government action; constitutional protection from any unjustified harassment by the state. The Constitutions of most parliamentary democracies provide an unambiguous legal review, a process that allows a specified number of Parliamentarians to initiate legal reviews against the law in the absence of a valid case. The major conclusion is that the most important results of the invisible review are inaccurate and anticipated. In addition, the ambiguous review results in much more legal proposals than expected in your absence. Finally, the model reveals that such a balance is based on the level of sentencing in the legislature. Surprisingly, an impartial court will be placed in a lower court, even though its impact on policy is great.

I. INTRODUCTION

Judicial review is the power of the courts of a country to examine the actions of the legislative, executive, and administrative branches of the government and to determine whether such actions are consistent with the Constitution. Those actions which are judged inconsistent are declared unconstitutional and, therefore, null and void. It is a great weapon in the hands of the judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority

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which is inconsistent or in conflict with the basic law of the land.[3]The doctrine of judicial review was originated in USA. It was propounded for the first time in the historic case of ***Marbury v. Madison***[4] by John Marshall the then Chief Justice of USA. He observed that the *Constitution is Supreme and it is duty of the court to declare what the law is. This is of very essence of judicial duty. Why otherwise does it (Constitution) direct the judges to take an oath to support it?*

In India, the Supreme Court in the landmark judgement of ***Keshavananda Bharti Case***[5] applied the doctrine of judicial review to give birth to the concept of *Basic Structure* .In ***Raj Narain v. Indira Gandhi***[6], the Supreme Court officially told that the Judicial Review is an integral part and parcel of the Basic Structure doctrine and cannot be removed by any amendment. While in ***Minerva Mills Case***[7], the Supreme Court observed that *the Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative actions and the validity of legislation. It is the sole duty of the judiciary under the Constitution to keep different organs of the state within the limits of the power conferred upon them by the Constitution by exercising power of judicial review as sentinel of qui vie.*

Meaning of Judicial Review

Judicial review is defined as a court's power to review the actions of other branches of government, especially the court's power to invalidate legislative and executive actions as being unconstitutional.[8] Judicial review is the power of the courts to check the constitutionality of any legislative and executive or administrative actions of the Union and the state governments. It is the duty of the courts to maintain the separation of power through the tool of judicial review.

Judicial Review can be studied under three heads:

1. *Judicial review of constitutional amendments.*
2. *Judicial review of Legislative enactments issued by Parliament and State legislature.*
3. *Judicial review of Executive orders of Union and State governments and subordinates.*

[3] Henry Abraham cited in *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261,292: AIR 1997 SC 1125.
[4] 2 L ed 60: 5 US (1 Cranch) 137 (1803).
[5] AIR 1973 SC 1461
[6] AIR 1975 SC 2299
[7] AIR 1980 SC 1789, 1925-1926.
[8] Black's Law Dictionary (8th Edn.) 864.

II. THE PLACE OF JUDICIAL REVIEW IN INDIAN CONSTITUTION

Judicial review plays a very important role as a defender once the executive, judiciary and legislature hurt the Constitutional values and denies the rights. The judicial assessment is taken into account as an imperative feature within the country. In India, there's parliamentary kind of democracy wherever each section of individuals is concerned in higher cognitive {process} and politics process. It's true that the first duty of the court to use rule of law and is that the groundwork of social equality. By physical exertion new powers of Parliament, rule of law that is to be applied by the court can't be changed. All those here, who are doing public duty, are accountable. They have to work within the democratic provisions of the Constitution of India. The thought of separation of power and rule of law is judicial review. The influence of judicial assessment has been farewell beneath Articles 226 and 227 just in case of court and Articles 32 and 136 of the Constitution of India for the review.

In post-independence India, the inclusion of specific provisions for '*judicial review*' was necessary so as to grant impact to the individual and cluster rights warranted within the text of the Constitution. Dr. B.R. Ambedkar, chaired the drafting committee of our Constituent Assembly, had described the provision related to the same as the '*heart of the Constitution'*. Article 13 (2) of the Constitution of India prescribes that the Union or the States shall not build any law that takes away or abridges any of the elemental rights, and any law created in dispute of the aforesaid mandate shall, to the extent of the dispute, be void.

While review over body action has evolved on the lines of common law doctrines like 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice, the Supreme Court of India and therefore the numerous High Courts got the facility to rule on the constitutionality of legislative yet as body actions to safeguard and enforce the fundamental rights granted under Part III of the Constitution. The High Courts also are approached to rule on queries of legislative competency, principally within the context of Centre-State relations since Article 246 of the Constitution scan with the seventh schedule, contemplates a transparent demarcation yet as a zone of intersection between the law-making powers of the Union Parliament and therefore the numerous State Legislatures.

