Constitutional Law

Judicial Review and Article 13 (Different Doctrines)

-Dr. Chandra Sen Pratap Singh
(Assistant Professor (Law), University of Lucknow, Lucknow)

U.K. and U.S.A. both adopt legal systems based on the common law. Judicial body, though one of the branches of the Government, enjoys an independent status with immense sense of acceptability and legitimacy for its actions. Judicial review is the power of the courts to review the exercise of power by the legislature and executive and declare them **ultravires** when found in violation of the constitutional norms. The non-democratic nature (non-elective) character of the judiciary lashed with power of judicial review becomes subject to questions many a times. But, it has its own vitality and therefore, it survives.

The power of the courts to exercise Judicial review finds its origin in Lord Coke's famous observation in **Dr. Bonham's Case**[1] in1610 when he said, **"When an act of Parliament is against common right and reason……the common law controls it and adjudge such act to be void."** It was reshaped in Federalist No. 78 by **Madison** by presenting judiciary as '**the weakest and therefore, the least dangerous'** branch of the government. It was given a prestigious position in Chief Justice **Marshall's** exposition in **Marbury** Vs. **Madison**[2] establishing as interpreter of the constitutional mandate and performing it's duties while declaring congressional laws void. To quote Marshall C.J., **"it is the province and duty of the judicial department to say what the law is."** Courts have stood the tests of time. Both in U.K. and U.S.A. the judiciary has asserted its power of judicial review in one way or the other. In U.K. where there is no written constitution and there is parliamentary supremacy, Judicial review is based on the doctrine of **ultravires** originating in Bracton's assertion, "**Ouod Rex Non debet esse homine, sed Deo et Lege"** (the king is under no man, but under God and the Law). The judicial Review is mainly extended to the review of administrative actions. On the

[1] 8 Co. Rep. 113b; 77 Eng. Rep. 646 (1610).
[2] 5U.S. (Icr.) 137 (1803)

other hand, U.S.A. has a 'Written Constitution' which brings the concept of limited government with the supremacy of the Constitution. Judicial review of legislation is a distinctive contribution to politico-legal theory. To quote Marshall C.J., "All those who have framed written Constitution contemplate them as forming the fundamental and 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". "Since Constitution is superior to any act of the legislature, Judiciary exercises its power of Judicial review while expounding the Constitutional mandate"

The Indian Constitution like other written Constitutions, follows the concept of "Separation of Powers" between three sovereign organs of the Constitution. The doctrine of separation of powers state in its rigid form means that each of the organ of the Constitution, namely, executive, legislature and judiciary should operate in its own sphere and there should be no overlapping between their functioning. Though the Constitution has adopted the Parliamentary form of government where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid.

DEFINITION

Judicial review is the power of the courts to review the exercise of power by the legislature and executive and declare them *ultra vires* when found in violation of the constitutional norms.

The Judiciary is one of the three branches of the government. Once thought as the weakest of the three branches and an institution lacking energy and prestige, the Judiciary has become now the most powerful branch of the government inspiring Raoul Berger to write a book on **Government by Judiciary** in America and in England promoting prestige of Judges from lion under the throne to lion over the thrown. This is so because of the power of judicial review entrusted to the judicial branch of the government. The Congress/Parliament legislate law. The executive executes law and the courts have to decide whether law is enacted legally on the basis of which one of the parties is claiming rights; whether the executive has

faulted in execution of the laws and whether any illegality is involved in either of them.

The doctrine of Judicial review means that the validity of acts of a legislature may be challenged before and adjudicated upon, by a judicial body. The position in the United Kingdom is somewhat different. It is not fully recognized in the United Kingdom, where the Acts of Parliament are unchallengeable, though the validity of delegated legislation may be examined. It is very well explained and exemplified by the power of the Supreme Court of the United States to review the constitutionality or otherwise of the act of Congress as well as the acts of the legislatures of the States. The U.S. Constitution does not expressly confer any power of Judicial review. The plea that the Supreme Court of U.S.A. could very well exercise this power seems to have been based on the power of the British Privy Council, in colonial times. During colonial times the acts of colonial legislatures were deemed to be void as being contrary to the laws of England. The same was done by the States Courts in the United States earlier wherein the state Courts declared the acts of State legislatures void as being contrary to natural Justice, or to the State Constitution.

