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Subject- Legislative and Quasi Judicial Powers of Administration

Class- LL.M. II Semester

Topic- Judicial Review as Basic Structure of Constitution

Judicial Review as Basic Structure of Constitution

I. INTRODUCTION

Judiciary is the key organ of modern State. One of the chief functions of the Judiciary is to interpret the Law. In the area of Constitutional Interpretation courts have always playing a law-creative function. When many Nations in the modern era having their written Constitutions. Then there has been a great emphasis on the Judicial Law making through constitutional interpretation to equip the decades old or in some instances centuries old Nations' Fundamental Law with the rapidly changing-socio-economic, political, scientific and technical-needs of the people. In the process of judicial interpretation the courts have evolved numerous constitutional principles. For instance Judicial Review, Immunity of instrumentalities, separation of powers, judicial independency, territorial nexus, police powers etc., are really the judicial inventions. there are new paradigms in the Constitution of India that the Supreme Court has propounded a few innovative constitutional theories in some of its landmark judicial decisions such as Collegiums system for appointment of Judges to the higher Judiciary¹, basic structure theory², the most recent conceptions of Right to Privacy³, and constitutional morality⁴ In this article the writer is intended to focus on the questions that, what the judicial review basically

1 The apex Court, in Supreme Court Advocates on Record Association (SCAORA) vs. Union of India, decided on 16-10-2015, held that the constitution 99th Amendment Act and the National Judicial Appointments Commission Act, 2014 (No.40 of 2014) as void and restored the Collegium system for appointment of Judges to the higher Judiciary(the Constitution of India, p. 61, Published by Gogia Law Agency, Hyderabad

2 Golak Nath AIR 1967SC 1643, Keshavananda, AIR 1973 SC 1461, 1973(4)SCC225, Indira Nehru Gandhi, AIR 1975, SC 2299 .

3 The Supreme Court in its sensational case, Justice Puttaswamy (retired) and Anr. vs Union of India, 26-9-2018, A nine- Judge bench of the Supreme Court of India unanimously held that right to Privacy is Constitutionally protected right in India, as well as being incidental to other freedoms guarantee by the Indian Constitution. This landmark judgment later has lot of legal implications on the centuries old Indian legislations which criminalizing same-sex relationship as well as bans on beef and alcohol consumption in many Indian States are brought before the court for judicial scrutiny The right to Privacy is an integral part of right to life , <https://globalexpression.columbia.edu>.

4 Navtej Singh Johar vs Union of India, <https://ohrh.law.ox.ac.uk>, the five- judge Constitutional bench of the Supreme court unanimously decriminalizes all kinds of consensual sexual behaviour between adults and there by read down that part of Section 377 of I P C which criminalizes homosexuality by restoring 2009 Delhi High Court Judgment, and reviewed its own decision in Suresh Kumar Koushal vs. Naz foundation, dated 11th December 2013, <https://en.m.wikipedia.org>, which held that the power to repeal or amend legislation is vested with the legislative body but not to the Court.. In a landmark ruling ie., NGO – Independent thought case the Supreme Court read down exception 2 to S.375(which defines rape) of I.P.C as amended by Criminal Amendment Act, 2013 which allows such a sexual act. The age of consent has been made 18 now it permits intrusive sexual intercourse with a girl child aged between 15 to 18 years only on the ground that she has been married. This clause(exception 2 to S.375 of I.P.C)contradicts the

is? What for the judiciary intervenes if already powers are separated? Is the judiciary by exercising power of judicial review trespasses into the legislative and executive domain?

II. MEANING, SCOPE AND DEFINITION OF JUDICIAL REVIEW

In the procedural Law Review Means reconsideration of a decision by the same court. It is a reexamination of a case in certain prescribed circumstances. In Black's Law Dictionary it has been defined as: (1) A court's power to review the actions of other branches or levels of Government, esp. the Court's power to invalidate Legislative and executive actions as being unconstitutional? (2) The constitutional doctrine providing for this power.(3) The court's review of a lower court's or an Administrative body's factual or legal finding.

In constitutional Law it has some wider meaning it is the power vested with higher judicature to constitutionally to testify that whether all actions of the-legislative, executive, Administrative, judicial and quasi-judicial authorities are within the Constitutional parameters or not. It is the authority of higher judicial body to nullify any law(including constitutional amendment) if it is repugnant to paramount Law of the Nation.

Thus the judicial review has two important functions:

1. Legitimizing the governmental action
2. To protect the Constitution against any undue encroachments by the government.