Hence the scope of review before Indian courts has evolved in three dimensions – first off, to make sure fairness in body action, second to safeguard the constitutionally warranted elementary rights of voters and third to rule on queries of legislative competency between the centre and therefore the states. The facility of the Supreme Court of India to enforce these elementary rights springs from Article 32 of the Constitution. It provides voters the correct to

directly approach the Supreme Court for seeking remedies against the violation of those elementary rights.

Article 13 of the Indian Constitution

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 rights 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 law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by 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 Right of Equality.

Article 21: Expansion of Fundamental Rights

The emergency period and the infamous Habeas corpus constituted defining moment in history of judicial review in India. The strong criticism of the judgment gave solid base to judicial review and was followed by expansion of fundamental rights. Article 21 of the Constitution of India reads as follows: "***No person shall be deprived of his life or personal liberty except according to procedure established by law***." The narrow interpretation of this article in the early years of the Supreme Court in *A.K. Gopalan's case*[9] was changed in *Maneka Gandhi's case*[10]. In that decision, it was held that governmental restraints on 'personal liberty' should be collectively tested against the guarantees of fairness, non-arbitrariness and reasonableness that were prescribed under Articles 14, 19 and 21 of the Constitution. The Court developed a theory of 'inter-relationship of rights' to hold that governmental action which curtailed either of these rights should meet the designated threshold for restraints on all of them. In this manner, the Courts incorporated the guarantee

[9] 1950 AIR 27, 1950 SCR 88
[10] 1978 AIR 597, 1978 SCR (2) 621 197

of '*substantive due process'* of U.S.A into the language of Article 21. This was followed by a series of decisions, where the conceptions of 'life' and 'personal liberty' were interpreted liberally to include rights which had not been expressly enumerated in Part III. In the words of ***Justice Bhagwati*:**

"we think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms."

Article 32 of the Indian Constitution

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 226 of Indian Constitution

Power of High Courts to issue certain writs

(1) *Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, 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.*

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the

residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

(a) Furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

Judicial Review of Ninth Schedule:

Article 31-B says that act and regulations in 9th schedule could not be challenged in the court on the ground that they are in contravention to fundamental rights. But in the famous *IR Coelho case*[11] Supreme Court held that judicial review is the *'basic structure'* of Indian Constitution. It said that the laws placed under ninth schedule after 24 April 1973 are open to challenge to the court on the ground that they are in contravention to fundamental rights (included in articles 14 ,15, 19 and 21) or they are in contradiction to the 'basic structure' of the constitution .

III. SPECIFIC WRITS- THE CONSTITUTIONAL REMEDIES

This title to constitutional remedies is itself a elementary right and may be implemented within the type of writs evolved in Common Law – ***like Habeas corpus, Mandamus, Prohibition, Certiorari*** **and** ***Quo warranto.*** Besides the Supreme Court, the High Court's set within the numerous States also are selected as constitutional courts and Article 226 permits individuals to file similar writs before the High Courts.

[11] AIR 2007 SC 861

Habeas Corpus

It is the most valuable writ for personal liberty. Habeas Corpus means, "*Let us have the body*." A person, when arrested, can move the Court for the issue of Habeas Corpus. It is an order by a Court to the detaining authority to produce the arrested person before it so that it may examine whether the person has been detained lawfully or otherwise. If the Court is convinced that the person is illegally detained, it can issue orders for his release. A writ of habeas corpus derived from Latin word means "you may have the body" is a writ (court order) that requires a person under arrest to be brought before a judge or into court. The principle of habeas corpus ensures that a prisoner can be released from unlawful detention—that is, detention lacking sufficient cause or evidence. The remedy can be sought by the prisoner or by another person coming to the prisoner's aid.

Mandamus

Mandamus is a Latin word, which means "*We Command*". Mandamus is an order from a superior court to a lower court or tribunal or public authority to perform an act, which falls within its duty. It is issued to secure the performance of public duties and to enforce private rights withheld by the public authorities. Simply, it is a writ issued to a public official to do a thing which is a part of his official duty, but, which, he has failed to do, so far. This writ cannot be claimed as a matter of right. It is the discretionary power of a court to issue such writs. The primary purpose of this writ is to make the Government machinery work properly. An order of mandamus is a command directed to any person, corporation or an inferior tribunal, requiring them to do some particular thing which pertains to their/his office and which is in the nature of a public duty. The public servants are responsible to the public for the lawfulness of their public duties and their actions under it. If a public authority fails to do what is required under law or does beyond what was to be done, a writ of mandamus may be issued to make him do what was required under law. Mandamus may also be issued to a tribunal to compel it to exercise the jurisdiction vested in it, which it has refused to exercise. Mandamus may also be issued where there is a specific legal right, without specific remedy for enforcement of such right and unreasonableness has no place. The Supreme Court in various decisions has held that the doctrine of legitimate expectation is akin to natural justice, reasonableness and promissory estoppel.

