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DIMENSIONS OF JUDICIAL REVIEW IN INDIA: AN EVALUATION

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AUTHOR'S CONTRIBUTION

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ABSTRACT

This paper is an attempt to study the various dimensions of judicial review in India. Judicial review is a process under which executive and legislative actions are subject to review by the judiciary. It 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. A court with judicial review power may invalidate laws and decisions that are incompatible with a higher authority; an executive decision may be invalidated for being unlawful or a statute may be invalidated for violating the terms of a written constitution. Judicial review is one of the checks and balances in the separation of powers; the power of the judiciary to supervise the legislative and executive branches when the latter exceed their authority.

Keywords: Judicial review; administrative discretion; legislative action; judicial decisions.

1. INTRODUCTION

Supremacy of the law is the spirit of the Indian Constitution. In India, the "**Doctrine of Judicial review**" is the basic feature of the Constitution. It is the concept of Rule of Law and it is the touchstone of Constitution of India. Though there is no express provision for judicial review in Indian Constitution but it is an integral part of our constitutional system, and without it there will be no Government of laws and Rule of law would become a mockery delusion and a promise of futility. In India, Judicial Review is a power of court to set up an effective system of check and balance between legislature and executive. The most prominent object of judicial review to ensure that the authority does not abuse its power and the individual receives just and fair treatment. The ostensible purpose of judicial review is to vindicate some alleged right of one parties to litigation and thus grant relief to the aggrieved party by declaring an enactment void, if in law it is void, in the judgment of the court. But the real purpose is something higher i.e., no statute which is repugnant to the constitution should be enforced by courts of law.

In **L. Chandra Kumar v. Union of India [1],** the Supreme Court held that "Henry J.

Abraham's definition of judicial review in the American constitution is, subject to a few modifications, equally applicable to the concept as it is understood in Indian constitutional law. Broadly speaking judicial review in India comprises three aspects: -Judicial review of legislative action, judicial review of judicial decisions and judicial review of administrative action."

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The Supreme Court in **State of Madras v. Row [2]** stated that the constitution contains express provisions for judicial review of legislation as to its conformity with the constitution. The court further observed "while the court naturally attaches great weight to the legislative judgments, it cannot desert its own duty to determine finally the constitutionality of an impugned statute".

In **A. K. Gopalan v. state of Madras [3]** the court held that "In India it is the constitution that is supreme and that a statue law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not". In **S. S. Bola v. B. D. Sharma [4]** Justice Ramaswami held "The founding fathers very wisely, incorporated in the constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability and enjoyment of equality, liberty and justice.

In **Subhash Sharma v. Union of India [5]**, The court observed that judicial review is a basic and essential feature of the constitutional policy and held that the Chief justice of India should play the primary role in the appointment of judges of High court and Supreme Courtand not the Executive. Justice Bhagwati in **Sampath Kumar v. Union of India [6]** held that "Judicial Review is essential feature of the constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the constitution will cease to be what it is".

In **Minerva Mills case [7]** Chandrachud, C.J speaking on behalf of majority observed "It is the function of the judges, nay their duty, to pronounce the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will become uncontrolled".

In the same case, Bhagwati, J observed "it is for the judiciary to uphold the constitutional values and to enforce the constitutional limitation. That is the essence of the rule of law, which inter alia requires that the exercises of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the constitution and the law. The power of judicial review is an integral part of our constitutional system and without it there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view if there is one feature of our constitution which, more than any other is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionable, to my mind, part of the basic structure of the constitution".

Ahmadi, C.J in **Chandra Kumar v. Union of India [8]** has observed "The judges of the Supreme Court have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limits".

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After the period of emergency the judiciary was on the receiving end for having delivered a series of judgments which were perceived by many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution. The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen.

Judicial review extends to every governmental or executive action from high policy matters like the President's power to issue a proclamation on failure of constitutional machinery in the States like in **S. R. Bommai v. Union of India [9]** *case*, to the highly discretionary exercise of the prerogative of pardon like in **Kehar Singh v. Union of India [10]** case or the right to go abroad as in **Satwant Singh v. Assistant Passport Officer, New Delhi [11]** case.

In India Judicial Review based on three important dimensions, these are "Judicial Review of Legislative Actions", "Judicial Review of Administrative Actions" and "Judicial Review of Judicial Decisions".