In this context, it is prudent to recall the views of former Chief justice of India A.S. Anand that "Judicial review is not an expression Exclusively used in Constitutional Law. Literally, it means the revision of the decree or sentence of an inferior court by a Superior Court. Under general Law, it works through the remedies of appeal, revision, and the like, as prescribed by the procedural law of the land, irrespective of the political system which prevails. Judicial Review has however, a more technical signification in public law, particularly in countries having written constitutions. in such countries it means that courts have the power of testing the validity of legislative as well as other Governmental actions. The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the Executive on the one hand and the judiciary on the other hand provides the means by which mistakes committed by one are corrected by the other and vice-versa."⁵

III. HISTORICAL PERSPECTIVES OF JUDICIAL REVIEW IN COMMON LAW OF ENGLAND

The history of the doctrine of Judicial Review could be traced back to the 17th Century of English History of Common Law which was based on Right, reason and justice. These Principles were applied by English Courts

POCSO Act 2012..The five-Judge bench of the supreme Court in its another sensational ruling scraps S.497of I.P.C a colonial era legislation that made the woman as chattel and treats the husband as her Master.www-indiatoday-in.cdn.ampproject... 5 judicial review- judicial activism- need for caution vol. 42: 2-4, J I L I, 2000 page. 149)

in the famous Dr. Bonham's case(1610).⁶ The Courts enunciated that the common law is superior to the statute law. The court declared that the impugned Act of Parliament was null and void on the ground that it was transgressing the limits of common law principles of right, reason and justice. Lord Coke, the preacher of common law in his historic Judgment in the above case made some deliberations that there are certain fundamental principles of law which are superior to the Act of Parliament. The reason for it is that there is no written constitution for England, it is guided by common law principles. Common law itself is an unwritten law, it is based on the common customs and common notions of the people of the realm.

During the colonial rule, the constitutional practices of maintaining supremacy of the paramount law of the land could be found in the judicial opinions of Privy Council which emphasized that the colonial legislation was void if it was contravenes with the charters granted by the Crown of England to the British colonies. However in the course of time the proposition of law as laid down in Dr.Bonham's case has become redundant due to the evolution of principles of Parliamentary supremacy and Parliamentary sovereignty. In English Constitutional system the Parliament is supreme legislative body, there are no constitutional limitations on its law making power, there is no judicial review of Parliamentary legislation. However there is a possibility of judicial Review of Administrative actions.⁷

IV. ORIGIN OF JUDICIAL REVIEW IN AMERICAN CONSTITUTION

After attaining freedom from the imperial rule. The America has its own written Constitution with Bill of Rights and the Supreme Court has power to pronounce any action of government as unconstitutional if it transgresses the Constitutional limitations. This process of constitutional scrutiny of all actions of the legislative, executive, judicial, and quasi-judicial authorities of the state is known as judicial review. In fact it is a judicial invention of the American Supreme Court by which it can keep constitutional balance of all other organs of the State. In the federal Constitution of U.S.A the powers of federal government and its constituent States are limited. The federal supreme Court as a final arbitrator to adjudicate disputes between them, claimed itself as one of the chief exponent of the Doctrine of Judicial Review. For the first time in its historic judgment in Marbury vs. Madison⁸ The case originated from political and ideological rivalry between outgoing President John Adams(federalist) and Incoming President Thomas Jefferson(Republican) The apex Court of America has pronounced that the Act of Congress as unconstitutional if it is inconsistent with the federal constitution. In the instant case President Jefferson and his associates had defeated the President Adams and his associates in one of its popular elections of 1800. At midnight hour before laying down his office, President Adams and his

6 Administrative Law First Edi.(1995) Dr. Abdul Rayeeskhan

7 Administrative Law First Edi.(1995) Dr. Abdul Rayeeskhan

8 2 L Ed. 60: 1 Cranch 137 (1803) by pronouncing the Act of congress as unconstitutional, if it was inconsistent with the provisions of the constitution.

federal associates made several judicial appointments. The U S senate quickly confirmed the Adam's appoints. Mr. William Marbury was one of the federalist persons selected for the Justice of Peace. Though his appointment was signed and sealed but was not delivered to him. President Jefferson's administration was not inclined to execute the decisions of making a midnight appointments. In consequence the frustrated appointee William Marbury moved the federal Supreme Court by invoking its jurisdiction under Judiciary Act 1789 to issue a writ of Mandamus to compel Jefferson's secretary of State, James Madison, to deliver to him an order of appointment.