The concept of Judicial Review is incorporated in Article 13 of our Constitution. Article 13 states as follows:
(i) **Pre-Constitution Law**: Art. 13(1). All laws in force in India as on 26-1-1950 which are inconsistent with Part III of the Constitution shall be void to the extent of the inconsistency.
(ii) **Post-Constitution Law**: Any law made by the 'State', which takes away or abridges the fundamental rights, shall be void to the extent of the contravention.
(iii) The term law is also defined in broad terms to include any rules, regulations, ordinances, bye-laws, notifications, G.O., custom or usage.

Thus the Supreme Court and the High Courts have the power to issue writs to declare law as *ultra vires* to the Constitution if it is not in accordance to the Constitution.

Basic Structure: The Supreme Court in ***Keshavananda Bharati's*** *case* has held that judicial review is part of the basic structure of the Indian Constitution. The basic structure doctrine depicts that the Constitution of India has certain basic feature that cannot be altered or destroyed through amendments by the Parliament.

Doctrines:

(i) Not Retrospective: The provisions of the Constitution relating to the fundamental rights have no retrospective effect. All inconsistent existing laws, therefore, become void only from the commencement of the Constitution. Acts done before the commencement of the Constitution in pursuance or in contravention of the provisions of any law, which after the commencement of the Constitution becomes void because of inconsistency with the fundamental rights, are not affected. The inconsistent law is not wiped out so far as the past acts are concerned.

In ***Keshava Madhava Menon Vs State of Bombay***, the Supreme Court held that Art. 13 was not retrospective i.e., it is operative from 26-1-1950. Hence, a trial for offence under a pre-Constitutional Law which is inconsistent with the Indian Constitution, is not wiped out on 26-1-1950, but may be continued. However, all procedural law is held to be prospective.

(ii) Doctrine of Severability: Under Judicial Review, the Supreme Court and the High Courts may declare a law as void if it is against the Constitution. The question is whether the whole of the law (or Statute) is void, or only that portion which is unconstitutional. To answer this, the Supreme Court has evolved the 'Doctrine of Severability'. Article 13 does not make the whole Act inoperative, it makes inoperative only such provisions of it as are inconsistent with or violative of the fundamental rights. It means if a statute has offending and also valid provisions and, it is possible to separate the offensive from the valid provisions, then the offensive provisions alone are declared void and unconstitutional. The entire Statute or Act will not be quashed.

In **A. *K. Gopalan Vs. State of Madras***, the court struck down Section 14 of the Preventive Detention Act, 1950 as violative of the fundamental right under Article 22. The rest of the Act was held to be valid. This doctrine was also applied in ***Balsara's Case*** and ***R.M.D.C.Case***. In ***R.M.D.C.Case***, Section 2 (d) of the Prize Competition Act was challenged. The Court held that competitions where success depended on 'Chance', could be severed from those dependent on SKILL. Hence,

doctrine was applied and provisions relating to chance were quashed. The others were held valid.

If the offensive and other provisions are inextricably bound up and cannot be severed, the entire Statute will be void.

In ***Kihoto Hollohan Vs Zachilu,*** Para 7 of the Anti-Defection Law provided that the speaker's decision regarding the disqualification shall be final and no court could examine its validity. Para 7 has been declared unconstitutional which is severable from the main provision of Tenth Schedule.

(iii) <u>Doctrine of Eclipse</u>: An existing law inconsistent with a fundamental right, though becomes inoperative from the date of the commencement of the Constitution, is not dead altogether."It is overshadowed by the fundamental right and remains dormant, but is not dead.

The Supreme Court decision in ***Bhikaji Narain Dhakras Vs State of M.P.*** is a good illustration of the application of the rule.

In that case an existing law authorized the State Government to exclude all private motor transport operators from the field of transport business. Parts of this law becomes void on the commencement of the Constitution as it infringed the provisions of Article 19 (1) (g) of the Constitution and could not be justified under the provisions of clause (6) of Article 19. In 1951, clause (6) of Article 19 was amended by the Constitution (First Amendment) Act, 1951, so as to permit the Government to monopolize any business. The Supreme Court held that after the amendment of clause (6) of Article 19, on June 18, 1951, the constitutional impediment was removed and the impugned Act ceased to be unconstitutional and became operative and enforceable.