2. JUDICIAL REVIEW OF LEGISLATIVE ACTION

Judicial review of legislation is a result of two of the most fundamental features of Indian constitution. The first is the two-tier system of law with the constitution as the Supreme law and other legislation being the ordinary law which is valid only in so far as is consistent with the constitution. The Second is the separation of the legislative, the executive and the judicial powers of the state. The exercise of each of

these powers is a function of the Legislature, the executive and the Judiciary as a separate organ of the State. Deriving their powers from the constitution, the legislatures in India enact statutes.

There is a two-fold limitation on the validity of the statues. The Legislatures must have the competence to enact them. Secondly, they must not conflict with the constitution. They would be invalid to the extent of their repugnancy with the constitution. 'Judicial Review' stands for something which is done by a court to examine the validity or correctness of the action of some other agency.

Thus, Judicial Review of legislative acts indicates review of legislative actions to check its constitutional validity or its correctness. "Thus judicial review is the interposition of judicial restraint on the legislative and executive organs of the Government. The concept has the origin in the theory of limited Government and in the theory of two laws, an ordinary law and the supreme law (i.e. The Constitution). From the very assumption that there is a supreme law which constitutes the foundation and source of other legislative authorities in the body polity, it proceeds that any act of the ordinary law making bodies which contravene the provision of the supreme law must be void and there must be some organ which is to possess the power or authority to pronounce such legislative acts void."

Under the constitution of India the Government is responsible to the parliament but the parliament, the president and the judiciaries are responsible to the constitution. All of them can exercise such powers as are given to them by the constitution. The court has to examine whether all the subordinate authorities of the constitution have exercised their powers within the framework of the constitution. This is the way in which the constitution has enabled the courts to determine by the state legislature by examining whether they are in accordance with the constitution.

There are three broad approaches to judicial review of the constitutionality of a primary legislation (i.e. laws passed directly by an elected legislature).

i. No review by any courts
ii. Review by general courts
iii. Review by specialised courts

2.1 No Review by Any Courts

Some countries do not permit a review of the validity of primary legislation. In the United Kingdom, statutes cannot be set aside under the doctrine of parliamentary sovereignty. Another example is the Netherlands, where the constitution expressly forbids the courts to rule on the question of constitutionality of primary legislation.

2.2 Review by General Courts

In the United States, federal and state courts (at all levels, both appellate and trial) are able to review and declare the "constitutionality", or agreement with the Constitution (or lack thereof) of legislation that is relevant to any case properly within their jurisdiction. In American legal language, "judicial review" refers primarily to the adjudication of constitutionality of statutes, especially by the Supreme Court of the United States. This is commonly held to have been established in the case of **Marbury v. Madison** [12], which was argued before the Supreme Court in 1803. A similar system was also adopted in Australia.

2.3 Review by a Specialized Court

In 1920, Czechoslovakia adopted a system of judicial review by a specialized court, the Constitutional Court as written by Hans Kelsen, a leading jurist of the time. This system was later adopted by Austria and became known as the *Austrian System*, also under the primary authorship of Hans Kelsen, being emulated by a number of other countries. In these systems, other courts are not competent to question the constitutionality of primary legislation; they often may, however, initiate the process of review by the Constitutional Court.

Russia adopts a mixed model since (as in the US) courts at all levels, both federal and state, are empowered to review primary legislation and declare its constitutionality; as in the Czech Republic, there is a constitutional court in charge of reviewing the constitutionality of primary legislation. The difference is that in the first case, the decision about the law′s adequacy to the Russian Constitution only binds the parties to the lawsuit; in the second, the Court's decision must be followed by judges and government officials at all levels.

3. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Most modern legal systems allow the courts to review administrative acts (individual decisions of a public body, such as a decision to grant a subsidy or to withdraw a residence permit). In most systems, this also includes review of secondary legislation (legally enforceable rules of general applicability adopted by administrative bodies). Some countries (notably France and Germany) have implemented a system of administrative courts which are charged with resolving disputes between members of the public and

the administration. In other countries (including the United States and United Kingdom), judicial review is carried out by regular civil courts although it may be delegated to specialized panels within these courts (such as the Administrative Court within the High Court of England and Wales). The United States employs a mixed system in which some administrative decisions are reviewed by the United States district courts (which are the general trial courts), some are reviewed directly by the United States courts of appeals and others are reviewed by specialized tribunals such as the United States Court of Appeals for Veterans Claims (which, despite its name, is not technically part of the federal judicial branch). It is quite common that before a request for judicial review of an administrative act is filed with a court, certain preliminary conditions (such as a complaint to the authority itself) must be fulfilled. In most countries, the courts apply special procedures in administrative cases.