The important question for consideration before the court was that whether the Court has been conferred with jurisdiction to issue writs. whether the congress could expand the original jurisdiction of the Court by passing legislation in the form of Judiciary Act 1789 to issue writ of Mandamus, Article III of the U.S Constitution is more clear that the Writ of Mandamus could be issued only in the classes of cases that could be covered by the original jurisdiction of the Court ie., the cases affecting the Ambassadors, other Public Ministers and consuls and those in which the State shall be a party. It was held by the chief justice Mashall that Article III of the Constitution directed the supreme Court not to issue a Writ of Mandamus to a classes of cases which had not fallen within the original jurisdiction of the Court. The Court viewed that what the Constitution does not expressly provided for, the Congress can not do it. In result the impugned provisions of the Judiciary Act 1789 were held to be unconstitutional. The Court emphasized that the "Law of the constitution is higher than the law of the congress" Chief Justice Marshall, the profounder of Judicial review held that "the constitution is either superior paramount Law unchangeable by ordinary means or it is on a level with ordinary legislative Acts, and like other acts is alterable when the legislature shall please to alter it certainly, all those who framed written constitutions contemplate them as forming the fundamental paramount law of the Nation and, consequently, the theory of every such government must be that an act of the legislature repugnant to the constitution is void. And further "It is emphatically the province and duty of the judicial Department to say what the law is....."⁹ *In Mc. Culloch vs Mary land*¹⁰, once again the U.S Supreme Court was invited to declare the Constitutional Validity of President Franklin D. Roosevelt's ambitious economic programme known as New deal Legislations.

The Supreme Court by invoking the doctrine of judicial Review held that several New deal legislations(from 1930-35) were unconstitutional. Despite public disapprobation at the court's action, the orders of the court were enforced. Annoyed by the Court's action, the President proposed to alter the composition of the court, but his proposal was strongly resisted by the Senate. At last the President got an opportunity to appoint a judge of his

9 2 L Ed. 60: 1 Cranch 137 (1803) by pronouncing the Act of congress as unconstitutional, if it was inconsistent with the provisions of the constitution.

10 (17 U.S 316)

choice with the resignation of one judge, later many of his policies were judicially upheld by the same Court. By reaffirming the importance of judicial review Chief Justice Marshall held that “we must never forget that it is a Constitution we are expounding and that the Constitution is intended to endure for ages to come and consequently to be adapted to various crises of human affairs. The Court must have regard to its great outlines and objects.”¹¹

V. JUDICIAL REVIEW AND THE INDIAN CONSTITUTION

It is not out of context to have a brief discussion of the relevant Constitutional Provisions which envisage the concept judicial Review¹²

Article 13 embodies that any law passed by parliament or State legislature or an already existing law (pre-Constitutional Law) is null and void, if it is repugnant to the part- III of the constitution¹²

Article 32 contains constitutional Remedies for enforcement of the fundamental rights guaranteed by Part-III of the constitution, The Supreme Court included it in the basic structure doctrine, Dr. Ambedkar described it as the soul of the Constitution and very heart of it¹³

Under Article 131 the Supreme Court has original jurisdiction in any dispute - 1. Between the Government of India and one or more States 2. Between Government of India and any State or States on one side and one or more other states on the other 3. Between the States *Interse*¹⁴. Articles 132 and 133 deal with the appellate Jurisdiction of the Supreme Court to entertain/ hear appeals from any judgment, decree or final order of High Court whether in civil, criminal or other Proceedings, if the High Court certifies under Article 134-A, that the case involves a substantial question of Law as to the Interpretation of this Constitution. The glaring difference between these two articles is that in the former case the appeals shall lie the Supreme Court in certain Civil or Criminal matters where as in latter case the appeal shall lie in the civil proceedings or other proceedings.

Article 134 provides that an appeal shall lie to supreme Court in Criminal matters from any judgment, final order or sentence of a High Court in two ways that- 1. If the High Court certifies that it is a fit case for appeal to Supreme Court 2. without any certificate of the High Court, if the High court (a) has on appeal reversed an order

11 a. ibid-10

12 These are articles 13, 32, 131-136, 143, 226, and 246, M.P Jain Indian constitutional law 4th edition, page 838)

13 The nullity of such an act does not left to the judicial mercy, but upon the express provision contained in Art 13, In I.R. Coelho vs. State of Tamil Nadu, It was opined that these rights are constituted as limitations against the arbitrary exercise of power by the State authorities, tps://www.lawctopus.com

14 Union of India vs. State of Rajasthan, 1984 AIR 1675, State of Karnataka vs. U O I, AIR 1978 SC 143, 1978 ELT 564 Kar State of Bihar vs UO I, 1970 AIR 1446, Tashi Delek gaming solutions Ltd v. State of Karnataka, <https://indiankanoon.org>, it was held that a private parties are not a part of of the dispute, Court can not take a dispute of private party and a government on other side, www.legalservicesindia.com

of acquittal of an accused person and sentenced him to death or (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial the accused is convicted for death penalty.

Article 136 clause one deals with appeals by special leave. It confers wider discretionary powers on the Supreme Court to grant Special leave to appeals from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India. However clause 2 of the said article provides an exception to the above said rule that clause one does not applicable to any judgment etc., made by any Court or tribunal constituted by or under any law relating to Armed Forces.¹⁵

This article grants infinite power to the Supreme Court to grant leave to appeal in any matter from a decision of any Court or Tribunal Including the High Courts.