Prohibition

Writ of prohibition means to forbid or to stop and it is popularly known as *'Stay Order'*. This Writ is issued when a lower court or a body tries to transgress the limits or powers vested in

it. It is a Writ issued by a superior court to lower court or a tribunal forbidding it to perform an act outside its jurisdiction. After the issue of this Writ proceedings in the lower court etc. come to a stop. The Writ of prohibition is issued by any High Court or the Supreme Court to any inferior court, prohibiting the latter to continue proceedings in a particular case, where it has no legal jurisdiction of trial. While the Writ of mandamus commands doing of particular thing, the Writ of prohibition is essentially addressed to a subordinate court commanding inactivity. Writ of prohibition is, thus, not available against a public officer not vested with judicial or quasi-judicial powers. The Supreme Court can issue this Writ only where a fundamental right is affected. A writ of prohibition is issued primarily to prevent an inferior court or tribunal from exceeding its jurisdiction in cases pending before it or acting contrary to the rules of natural justice. It is issued by a superior court to inferior courts from usurping a jurisdiction with which it was not legally vested, or in other words to compel inferior courts to keep within the limits of their jurisdiction. Thus the writ is issued in both cases where there is excess of jurisdiction and where there is absence of jurisdiction.

Certiorari

Literally, Certiorari means *to be certified*. The Writ of Certiorari is issued by the Supreme Court to some inferior court or tribunal to transfer the matter to it or to some other superior authority for proper consideration. The Writ of Certiorari can be issued by the Supreme Court or any High Court for quashing the order already passed by an inferior court. In other words, while the prohibition is available at the earlier stage, Certiorari is available on similar grounds at a later stage. It can also be said that the Writ of prohibition is available during the tendency of proceedings before a sub-ordinate court, Certiorari can be resorted to only after the order or decision has been announced.

Quo Warranto

The word Quo-Warranto literally means "*by what warrants*?" It is a writ issued with a view to restraining a person from acting in a public office to which he is not entitled. The Writ of quowarranto is used to prevent illegal assumption of any public office or usurpation of any public office by anybody. For example, a person of 62 years has been appointed to fill a public office whereas the retirement age is 60 years. Now, the appropriate High Court has a right to issue a Writ of quo-warranto against the person and declare the office vacant. A writ of Qua-Warranto can be claimed by a person if he satisfies the court that— 1. The office in question is public office 2. it is held by a person without legal authority the writ of Qua Warranto is not issued in respect of an office of a private character.

With the arrival of Public Interest legal proceeding (PIL) and dilution of conception of locus standi in recent decades, Article 32 has been creatively understood to form innovative remedies like a 'continuing mandamus' for guaranteeing that government agencies suits judicial directions.

IV. MILESTONES OF PUBLIC INTEREST LITIGATION IN INDIA

One of the earliest cases of public interest litigation was reported as *Hussainara Khatoon (I) v. State of Bihar*[12]. This case was concerned with a series of articles published in a prominent newspaper - the Indian Express which exposed the plight of undertrial prisoners in the state of Bihar. A writ petition was filed by an advocate drawing the Court's attention to the deplorable plight of these prisoners. Many of them had been in jail for longer periods than the maximum permissible sentences for the offences they had been charged with. The Supreme Court accepted the dilution of locus standi and allowed an advocate to maintain the writ petition. Thereafter, a series of cases followed in which the Court gave directions through which the 'right to speedy trial' was deemed to be an integral and an essential part of the protection of life and personal liberty. Soon thereafter, two noted professors of law filed writ petitions in the Supreme Court highlighting various abuses of the law, which, they asserted, were a violation of Article 21 of the Constitution. These included inhuman conditions prevailing in protective homes, long pendency of trials in court, trafficking of women, importation of children for homosexual purposes, and the non-payment of wages to bonded labourers among others. The Supreme Court accepted their locus standi to represent the suffering masses and passed guidelines and orders that greatly ameliorated the conditions of these people.

In another matter, a journalist, Ms. Sheela Barse, took up the plight of women prisoners who were confined in the police jails in the city of Bombay. The Court took cognizance of the matter and directions were issued to the Director of College of Social Work, Bombay to visit the Bombay Central Jail and conduct interviews of various women prisoners in order to ascertain whether they had been subjected to torture or ill-treatment. Based on his findings, the Court issued directions such as the detention of female prisoners only in designated female lock-ups guarded by female constables and that accused females could be interrogated only in the presence of a female police official.

Public interest litigation acquired a new dimension – namely that of 'epistolary jurisdiction'

[12] 1979 AIR 1369

with the decision in the case of *Sunil Batra v. Delhi Administration*[13] It was initiated by a letter that was written by a prisoner lodged in jail to a Judge of the Supreme Court. The prisoner complained of a brutal assault committed by a Head Warder on another prisoner. The Court treated that letter as a writ petition, and, while issuing various directions, opined that:

"…technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found".