Judicial review of administrative action is the power of court to review the governmental action to determine whether they confirm to rules and principles laid down in the constitution. Judicial review is based on the idea that a constitution which dictates the nature, functions and limits of a government is the supreme law. Consequently, any action by a government that violates the principle of its constitution is invalid. The system of judicial review of administrative action has been inherited from Britain. It is on this foundation that the Indian Courts have built a superstructure of control mechanism. The whole law of judicial review of administrative action has been developed by judges on case to case basis. Consequently, a thicket of technicalities and inconsistencies surrounds it.

However, present trend of judicial decisions to widen the scope of judicial review of administrative action and to restrict the immunity from judicial review to class of cases which relate to deployment of troops and entering into international treaties, etc. That power corrupts a man which ultimately leads to a tyranny, anarchy and chaos.

Review is different from appeal. In appeal, the appellate authority can go into the merits of the decisions of the authority appealed against. In judicial review, the court does not go into the merits of the administrative action; courts function is restricted to ensuring that such authority does not act in excess of its power. The court is not supposed to substitute its decision for that of the administrative authority. In judicial review of administrative action, the courts merely enquire whether the administrative authority has acted according to the law.

According to **de Smith**, 'Judicial review of administrative action is inevitably sporadic and peripheral. It undertakes scrutiny of administrative action on the touchstone of the doctrine of *ultra vires*.'

The administrative authorities are given power by the statutes and such powers have to be exercised within the limits drawn upon them by the statutes. As long as an authority acts within the ambit of the power given to it, no court should interfere. It is in this sense that such an authority is said to have the liberty to act rightly as well as wrongly.

Judicial quest in administrative matters is to strike the just balance between the administrative discretion to decide matters as per the government policy and the need of fairness, any unfair action must be set right by administrative review. Judicial review of administrative action is perhaps the most important development in the field of public law in the second half of the century.

In **State of U.P. v. Nand Kishore Shukla [13]**, It has been held that a court exercising judicial review should not act as a court of appeal over a tribunal as an authority whose decision comes before it for review.

The Supreme Court reiterated this principle of judicial review in **State of M.P. v. M.V. Vyayasaya Co. Ltd. [14]** as follows, "It has been repeatedly held by this court that the power of the High Court under Article 226 of the Constitution is not akin to appellate power. While exercising this power, the court does not go into the merits of the decision taken by the authorities concerned but only ensures that the decision is arrived in accordance with the procedure prescribed by law and in accordance with the principles of natural justice wherever applicable. Further where there are disputed question of fact, the High Court does not normally go into or adjudicate upon the disputed question of fact."

Judicial review is concerned with reviewing not the merits of a decision or an order but with how the decision has been arrived at. The review court is concerned with two questions:-

i. Whether the authority has exceeded its power? and
ii. Whether it has abused its power?

3.1 Grounds for Judicial Review of Administrative Action

Judicial review is central in dealing with the malignancy in the exercise of administrative power. Outsourcing of legislative and adjudicatory powers to

the administrative authorities as an imperative of modern system of governance has brought the law of judicial review of administrative action in prime focus. Law dealing with judicial review of administrative action is largely judge-induced and judge led; consequently thickets of technicalities and inconsistencies surround it.

Anyone who surveys the spectrum of judicial review finds that the fundamentals on which courts base their decision include rule of law, administrative efficiency, fairness and accountability. These fundamentals are necessary for making administrative action people centric. Courts have generally exhibited a sense of self restraint where judicially manageable standards do not exist for judicial intervention. However, self restraint is not the absence or lack of power of judicial review. Courts have not hesitated even to review policy matters and subjective satisfaction of the executive.

Generally, judicial of administrative action can be exercised on four grounds:

i. Illegality
ii. Irrationality
iii. Procedural Impropriety
iv. Proportionality

These grounds of judicial review were developed by the Lord Diplock in **Council of Civil Services Union v. Minister of Civil Services [15].** Though these grounds of judicial review are not exhaustive and cannot be put in water tight compartments yet these provide sufficient base for the courts to exercise their review jurisdiction over administrative action in the interest of efficiency, fairness and accountability.

4. JUDICIAL REVIEW OF JUDICIAL DECISIONS

Judicial review of judicial decisions is a means of controlling the decisions of inferior courts by the Superior Court. The Superior Court can control the decisions of inferior courts by issuing the writs of prohibition and certiorari. Prohibition has much in common with the certiorari. Both the writs are issued with the object of restraining the inferior courts with the object of restraining the inferior courts from exercising their jurisdiction.