Article 137 expressly confers powers on the Supreme Court to review its Judgments. It embodies that subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or made by it. To exercise this power the supreme Court is governed by the rules made by this Court under Article 145 on the grounds specified in order 47 rule 1 of Civil Procedure Code that 1.Discovery of new important matters of evidence 2. Mistake or error on the face of the record and 3. Any other sufficient reason. As there is no appeal from the judgment of the supreme Court, this provision enables the apex court to meet the ends of justice.¹⁶

Article 139 states that Parliament may by law confer on the Supreme Court Power to issue directions orders or Writs for any purpose other those mentioned in cl. (2) of article 32. It is obvious that the Parliament can enlarge the Supreme Court jurisdiction by conferring more powers .

Article 142 deals with enforcement of decrees and orders of supreme Court ¹⁷ Article 143 provides the provisions for advisory Jurisdiction of the Supreme Court on any reference made to it by the President on the

15 Mathai @joby vs. George & Anr on March, 2010”it is well settled that Article 136 does not confer a right to appeal on any party; it confers a discretionary power on the Supreme Court to interfere in suitable cases “In Bihar Legal Support Society vs. Chief of Justice of India and Anr. (1986)4 SCC 767 vide para 3) “it may, however, be pointed out that this Court of was never intended to be a regular court of appeal against orders made by the High Court or the Sessions court or the magistrates. It was created for the purpose of laying down the law for the entire country ... It is not every case where the apex court finds that some injustice has been done that it would grant special leave and interfere. That would be converting the apex court into a regular court of appeal and moreover, by so doing, the apex court would soon be reduced to a position where it will find itself unable to remedy any injustice at all on account of the tremendous backlog of cases which is bound to accumulate. We must realize that in the vast majority of cases the High Courts must become final even if they are wrong”, [https:// Indiakanoon.org](https://Indiakanoon.org)

16 In order to rectify an error and prevent miscarriage of Justice the provisions for review has been laid down under section 114 and order 47 of Civil Procedure Code 1908 apart from the Constitutional remedy Under Article 137, a statutory remedy under C.PC is available to meet the ends of justice.

17 By invoking this jurisdiction the apex court appointed the Lokayukta to U.P State when there is no consensus opinion among the Constitutional authorities of the State, In the Union Carbide case in order to do complete justice the Court opined that it Can override the Parliament’s law. By using this power in the case of ban of alcohol sale along National and State Highways the Court’s decision gave negative impact which forced several Lakhs of workers without employment. <https://www.quora.com>

ground that 1.a question of law or fact arises or is likely to arise 2. The question is of such a nature and of such public importance that it is Expedient to obtain the opinion of the apex Court upon it.¹⁸

Article 226 states that notwithstanding any thing in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises 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, Prohibition, quawarranto and Certiorari or any of them for enforcement of fundamental rights and for any other purposes. The jurisdiction of the High Court under Article 226 is very wider than the Supreme Court under article 32 It is obvious from the language of the said article that High Court's Jurisdiction under Article 226 is extended not only to enforce the Fundamental rights but also to any other legal right.

Article 245 and 246 deals with the distribution of legislative powers between Union and the States under the three lists- namely 1.Union list 2. State list 3. Concurrent list as enumerated in VII schedule. Under these Articles the higher judicature has been entrusted with enormous powers to review and interpret any law passed by the Parliament or State legislature in order to ensure that one branch of the Government shall not trespass into the domain of other organs of the State the modern State does not function as Police State but works as welfare State.¹⁹ From the aforesaid Constitutional provisions it is clear that unlike U.S Constitution the Judicial review has been explicitly laid down in the Indian Constitution.

Basic structure and the Constitution of India

The historical roots of basic structure theory can be found in the well-known judgment of the apex court, in Golak Nath where it was held that fundamental rights are a part of basic Structure.

There is no uniformity of opinion about the basic structure doctrine among the 13 judges who delivered the landmark judgment in Keshavananda²⁰ but for our present study it is pertinent to quote some fundamental features of the constitution i.e Judicial review, federal character, secular character, separation of powers, independence of judiciary, Parliamentary and democratic form of government, supremacy of the Constitution and rule of law- thus judiciary review is considered as one of the integral parts of the basic structure theory. Basing on the doctrine of separation of powers the legislative powers are vested with the Parliament and State

18 The first case referred under this article is Delhi laws case, (1951) S C R 332, in re the kerala education bill A I R 1958 S C 956 in re Berubari (Indo-Pakistan agreements), A I R 1960 S C 845, in re in the matter of Ram Janamabhoomi (1993)1 SCC 642

19.(Rai Sahib Ram Jawaya Kapur vs. State of Punjab AIR 1955,SC549;(1955)2 SCR 225 where the apex court held that an executive authority can interfere in a private rights without any specific legislative sanction, The main object of separation of powers is to prevent the abuse of power but not concentration of power in one branch of government, In Menaka Gandhi v. Union of India, AIR,1978 SC 597, where the apex court expanded the scope of Procedure established by imbibeing the principles of Natural justice.