In *Municipal Council, Ratlam v. Vardichand*[14] the Court recognized the locus standi of a group of citizens who sought directions against the local Municipal Council for removal of open drains that caused stench as well as diseases. The Court, recognizing the right of the group of citizens, asserted that if the:

"*…centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men."*

In *Parmanand Katara v. Union of India*[15] the Supreme Court accepted an application by an advocate that highlighted a news item titled *"Law Helps the Injured to Die*" published in a national daily, The Hindustan Times. The petitioner brought to light the procedural difficulties which came in availing urgent and life-saving medical treatment to persons injured in road and other accidents. The Supreme Court directed medical establishments to provide instant medical aid to such injured people, notwithstanding the formalities to be followed under the procedural criminal law.

The Supreme Court has met the changing needs of society by the extensive liberalization of the rule of locus standi which gave birth to a flexible public interest litigation system. A powerful thrust to public interest litigation was given by a 7-judge bench in the case of *S.P. Gupta v. Union of India*[16]. The judgment recognized the locus standi of bar associations to file writs by way of public interest litigation. In this particular case, it was accepted that they had a legitimate interest in questioning the executive's policy of arbitrarily transferring High Court judges, which threatened the independence of the judiciary. Explaining the liberalization of the concept of locus standi, the court opined:

[13] (1978) 4 SCC 409
[14] 1980 AIR 1622
[15] 1989 AIR 2039
[16] AIR 1982 SC 149

"*It must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him."*

The unique model of public interest litigation that has evolved in India not only looks at issues like consumer protection, gender justice, prevention of environmental pollution and ecological destruction, it is also directed towards finding social and political space for the disadvantaged and other vulnerable groups in society. The Courts have given decisions in cases pertaining to different kinds of entitlements and protections such as the availability of food, access to clean air, safe working conditions, political representation, affirmative action, anti-discrimination measures and the regulation of prison conditions among others.

For instance, in *People's Union for Democratic Rights v. Union of India*[17] a petition was brought against governmental agencies which questioned the employment of underage labourers and the payment of wages below the prescribed statutory minimum wage-levels to those involved in the construction of facilities for the then upcoming Asian Games in New Delhi. The Court took serious exception to these practices and ruled that they violated constitutional guarantees. The employment of children in construction-related jobs clearly fell foul of the constitutional prohibition on child labour and the non-payment of minimum wages was equated with the extraction of forced labour. Similarly, in *Bandhua Mukti Morcha* v. *Union of India*[18] the Supreme Court's attention was drawn to the widespread incidence of the age-old practice of bonded labour which persists despite the constitutional prohibition. Among other interventions, one can refer to the *Shriram Food & Fertilizer case* where the Court issued directions to employers to check the production of hazardous chemicals and gases that endangered the life and health of workmen. It is also through the vehicle of PIL, that the Indian Courts have come to adopt the strategy of awarding monetary compensation for constitutional wrongs such as unlawful detention, custodial torture and extra-judicial killings by state agencies.

[17] *1982* AIR 1473
[18] 1984 AIR 802

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An important step in the area of gender justice was the decision in *Vishaka v. State of Rajasthan*[19]. The petition in that case originated from the gang-rape of a grassroots social worker. In that opinion, the Court invoked the text of the Convention for the Elimination of all forms of Discrimination against Women (CEDAW) and framed guidelines for establishing redressal mechanisms to tackle sexual harassment of women at workplaces. The decision came under considerable criticism for encroaching into the domain of the legislature. It must be remembered that meaningful social change, like any sustained transformation, demands a long-term engagement. Even though a particular petition may fail to secure relief in a wholesome manner or be slow in its implementation, litigation is an important step towards systemic reforms.

V. CONCLUSION

Although Doctrine of Judicial Review is the basic structure of the constitution of India, it is not justified in policy matters. However, it is justified in policy matters provided that the policy is arbitrary, unfair or voilative of fundamental rights. In Kerala Bar Hotels Association vs State of Kerala[20], the Supreme Court held that the courts must be loath to venture into an evaluation of state policy which must be given a reasonable time to pan out. If a policy proves to be unwise, oppressive or mindless, the electorate has been quick to make the government aware of its folly. The Doctrine of Judicial Review is thus, the interposition of the judicial restraint on the legislative, executive and judicial actions of the government. It has assumed the status of permanence through judicial decisions laid down from 1973 till now. Thus, Judicial Review is the basic structure of the constitution of India and any attempt to destroy or damage the basic structure is unconstitutional.

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[19] (1997) 6 SCC 241
[20] AIR 2016 SC 163