The only difference between the two is, whereas a writ of prohibition is issued to prevent an inferior court or tribunal to go ahead with the trial of a case in which it has assumed excess of jurisdiction, a writ of certiorari is issued to quash the order passed by an inferior court or tribunal in excess of jurisdiction.

In addition to the above, following provisions have been made in the Constitution for reviewing the judicial decisions:-

1. **Article 132-136:-** Supreme Court is the highest court of Appeal in the country. The writ and decrees of the Court run throughout the country. The appellate jurisdiction of the Supreme court can be divided into four main categories

- **Appeal in Constitutional matters:-** Under Article 132 (1) an appeal shall lie to the Supreme Court from any judgement, decree or final order of a High Court whether in civil, criminal or other proceedings, if the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of this Constitution. Where such a certificate is given any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided.

Under Article 132 (1) three conditions are necessary for the grant of certificate by the High Court:-

i. The order appealed must be against a judgement, decree or final order made by the High Court in civil, criminal or other proceedings
ii. The case must involve a question of law as to the interpretation of this Constitution
iii. If the High Court under Article 134A certifies that the case be heard by the Supreme Court

An appeal against High Court's decision would lie to the Supreme Court only when its decision amounts to a final order. An order of the High Court amounts to a final order only if the order puts an end to the suit or other proceedings. If after the order, the suit is still alive, it will not be a final order and no appeal would lie in the Supreme Court.

- **Appeal in Civil cases:-** Article 133 provides that an appeal shall lie to the Supreme Court from any judgement, decree or final order in a civil proceeding of a high Court only if the High Court certifies under article 134A that

i. The case involves a substantial question of law of general importance
ii. In the opinion of the High Court the said question needs to be decided by the Supreme Court.

- **Appeal In Criminal Cases:-** According to article 134 an appeal lies to the Supreme Court

from any judgement, final order or sentence in a criminal proceeding of a high Court in the following two ways:-

A. Without a Certificate – Article 134 (a) (b) – An appeal lies to the Supreme Court without the certificate of the High Court if the High Court

i. Has on appeal reversed an order of acquittal of an accused person and sentenced him to death

ii. Has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death.

B. With a Certificate - Article 134 (c) – Under Clause (c) an appeal lies to the Supreme Court if the High Court certifies under Article 134 A that it is a fit case for appeal to the Supreme Court.

- **Appeal by Special leave: -** Under Article 136 the Supreme Court is authorised to grant in its discretion special leave to appeal from any judgement, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in the territory of India.

The only exception to this power of the Supreme Court is with regard to any judgment etc. Of any Court or tribunal constituted by or under any law related to the Armed Forces.

2. Article 137: - Under Article 137, the Supreme Court has expressly been given the power to review its judgement. However, this is subject to any law passed by the parliament. This power is exercisable under rules made by the Court under Article 145, on grounds mentioned in Order 57, Rule 1 of CPC. A review will lie in the Supreme Court on:-

i. Discovery of new important matters of evidence
ii. Mistake or error on the face of record
iii. Any other sufficient reason

In a review petition, an error of substantial nature only can be reviewed. When a plea of self -defense is taken and if the court is satisfied that it is probable and there is basis for the same and if the benefit is to be given to the accused then the legality of the conviction itself is involved. The question of self -defense is one of both law and fact. If the Court is satisfied about probability and basis of such plea, such a question can be examined.

3. Article 225-228:- Article 225 -228 of the Constitution deals with jurisdiction of the High Court. Article 225 says that subject to the provisions of the Constitution and to the provisions of any law of the appropriate legislature (a) the jurisdiction of the High Court (b) the law administered in the existing High Court (c) the power of the judges in relation to the administration of justice in the Court (d) the power to make rule of the High Court shall be the same as immediately before the commencement of the Constitution.

Under Article 227, every High Court has the power of the superintendence over all Courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power of superintendence conferred on the High Court by this Article is a very wide power. This power is wider than the power conferred on the High Court to control inferior courts through writs under Article 226. It is not confined only to administrative superintendence but also judicial superintendence over all subordinate courts within its jurisdiction. The power of superintendence conferred on the High Court by Article 227 being extraordinary to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere error of facts, however, erroneous those may be.

The main grounds on which the High Court usually interferes are when the inferior courts act arbitrarily or act in excess of jurisdiction vested in them or fail to exercise jurisdiction vested in them or act in violation of principles of natural justice or if there is error of law apparent on the face of record. However, the high Court should not interfere with a finding on the jurisdiction of the inferior tribunal or court except where the finding is perverse in law in the sense that no reasonable person properly instructed in law could have come to such finding or there is misdirection in law or view of fact has been taken in the teeth of preponderance of evidence or the finding is not based on any material evidence or it resulted in manifest injustice.