20 *ibid.*2

legislature. The executive powers of the States are conferred on the Governor and Council of Ministers. Though the President and Governor can exercise some legislative and judicial powers but they are bound by the decisions of respective Council of Ministers²¹ 'for instance the President's ordinance making powers'²² Pardoning powers²³ and the Governor's ordinance making powers²⁴ Pardoning powers²⁵ in this context it is relevant to refer the observations made by Dr.B.R.Ambadkar while considering the Constitutional position of the President that "The President's place in the administration is that of a ceremonial device, on a seal by which the nation's decisions are made known. The President of the Indian Union will generally bound by the advise of his Ministers. He can do nothing contrary to their advise nor can he do anything without their advise. The President of U.S can dismiss any secretary at any time. The President of Indian Union has no power to do, so long as his ministers command a majority in Parliament"²⁶

The Judicial powers are exercised by Judiciary, The supreme Court is elevated as highest judicial forum in hierarchy followed by High Courts and subordinate Courts. It is one of the unique features of the constitution that the executive and legislature cannot supervise or review the Judicial and quasi-Judicial actions. The Supreme Court and High Courts have been bestowed with the power to review the executive and legislative actions and test the legality and constitutionality of their actions. In exercise of power of judicial review the higher judiciary is having power as well as duty to ensure that all actions of other organs of the State are susceptible to the Constitution.

VI. JUDICIAL REVIEW OF LEGISLATIVE ACTIONS:

The constitutional makers conferred enormous powers on the judiciary to review all laws including Constitutional amendments. In this context it is more appropriate to quote the views of Dr.B.R Ambedkar that he strongly defended the provisions of judicial Review as being absolutely necessary. In his opinion the provisions for Judicial Review and particularly the writ jurisdiction that gave quick relief against the arbitrary exercise of State's power to invade the fundamental Rights which constitute the heart of the Constitution and the very soul of it Mr. Alladi Krishna Swamy Ayyer has remarked "The future evolution Indian Constitution will thus dependⁱt to a large extent upon the working of the supreme Court and direction given to it by the court, while its function may be one of interpreting the constitution, it can not in the discharge of its duties afford to ignore the Social, economic and work tendencies of time which furnishes the necessary background"

21. Kehar Singh case, AIR 1988 SC 1883, S.R.Bomma case,AIR 1994 SC,1918

22 Article 123,Power of the President to promulgate Ordinances during recess of Parliament.

23 Article 72,Power of president to grant pardons, etc., and to suspend, remit or commute sentences in certain cases:

24 Article 213,Power of Governor to promulgate Ordinances during recess of Legislature

25 Article 161,Power of Governor to grant pardons,etc., and to suspend, remit or commute sentences in certain cases

26 The Constitutional Law of India Page.433, 46 Edition By Dr.J.N. Pandey

As Justice Untwallia observed “The Judiciary is watching tower above all the big structures of other limbs of the State from which it keeps a watch like a sentinel”.²⁷

Thus the Judiciary as protector and guardian of the Constitution is entrusted with the task of interpreting the Constitution and bring within its ambit all functions of the State authorities through Constitutional Scrutiny, If any function of state is inconsistent with the Constitution it can be declared unconstitutional. The legal position of the judicial review in our Constitution was very broadly enlightened by the apex Court in *V.G Row*.²⁸ it was held “our constitution contains express provisions for Judicial review of Legislations as to its conformity with the Constitution as in the case of America, Where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted”Due Process”clause in 5th and 14th amendments. If then the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority as a crusader’s spirit but in discharge of duty plainly laid upon them by the Constitution. This is especially true as regards the fundamental rights as to which this Court naturally attaches great weight to the legislative judgment, it can not desert its own duty to determine finally the Constitutionality of an impugned statute.”^{29a}

The Supreme Court while re-asserting its Constitutional as well as legal Authority to review the validity of legislation in the President’s special reference *case No.1 of 1964* that”whether or not there is distinct and rigid separation of

powers, there is no doubt that the constitution has entrusted the judicature in this country with the task of construing the provisions of the Constitution and of safeguarding the Fundamental Rights of the citizens when a statute is challenged on the ground that it has been passed by a legislature with out authority or has otherwise Constitutionally trespassed on fundamental rights, it is for the Courts to decide whether the law passed by the legislature is valid or not,”it was also held that adjudication of such a dispute is entrusted solely and exclusively to the judicature of this Country.”²⁹

It is interesting to note that in *Fundamental Rights case*³⁰ despite the existence of clause 4 of Article 13 which was inserted by 24th Constitutional amendment Act 1971³¹, the apex Court by exercising its inherent power of Judicial review intervened to declare the Constitutional validity of 24th and 25th & 29th Constitutional amendment Acts . Clause 4 of Article 13 states that “Nothing in this Article shall apply to any amendment of this constitution made under Article 368”. 25th amendment Act 1971 introduced the declaration clause to

27 Union of India vs. Saklchand H.Seth (1977)SCC ,193

28 State of Madras v. V.G Row., AIR 1952 SC 196

29 AIR 1965 S.C 745

30 *ibid.*2

31 www.elections.in The then Prime Minister of India initiated the 24th amendment to Constitution with the sole object to nullify the Supreme Court’s ruling which prevents the Parliament to curtail the Fundamental Rights.

Article 31-C that and no law containing a declaration that it is for giving effect to such policy shall be called in question that it does not give effect to such policy”. Though the Court has upheld the 24th amendment Act 1971 and clause 4 of this Article, but it has struck down the declaration clause of Article 31-C which was added by 25th amendment Act 1971, on the ground that it excludes the Court’s jurisdiction to review any law including Constitutional Amendment.

In the light of struggle between the judicial and legislative Supremacy since 26th November, 1949, when the Constitution was dedicated to the people, the majority Court once again reaffirmed that the judicial review as one of the basic feature of the Constitution, which can not be abrogated or taken away by the Constitutional amendment and it was further held that the immunity to any specific law to enforce the directives contained in Article 39(c)³² is also unconstitutional. As Justice Khanna observes that “it has thus become an integral part of our constitutional system and the power has been vested in the High Courts and the Supreme Courts to decide about the Constitutional validity of the provisions of statutes. If the provisions of the statutes are found to be violative of any of the Articles of the Constitution, which is the touchstone for the validity of all laws, the Supreme Court and High Courts are empowered to strike down the said provisions”

The Supreme Court in its landmark Judgment in Indira Nehru Gandhi case³³ held that the judicial Review as basic structure of the constitution the Court by exercising its power of judicial review struck down clause (4) of Article 329-A which was incorporated by 39th Amendment Act 1975(subsequently repealed by 44th amendment Act) on the ground that it curtails the court’s power to review the election disputes of Prime Minister and Speaker.

The relevance and importance of Judicial review was further reiterated by apex court in *Minerva Mills case*³⁴ However the constitution 42nd amendment Act 1976, could not succeed to put an end to the persistent conflicts between the Parliament and judiciary in respect of Amending power of the Parliament. In the present case section 4 and 55 of the said amendment Act was challenged. The Supreme Court decided to review the case with in the frame work of *Keshavananda case*³⁵ and pronounced that Section 55 of the said amendment Act was unconstitutional and void on the ground that it nullifies the basic structure of the constitution and converted a controlled Constitution into uncontrolled one. Consequently clauses 4 and 5 of Article 368 were also held invalid. The judgment in this case wiped out section 55 of the said amendment Act and restored the *Keshavananda case*.³⁶ Thus the judicial Review is made as an integral part of the basic structure. In this context

32 Article 39(c) states that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

33 AIR 1975 SC 2299,(Indira Nehru Gandhi Vs Shri Raj Narain & Anr)

34 AIR 1981 SC 1787,(1980)2 SCC,591,AIR 1980 1789.Minerva Mills case

35 ibid-2

36 ibid-2

it is appropriate to quote the observations of chief Justice P.N Bhawat that “Judicial review is a basic and essential features of the Constitution and no law passed by Parliament in exercise of its “Constituent”power can abrogate or take it away, If the Power of Judicial review is abrogated or taken away the constitution will cease to be what it is”³⁷

In *Asif Hamed 's case*³⁸ while expanding the scope of judicial review and its importance in the contest of social and economic Justice the Supreme Court emphasized that “Although the doctrine of separation of powers has not been recognized under the constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and Judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the function assigned to another.judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of the State function within the constitution limits. It is the sentinel of democracy. Judicial review is a power full weapon to restrain unconstitutional exercise of power by legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social, economic Justice”

Once again the apex was invited to reassert the constitutional position of Supreme Court’s and High Court’s power to review the legislative actions in *L.Chanra Kumar Case*³⁹The seven member Constitution Bench of the supreme court reviewed the *Sampath Kumar Case*⁴⁰ and unanimously held that clause 2(d) of Articles 32-A, clause 3(d) of Article 323-B and Sec. 28 of the Administrative Tribunal Act 1985 to the extent that they excluded the Review Jurisdiction of the Supreme Court under Article 32 and High Courts under Article 226 are held to be unconstitutional. The supreme Court held that “the power of judicial review over legislative actions vested in the High Courts Under article 226 and Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution and formed part of its basic structure”

In *A D M Jabalpur v Shivakant Shukla*⁴¹ popularly known as Habeas Corpus case A Five-Judge Constitutional bench of the Supreme Court denied the citizens freedoms by rejecting the Right to Constitutional remedies consequently their Right to personal liberty was curtailed, the majority court lead by Justice A.N Ray pronounced that under declaration of emergency no person has any locus standi to move any Writ either under Art.226 or under Art.32.This judgment left a scar on the Indian judiciary which makes the fundamental rights as redundant provisions.