Under Article 228, the high court has power to withdraw a case from a subordinate court if it is satisfied that a case pending in a subordinate court involves a substantial question of law as to the interpretation of the Constitution. It may then either dispose of the case itself or may determine the said question of law and return the case to the subordinate court with a copy of its judgment. The subordinate court will then decide the case in conformity with the High Court's judgment.

4. **Curative writ petition: -** In a judgement of far reaching consequence in **Rupa Ashok Hurra v. Ashok Hurra [16]** a five judge constitution bench of the supreme Court has unanimously held that in order to rectify gross miscarriage of justice in its final judgement which cannot be challenged again the Court will allow curative petition by the victim of miscarriage of justice to seek a second review of the final order of the Court. However, the court has laid down certain specific conditions for the court to entertain such a curative petition under its inherent power to prevent floodgates of unnecessary petitions seeking their second review. These requirements are the following

i. Court reaffirms that litigants are barred on challenging final decisions.
ii. But in cases of miscarriage of justice it would be its legal and moral obligation to rectify the error.
iii. The petitioner will have to establish that there was a genuine violation of principles of natural justice and fear of the bias of the judge and judgement that adversely affected him.
iv. The curative petition must accompany certification by a senior lawyer relating to the fulfilment of requirements
v. The petition is to be sent to three judges of the bench who passed the judgement affecting the petition.
vi. If the majority of the judges on this bench conclude that the matter needed hearing before the same bench which may pass appropriate order, it should be listed.
vii. They could impose exemplary costs of the petitioner if his pleas lacked merit.

5. CONCLUSION

We can conclude that judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. In other words, judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. Examples of the types of decision which may fall within the range of judicial review include:

- Decisions of local authorities in the exercise of their duties to provide various welfare benefits and special education for children in need of such education;
- Certain decisions of the immigration authorities and the Immigration and Asylum Chamber;
- Decisions of regulatory bodies;
- Decisions relating to prisoner's rights

Judicial review knows no bounds except the restraint of the judges themselves regarding justifiability of an issue in a particular case. In **Maneka Gandhi v. Union of India [17]** the judicial review has acquired the same or even wider dimensions as in the United States. Now 'procedure established by law 'in Article 21 does not mean any procedure lay down by the legislature but it means a fair, just and reasonable procedure. Ageneral principal of reasonableness has also been evolved which gives power to the court to look into the reasonableness of all legislative and executive actions.

Supreme Court in **Minerva Mills Ltd. v. Union of India [18]** observed that the constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and validity of legislation. It is the solemn 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 on the *qui vive.*

Recent Judgment of Supreme Court dated 11.01.2007 rendered in the case in **I.R. Coelho (Dead) by LRs v. State of Tamil Nadu and others [19]** is a master stroke of the judiciary. Prima facie, it is laudable for the reason, that it is a unanimous judgment of nine judges Constitution Bench of the Supreme Court, unlike fractured earlier judgments on the point.

In **Keshavananda Bharati v. State of Kerala [20]** which is said to have first propounded the Doctrine of basic structure of the Constitution, the Hon'ble 13 Judge Constitution Bench of Supreme Court delivered 11 truncated judgments. Since 24th April 1973, the date of the judgment of the Keshavananda Bharati case, the debate is, what is the *ratio decidendi*, viz., the point of law laid down in the said judgment. Fortunately, the present judgment of Supreme Court by providing unanimous verdict saved the Nation from such turmoil of searching for the *ratio decidendi* with magnified glasses. Fractured Judgments pains the Nation a lot to understand what is the Law and much time and energy of legal fraternity is spent on debating, interpreting and searching laws from such truncated judgments. The whole of the present judgment is devoted to understand and lots of pains have been taken to impress that Doctrine of Basic Structure was propounded in Keshvananda Bharati case. Much effort is made to highlight and explain Justice Khanna's views in Keshavananda Bharti's case and as clarified by Justice Khanna in Indira Gandhi case, since Justice Khanna's vote in favor of Basic Structure Doctrine will give the much needed majority in its favour in Keshavananda Bharti's case. However the propriety and validity of the

clarifications provided by Justice Khanna in Indira Gandhi case, whether the same clarification can be read into Keshavananda Bharati case, is a question to be answered. Now a day, it is a welcome feature that most of the landmark judgments are unanimous.

COMPETING INTERESTS

Author has declared that no competing interests exist.

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