37 ibid-2

38 *Asif Hamed v. State of J&K* AIR 1989 S C 1899

39 AIR 1997 S C 1125.*L.Chandra Kumar case*

40 AIR 1987 SC 386, 1987SCR(3)233,*Sampath Kumar case*

41 (1976)2 SCC 521,*A D M Jabalpur case*

In *I.R C Coelho V. State of Tamil Nadu*⁴² Once again the Supreme Court has been invited to pronounce upon the Constitutional validity of various Central State Laws which were inserted into the 9th Schedule including the Tamil Nadu Reservations Act. The said act increases Reservations up to 69% has been put in 9th schedule with a view to overcome Supreme Court decision in *Mandal's case*⁴³ which imposes a cap on the over all reservations shall not go beyond 50%. The 9 judge Constitutional Bench presided over by Chief Justice Y.K Shabharwal and gave a unanimous decision by reiterating the basic feature theory and the Court's right to judicial review of all such laws including Constitutional amendment which destroys or damages the basic structure as laid down in Article 21 read with Article 14 and 19 and the principles stated there under even if they have been incorporated in 9th schedule after 14th April 1973(the date of Judgment of *Keshavananda case*. It was further held that (the schedule can not be challenged as it was already tested, but the legislations added to 9th schedule are open to challenge on the ground of infringement of fundamental Rights. In view of the aforesaid judicial opinions, it is obvious that the Judicial review has become an integral part of the Inviolable basic structure. Some jurists and scholars have criticized the working of the institution of judicial review as they were the opinion that under the thin guise of interpretation, the judiciary has invaded up on the legislative and executive domain⁴⁴,

In *NJAC Case or SCAORA Case*⁴⁵ the majority court had upheld the existing collegiums system by declaring the 99th Amendment and NJAC Act unconstitutional while justice Chelameswar upheld it, the majority court once again upholds the Judicial supremacy, there are well established constitutional practices that in no other constitutional system the judges will have the final word on judicial appointments⁴⁶ In *Vishaka case*⁴⁵ the court framed certain guide lines pending suitable legislation to curb the sexual harassment of women at work places, In *Vineet Narain v. Union of India*⁴⁷, it was held that the plenary duty of the Parliament is to enact suitable legislations for the smooth conduct of elections in the absence such law, the court can frame new rules in the form of guide lines and direct the C B I and the central vigilance commission(CVC) to act in conformity with

42 AIR 2007 S C 8617, I.R.C Coelho case

43 *Indra Sawhney & Ors v. Union of India (Mandal's case)* AIR 1993 SC 477, 1992 Supp(3) Scc 217 The apex Court upheld the implementation of separate reservation for Other backward Classes(OBC) in Central government Jobs. Ordered to exclude Creamy layer of OBC from enjoying reservations facilities.

44 <https://en.m.wikipedia.org>, <https://papers.ssrn.com>, The three judge bench of the Supreme Court headed by TS Thakur ordered the ban on sale of liquor at liquor Shops within 500 meters along the National highways from April 2017 <https://www.hindustantimes.com> (RamJawayya Kapur vs. State of Punjab where the apex court held that an executive authority can interfere in a private right without any specific legislative sanction, The main object of separation of powers is to prevent the abuse of power but not to concentrate the power in one branch of government, In *Menaka Gandhi v. Union of India*, 1978, AIR 597 where the apex court expanded the scope of Procedure established by Law the court inclined to read the principles of Natural justice which is a vague concept rejected by our constitutional makers as held in *A.K Gopalan case*

45 NJAC case, 99th Constitutional Amendment Act, Supreme Court Advocates on Record Association(SCAoRA), <https://en.m.wikipedia.org>

46 <https://www.legalserviceindia.com>, <https://en.m.wikipedia.org> *Visakha case*. (1997) 6 SCC 24

47 (1998) 1 SCC ,226: 1998 SCC(cri) 307(*Vineet Narain v. U O I*)

the said guide lines, in *Navtej Singh Johar*⁴⁸ the apex court decriminalizes all kinds of consensual sexual orientation between adults by reviewing its own 2013 judgment in *Suresh Kumar Koushal*⁴⁹. In order to uphold the Rights of LGBT community the Court propounded a new theory of constitutional morality which is different from social morality.

There is an inherent danger in the power of judicial Review where judiciary holds opposite views than those of ruling party⁵⁰. Many progressive legislations which carry socio-economic policies for upliftment of the peasant, industrial workers and other neglected classes were held to be ultravires the fundamental rights⁵¹ “President Roosevelt’s New Deal legislations were invalidated by the American Supreme Court and this consequently led to a proposal to alter the composition of the Court”⁵²

In this context it is relevant to recall the views of chief Justice Subba Rao in *Golak Nath*⁵³ assuming himself as a law maker for the Supreme Court held that “Article 32 141 and 142 couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice. To deny this power to the Supreme Court on the basis of some out- moded theory not to make, it is to make ineffective the powerful instrument of justice placed in the hands of the highest judiciary of this country”. The learned judge however propounded a new rule for future transactions i.e., the doctrine of prospective overruling . In this context one can refer to the views of a famous English jurist- and profounder of declaratory theory of law, Blackstone that the duty of the court is not to make the law, but only to discover or find the existing law. he opines that judge can declare the law.⁵⁴ The founding fathers of our Constitution also viewed that the Judiciary should not be raised to the level of “super legislature”⁵⁵

Bentham the champion of the legislative law making”had a deep distrust of judge made law, he criticized that it is undemocratic for the non-elected judiciary to act as a law makers and this function should be prerogative of

48.(Navtej Singh Johar vs Union of India, <https://ohrh.law.ox.ac.uk>, the five- judge Constitutional bench of the Supreme court unanimously decriminalizes all kinds of consensual sexual behaviour between adults and there by read down that part of Section 377 of I P C which criminalizes homosexuality by restoring 2009 Delhi High Court Judgment, and reviewed its own decision.

49 Suresh Kumar Koushal vs. Naz foundation, dated 11th December 2013, <https://en.m.wikipedia.org>, which held that the power to repeal or amend legislation is vested with the legislative body but not to the Court. In a landmark ruling i.e., NGO – Independent thought case the Supreme Court read down exception 2 to S.375(which defines rape) of I.P.C as amended by Criminal Amendment Act 2013 which allows such a sexual act. The age of consent has been made 18 now it permits intrusive sexual intercourse with a girl child aged between 15 to 18 years only on the ground of she has been married. This clause(exception 2 to S.375 of I.P.C)contradicts the POCSO Act 2012. The five-Judge bench of the supreme Court in its another sensational ruling scraps S.497of I.P.C a colonial era legislation that made the woman as chattel and treats the husband as her Master, [www-indiatoday-in.cdn.ampproject](http://www.indiatoday-in.cdn.ampproject)

50 V.D. Kulashrestha’s Land marks in Indian legal and constitutional History 6th edition, page416.

51 Golak Nath, AIR1967 SC 1669 and Bank Nationalization,(R.C Cooper v. U O I) AIR 1970 SC 564.

52 V.D.Kulashrestha’s Land marks in Indian legal and Constitutional History, 6th Edition.

53 AIR 1967 SC 1669 ,(Golak Nath case)

54. <https://www.jstor.org>, his great work is “commentaries “on English law. Jurisprudence(legal Theory)by Dr.B.N.Mani Tripathi, 18th ed., page 226.he strongly condemns the Judge-made law

55 VII,CAD 1195,IX CAD 1195-6

the elected Members in Parliament”⁵⁶ Thus the exercise of power of judicial review has been invited many controversies and rifts among the three wings of the State- legislature, executive and judiciary. Despite the constant attempts made by the Parliament to dilute the scope of judicial Review in respect of some constitutional areas particularly in acquisition of private property and elections to the highest Constitutional offices, establishment of Administrative Tribunals etc.,⁵⁷ but still the higher judiciary as an interpreter of the constitution intervenes to keep the balance wheel of the Constitution and maintain Constitutional Supremacy and rule of Law. Before concluding my discussion in this topic I can end it with the popular dictum by Charles Evans Hughes⁵⁸ “we are under a Constitution but the Constitution is what the judges say it is”.

56 Judicial activism-Constitutional Obligation of Courts-by Justice R.C Lahoti, C J I, AIR 2005 jour.p.177

57 1. Minerva Mills, AIR 1981 S C 1787, 42nd Amendment Act 1976 was challenged 2.Indira Nehru Gandhi, AIR 1975 SC 2299, 39th Constitutional Amendment which takes away the power of the court to question the elections to highest Constitutional offices 3. L.Chandra Kumar v. Union of India, AIR 1997 S C 1125,

58 The judicial process- Abraham, p.326,968; The judiciary in the governing process-Abraham,(1977)
